

# Entertainment Decision

## Complaint by Mr Julian Assange

***True Stories: WikiLeaks: Secrets and Lies, More 4, 29 November 2011***

Case No. 1-196583661

### Material Considered

- Complaint form dated 18 December 2011;
- Emails to Ofcom from Mr Assange dated 10 and 22 January 2012; and
- Recording of programme.

### Introduction

On 29 November 2011, Channel 4 broadcast on its channel More 4 an episode from its *True Stories* strand of documentaries, entitled: "*WikiLeaks: Secrets and Lies*". The programme chronicled the history of WikiLeaks, which was described in the programme as "*the biggest leak of secrets in history. In its wake, dictators fall, wrongdoing is uncovered and a superpower is humbled*". The programme featured extracts of interview footage of the complainant, Mr Julian Assange, and other contributors who were involved with WikiLeaks and Mr Assange.

After a brief introduction, the programme featured footage from Mr Assange's interview in which he was shown responding to the question of why he started WikiLeaks. The programme then cut immediately to the programme's narrator who gave a brief biography of Mr Assange and revealed that Mr Assange had "*attended 37 schools as a child*" and that, while studying at Melbourne University in Australia, he had:

*"established himself as Australia's foremost hacker. His tag: mendax-translation; given to lying. In 1996 he was prosecuted for a hack into telecoms giant Nortel; his conviction [was] one of the world's earliest".*

The narrator stated that Mr Assange set up WikiLeaks as a "*website openly committed to whistle-blowing*" in 2006, and that as "*the secrets poured in*" he had hired a "*Berlin-based computer programmer*" called Mr Daniel Domscheit-Berg. Footage from Mr Domscheit-Berg's interview was then broadcast. He was described in text shown in screen as a "*WikiLeaks spokesperson*" and explained how and why he became involved with WikiLeaks. Excerpts from Mr Domscheit-Berg's interview were featured throughout the programme.

The programme included interview footage from Mr David Leigh, the investigations editor at 'The Guardian' newspaper, who described his first meeting with Mr Assange at a journalist conference in Norway in March 2010 and his impressions of him. Mr Leigh said that during this meeting, Mr Assange had shown him footage of US soldiers shooting civilians in Iraq. This footage, known as the "*Collateral Murder footage*", was also broadcast in the programme. Mr Leigh remarked that in releasing this footage, Mr Assange was "*providing a great journalistic service*".

A contribution from Mr Adrian Lamo, who was introduced as *“one of Assange’s few rivals for most famous hacker in the world”* was also featured in the programme. The programme explained that Mr Lamo had been in contact with Mr Bradley Manning, a US serviceman who was charged with supplying classified information to WikiLeaks after Mr Lamo informed the US authorities that Mr Manning had allegedly confessed to leaking information to WikiLeaks. The narrator said that Mr Manning’s arrest had prompted an internal split at WikiLeaks, with Mr Assange wanting to continue releasing material and Mr Domscheitt-Berg wanting to stop.

The programme moved on to discuss the meeting which took place at ‘The Guardian’ newspaper headquarters in London attended by representatives from ‘The New York Times’, ‘Der Spiegel’ (an important newsmagazine in Germany) and Mr Assange. This meeting was the culmination of an agreement between Mr Nick Davies (a special correspondent at The Guardian) and Mr Assange, to disclose the next batch of *“secrets”* (the *“Afghan War Logs”*) through a *“media alliance”*. During this part of the programme, Mr Leigh stated that Mr Assange had carried himself as *“a cult leader”* and *“made you feel you were dealing with someone who wasn’t quite from the same planet as the rest of us”*.

Mr Davies stated in the programme that for moral and political reasons, the newspapers and magazines involved were always aware that they could not publish anything *“which might get someone hurt on the ground”*. Therefore, it was important that the material *“did not identify any sensitive locations or sensitive methods of operations”*. Mr Leigh added that at this point it became apparent that Mr Assange and WikiLeaks had a *“very different mindset”* because they just wanted to *“dump out all the data”*. Mr Leigh explained that they had tried to warn Mr Assange of the possible reprisals that informants might suffer if he published the material, but Mr Assange had replied *“they’re American informants, they deserve to die”*. The programme then cut to footage taken from Mr Assange’s interview in which he said *“there was no row at all...only hints of a discussion”*.

The programme then included archive footage from 25 July 2010 when the various media partners published, in conjunction with WikiLeaks, the *“Afghan War Logs”*. Mr Davies said that after the material had been published, ‘The Times’ newspaper had gone to the WikiLeaks website and had discovered information which *“clearly put in jeopardy the safety of identifiable Afghan civilians”*. Mr Domschielt-Berg stated that, in his view, the WikiLeaks story had now changed to *“publishing for the sake of publishing”* and that it was *“becoming the kind of organisation that does things because no one can stop you”*.

Mr Assange stated in the programme that he was in *“a precarious position”* and that in late July 2010, he had to go into hiding. Consequently, he had given a copy of a password which would allow access to 250,000 diplomatic ‘cables’ (*“the Diplomatic Cables”*) to Mr Leigh for *“safe-keeping”*. Mr Leigh then said that while he was reading this material, he received a telephone call from Mr Davies who told him that Mr Assange had been arrested on suspicion of rape<sup>1</sup>. Mr Davies expressed his disbelief at the allegations and had called the WikiLeaks co-ordinator, Mr Donald Bostrom, who said: *“I am sorry to tell you it’s true”*. Footage of Mr Assange dancing in a nightclub in Iceland was shown accompanied by Mr Leigh stating that Mr Assange had:

*“upset these two women by his incontinent sexual behaviour which had involved, it would appear, jumping on them and not using a condom even though they had very much wanted him to.”*

---

<sup>1</sup> On 7 December 2010, Mr Assange was arrested, pursuant to a European Arrest Warrant which was issued in response to a request made by Swedish police to question Mr Assange on allegations of sexual assault.

Mr Davies remarked that he found it “*distressing*” that Mr Assange was suggesting that the rape allegations were “*some kind of American dirty trick*” because “*the guy is supposed to stand for truth and that wasn’t true*”.

The programme then referred to the publication of the “*Iraq War Logs*” and stated that at this point, although Mr Davies had wanted to continue publishing, he was not prepared to “*be the main point of contact with Mr Assange*.” This was because Mr Assange had approached a number of television stations to cover the Afghan war diaries, despite WikiLeaks’ contract with ‘The Guardian’ newspaper, and because it was necessary for the material to be kept secret because otherwise the Pentagon might prevent the media outlets involved from publishing it. The programme then cut to interview footage of Mr Assange who said that Mr Davies was a part of the UK media industry which he viewed as a “*credit-stealing, credit-whoring and back-stabbing industry*”. Mr Davies further stated that he had never “*met a human being as dishonest as Julian [Assange]*”.

When the “*Iraq War Logs*” were published, the programme stated that ‘The New York Times’ had run a personal profile of Mr Assange which he described as a “*sleazy hit piece full of factual inaccuracies*”. The programme’s narrator said that Mr Assange was furious and consequently decided that ‘The New York Times’ would have “*no part in the release of the last and most significant batch of documents...*”. However, the programme went on to state that a “*pact*” was subsequently formed between the existing media partners (i.e. ‘The Guardian’, ‘Der Spiegel’ and ‘The New York Times’), Mr Assange and two new media partners (‘Le Monde’ and ‘El Pais’<sup>2</sup>) for the release of the “*Diplomatic Cables*”.

Archive footage of Mr Assange arriving at court and news items detailing Mr Assange’s refused bail application was then shown in the programme. Mr Davies commented that:

*“WikiLeaks moral and political authority flows from the fact of truth-telling and you cannot do that and then also tell lies to the world, it doesn’t work”.*

The programme then went on to detail Mr Assange’s decision to publish “*all the cables with nothing blacked out*” despite facing worldwide condemnation, including from his “*former media partners*”. Mr Domscheit-Berg described the decision as “*anti-secrecy*” rather than “*pro-whistle blowing*” and Mr Davies said that it was “*a Greek tragedy...but ultimately it had become a disaster because of one man’s personality flaws*”. Immediately following Mr Davies’ comments, Mr Assange was shown stating that:

*“There is a view that one should never be permitted to be criticised for being even possibly engaged in a contributory act that might be immoral. And that that type of arse-covering is more important than actually saving people’s lives. That it is better to let 1000 people die than risk going to save them and possibly run over someone on the way. That is something that I find to be philosophically repugnant.”*

The programme concluded with on-screen text stating:

*“November 2<sup>nd</sup> 2011 High Court rejects Julian’s appeal<sup>3</sup>. Julian is appealing - again”.*

This is followed by:

*“WikiLeaks suspends all publishing”.*

---

<sup>2</sup> ‘Le Monde’ and ‘El Pais’ are high profile broadsheet daily newspapers in France and Spain respectively.

<sup>3</sup> This relates to Mr Assange’s appeal in relation to being extradited to Sweden to stand trial for allegations of rape.

Following the broadcast of the programme, Mr Assange complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the programme as broadcast.

## **The Complaint**

Mr Assange completed a Fairness and Privacy Complaint Form dated 18 December 2011 which was received by Ofcom on 19 December 2011. Further material relating to his complaint was submitted to Ofcom by email on 10 and 22 January 2012.

### Unjust or unfair treatment

In summary, Mr Assange complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme did not obtain Mr Assange's informed consent to appear in the programme. In particular, Mr Assange complained that:
  - i) The programme makers misrepresented to him what the programme would focus on.
  - ii) He was not made aware of other key contributors who would be appearing in the programme.
  - iii) Opportunities to preview the programme were not offered to him but were offered to other contributors such as 'The Guardian' newspaper.
- b) The programme presented, disregarded and omitted material facts in a way that was unfair to Mr Assange. In particular, Mr Assange complained that the programme:
  - i) Broadcast material which was highly prejudicial to his extradition hearing (which was held a few days after the programme was broadcast), and other potential hearings related to the allegations of rape or WikiLeaks. Mr Assange said that the programme included comments from interviewees, who had no first-hand knowledge of the allegations he faced. In addition, the programme did not interview any of Mr Assange's legal team who had the authority to provide information on the allegations.
  - ii) Omitted crucial facts, such as:
    - That Mr Leigh had broken a written agreement and had revealed a secret decryption key which led to the publishing of the "unredacted cables" [i.e. the U.S Diplomatic Cables]. Instead, the programme said that this was an incomprehensible and reprehensible decision made by WikiLeaks;
    - Attributing the statement "*they're American informants, they deserve to die*" to Mr Assange but failing to mention that two individuals, Mr Goetz and Mr Stark, who were also present at the time this statement was supposed to have been made, have no recollection of Mr Assange making such a statement;
    - Failing to mention that Mr Domscheit-Berg (whose status was misrepresented by being described as a "*WikiLeaks spokesperson*" in the programme) had: stolen funds and sabotaged WikiLeaks; deleted thousands of submissions revealing war crimes and corruption in financial institutions; profiteered from and unleashed the chain of events that led to the publishing of the unredacted Diplomatic Cables. After February 2011, Mr Domscheit-Berg had little to no involvement with WikiLeaks operations after being sacked on 14 September 2010. Mr Assange

added that all this information was available in two public statements issued by WikiLeaks;

- Disregarding the fact that the reason that Mr Assange did not want 'The New York Times' to be involved in the publishing of the Diplomatic Cables was because 'The New York Times' had told the Pentagon about earlier releases; and
  - Disregarding the banking blockade against WikiLeaks and the ongoing harassment of WikiLeaks volunteers. Mr Assange said that the programme gave the impression that WikiLeaks suspended publication because of his impending court hearing when, in fact, WikiLeaks suspended publication on 27 October 2011 due to financial blockades that were imposed on WikiLeaks, before the High Court made its decision on 2 November 2011.
- iii) The programme portrayed Mr Assange as "anti-American" and a "hacker" rather than a journalist or publisher.
- c) Mr Assange was not given a timely and appropriate opportunity to respond to the allegations made in the programme. In particular, Mr Assange stated that he was not given direct questions to answer in relation to many of the allegations stated in the programme.

#### Unwarranted infringement of privacy

In summary, Mr Assange complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Footage that was filmed of Mr Assange in a nightclub in Iceland was broadcast in the programme without his consent.

Mr Assange said that the person who recorded the video sought his permission to film him in the nightclub and that Mr Assange agreed to this on the basis that it would be for his personal use only. However, it was broadcast in the programme and Mr Assange had no knowledge of how the programme's producer sourced this footage. Mr Assange said that he could not understand why this footage had been included in the programme or why it was relevant.

**Please refer to the complaint form and any accompanying material for full details.**

#### **Relevant legislation**

Under section 110(1) of the Broadcasting Act 1996 (as amended) ("the Act"), and subject to the remaining provisions of Part V of the Act, Ofcom has a duty to consider and adjudicate on complaints which relate:

- (a) to unjust or unfair treatment in programmes,<sup>4</sup>

Or

- (b) to unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.

---

<sup>4</sup> Section 130 of the Act defines "unjust or unfair treatment" as including "treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged."

These complaints are collectively referred to as “fairness complaints” by virtue of section 110(4) of the Act.

Part V of the Act (and in particular sections 111 and 114) sets out a number of statutory criteria which must be satisfied before a fairness complaint can be entertained by Ofcom.

### **Ofcom’s Jurisdiction:**

#### **“The Person Affected”**

Section 111(1) of the Act provides that a “fairness complaint may be made by an individual or by a body of persons, whether incorporated or not, but ... shall not be entertained by Ofcom unless made by “the person affected” or by a person authorised by him to make the complaint for him”.

“the person affected” is defined by section 130 of the Act as follows:

- (a) In relation to any unjust or unfair treatment in programmes, it means a participant in the programme in question who was the subject of that treatment or a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment. (“Participant” is further defined by section 130 as meaning a “person who appeared, or whose voice was heard, in the programme”).

And,

- (b) In relation to any unwarranted infringement of privacy, it means a person whose privacy was infringed.

Under section 111(7)(a) of the Act, Ofcom may refuse to entertain a complaint of unjust or unfair treatment “if the person named as the person affected was not himself the subject of the treatment complained of and it appears to Ofcom that he did not have a sufficiently direct interest in the subject-matter of that treatment to justify the making of a complaint with him as “the person affected”.

In relation to Mr Assange’s complaint of unjust or unfair treatment, Ofcom is satisfied that Mr Assange meets the definition of “the person affected” as defined in section 130(a) above. Since Mr Assange appeared in the programme and his complaint of unfair treatment relates to the matters discussed in the programme, Ofcom considers that he was therefore a “participant” in the programme who was the “subject of” the treatment complained of.

In any event, Ofcom considers that Mr Assange also has a “direct interest” in the subject matter of the programme because his involvement in WikiLeaks ( the website he had founded) was the main focus of the programme.

In relation to Mr Assange’s complaint of unwarranted infringement of privacy, Ofcom considers that Mr Assange satisfies the definition of “the person affected”, since he complains that his privacy was infringed by the broadcasting of footage which he alleges was not filmed for inclusion in the programme.

#### **“Reasonable time”**

Section 111(5) of the Act provides that “Ofcom may refuse to entertain a fairness complaint if it appears to Ofcom not to have been made within a reasonable time after the last occasion on which the relevant programme was broadcast or, as the case may be, included in a licensed service.”

In this respect, Paragraph 1.10 of Ofcom's "Procedures for the consideration and adjudication of Fairness and Privacy complaints" ("Ofcom's Fairness and Privacy Procedures") (dated 1 June 2011) provides that complainants should submit their complaint to Ofcom within 20 working days after broadcast of the relevant programme, and that, ordinarily, Ofcom will not accept a complaint which is submitted after this deadline.

Ofcom notes that Mr Assange submitted his complaint on 19 December 2011, which was 14 working days after the programme was broadcast (i.e. 29 November 2011). Accordingly, Ofcom is satisfied that it was made within the normal period (i.e. 20 working days) set out by Paragraph 1.10 of Ofcom's Fairness and Privacy Procedures.

### **"Legal proceedings"**

Sections 114(2) of the Act provides that Ofcom shall not entertain, or proceed with the consideration of, a fairness complaint if it appears to Ofcom:

- (a) that the matter complained of is the subject of proceedings in a court of law in the United Kingdom, or
- (b) that the matter complained of is a matter in respect of which the complainant or the person affected has a remedy by way of proceedings in a court of law in the United Kingdom, and that in the particular circumstances it is not appropriate for Ofcom to consider a complaint about it.

Ofcom is aware that the decision on whether or not Mr Assange should be extradited to Sweden where he faces criminal allegations, is currently being considered on appeal by the Supreme Court in the United Kingdom. Ofcom is also aware that the extradition proceedings relate to the investigation of allegations of rape and assault in Sweden, and that therefore there are active proceedings in Sweden related to these allegations. However, Section 114(2) of the Act only precludes Ofcom from entertaining a complaint where it is the "subject of proceedings in a court of law in the **United Kingdom**" (emphasis added by Ofcom). Therefore Ofcom will only consider whether the extradition proceedings in the Supreme Court in the United Kingdom will prevent Ofcom from entertaining Mr Assange's complaint, as set out below.

Under Section 114(2)(a) of the Broadcasting Act 1996 (as amended), Ofcom is precluded from entertaining or proceeding with the consideration of a fairness complaint if it appears that the matter complained of is the subject of legal proceedings in a court of law in the UK.

The equivalent legal constraint which was previously set out in Section 55(4) of the Broadcasting Act 1981<sup>5</sup> was considered in *R v BCC Ex parte Thames Television*, when the court rejected a narrow construction of the provision. In particular, the court considered whether the relevant complaints did in fact "*substantially marry up*" with the subject of the relevant proceedings. Therefore, Ofcom is precluded under section 114(2)(a) of the Act from entertaining or proceeding with consideration of a fairness complaint when the matter complained of is the subject of, or substantially the same as the subject of, the proceedings.

In light of the above and having examined all the material before it, it is Ofcom's view that Mr Assange's complaint to Ofcom is not the subject of, or substantially the same as the subject

---

<sup>5</sup> The wording used in section 114(2) of the Broadcasting Act 1996 is similar to one originally used in section 55(4) of the Broadcasting Act 1981, which provided as follows: "*The Commission shall not entertain, or proceed with the consideration of, a complaint if it appears to them (...) that the unjust or unfair treatment or unwarranted infringement of privacy complained of is the subject of proceedings in a court of law in the United Kingdom*".

of the proceedings in the Supreme Court in the UK. The proceedings there concern a specific question as to whether a European Arrest Warrant “is a valid Part 1 European Arrest Warrant issued by a “judicial authority” for the purpose and within the meaning of the Extradition Act 2003.”<sup>6</sup> Although Mr Assange mentions the current proceedings in his complaint and the programme also refers to the proceedings, Ofcom considers that the subject matter of the complaint as set out in heads a) to d) above concern how Mr Assange was portrayed in the programme. Therefore, Ofcom considers that the matter complaint of is not the subject of, or substantially the same as the subject of, the proceedings in the Supreme Court. The result is that, notwithstanding the proceedings in the Supreme Court, Ofcom is not precluded from considering Mr Assange’s complaint under section 114(2)(a).

In relation to section 114(2)(b), Ofcom notes that Mr Assange has specified that he has not commenced any legal action with regard to his complaint. The current proceedings in the Supreme Court (as detailed above) concern his possible extradition to Sweden and therefore will not provide him with a “remedy” in respect of his complaint of unfair treatment and unwarranted infringement of privacy in the programme as broadcast. Therefore, Ofcom does not consider that it would be inappropriate under this section of the Act, to consider Mr Assange’s complaint.

### **“Frivolous”**

Section 114(2)(c) of the Act provides that “Ofcom shall not entertain, or proceed with the consideration of, a fairness complaint if it appears to Ofcom that the complaint is frivolous.”

Ofcom will normally consider a complaint to be “frivolous” if in its opinion the complaint is unsustainable. Normally this is because the complainant has not provided reasonable grounds on which to base a complaint of unjust or unfair treatment or unwarranted infringement of privacy and therefore, the complaint is on its face without substance and there is not a case for the relevant broadcaster to answer.

In that context, it does not appear to Ofcom that Mr Assange’s complaint is “frivolous”. This is because, on the face of it, there appear to be sustainable grounds of complaint for the broadcaster to answer in this case.

### **Inappropriate for “any other reason”**

Section 114(2)(d) of the Act provides that “Ofcom shall not entertain, or proceed with the consideration of, a fairness complaint if it appears to Ofcom that for any other reason it is inappropriate for Ofcom to entertain, or proceed with the consideration of, the complaint.”

Ofcom considers that there does not appear to be “any other reason” why it would be inappropriate for Ofcom to entertain, or proceed with the consideration of, Mr Assange’s complaint in the circumstances of this case.

### **Decision**

Ofcom has entertained Mr Assange’s fairness complaint and it will be considered as it is set out under “Entertained Complaint” below.

---

<sup>6</sup> Information provided on the Supreme Court website.



## Entertained Complaint:

### Unjust or unfair treatment

In summary, Mr Assange complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme did not obtain Mr Assange's informed consent to appear in the programme. In particular, Mr Assange complained that:
  - i) The programme makers misrepresented to him what the programme would focus on.
  - ii) He was not made aware of other key contributors who would be appearing in the programme.
  - iii) Opportunities to preview the programme were not offered to him but were offered to other contributors such as The Guardian newspaper.
- b) The programme presented, disregarded and omitted material facts in a way that was unfair to Mr Assange. In particular, Mr Assange complained that the programme:
  - i) Broadcast material which was highly prejudicial to his extradition hearing (which was held a few days after the programme was broadcast), and other potential hearings related to the allegations of rape or WikiLeaks. Mr Assange said that the programme included comments from interviewees,, who had no first- hand knowledge of the allegations he faced. In addition, the programme did not interview any of Mr Assange's legal team who had the authority to provide information on the allegations.
  - ii) Omitted crucial facts, such as:
    - That Mr Leigh had broken a written agreement and had revealed a secret decryption key which led to the publishing of the "unredacted cables" [i.e. the U.S Diplomatic Cables]. Instead, the programme said that this was an incomprehensible and reprehensible decision made by WikiLeaks;
    - Attributing the statement "*they're American informants, they deserve to die*" to Mr Assange but failing to mention that two individuals, Mr Goetz and Mr Stark, who were also present at the time this statement was supposed to have been made, have no recollection of Mr Assange making such a statement;
    - Failing to mention that Mr Domscheit-Berg (whose status was misrepresented by being described as a "*WikiLeaks spokesperson*" in the programme) had stolen funds and sabotaged WikiLeaks; deleted thousands of submissions revealing war crimes and corruption in financial institutions; profited and unleashed the chain of events that led to the publishing of the unredacted Diplomatic Cables. After February 2011, Mr Domscheit-Berg had little to no involvement with WikiLeaks operations after being sacked on 14 September 2010. Mr Assange added that all this information was available in two public statements issued by WikiLeaks;
    - Disregarding the fact that the reason that Mr Assange did not want The New York Times to be involved in the publishing of the Diplomatic Cables was because The New York Times had told the Pentagon about earlier releases; and

- Disregarding the banking blockade against WikiLeaks and the ongoing harassment of WikiLeaks volunteers. Mr Assange said that the programme gave the impression that WikiLeaks suspended publication because of his impending court hearing when, in fact, WikiLeaks suspended publication on 27 October 2011 due to financial blockades that were imposed on WikiLeaks, which was before the High Court made its decision on 2 November 2011.
- iii) The programme portrayed Mr Assange as “anti-American” and a “hacker” rather than a journalist or publisher.
- c) Mr Assange was not given a timely and appropriate opportunity to respond to the allegations made in the programme. In particular, Mr Assange stated that he was not given direct questions to answer in relation to many of the allegations stated in the programme.

#### Unwarranted infringement of privacy

In summary, Mr Assange complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Footage that was filmed of Mr Assange in a nightclub in Iceland was broadcast in the programme without his consent.

Mr Assange said that the person who recorded the video sought his permission to film him in the nightclub and that Mr Assange agreed to this on the basis that it would be for his personal use only. However, it was broadcast in the programme and Mr Assange had no knowledge of how the programme’s producer sourced this footage. Mr Assange said that he could not understand why this footage had been included in the programme or why it was relevant.

**Please refer to the complaint form and any accompanying material for full details.**