Layers of consent

This paper argues that highly-developed television documentary-making techniques could provide a model more generally for journalists navigating the complicated process of obtaining contributors’ consent.

Keywords: ethics of consent, television documentary, digital speed, media regulation

For Mr ‘X’, the situation was unacceptable: his daughter, a postgraduate student, had not been properly informed of the nature of the BBC’s involvement in a trip to North Korea in 2013, organised by a student society at the London School of Economics and Political Science (LSE). The BBC Trust’s Editorial Standards Committee (ESC) agreed, finding that Panorama’s provision of information to the students when journalist John Sweeney joined the trip to film secretly within the country ‘was insufficient and inadequate’ and that student ‘X’ ‘did not possess the knowledge necessary to give informed consent’ (ESC 2014: 1). Meanwhile, in an interview with Press Gazette, another student challenged this version of events, claiming they were made properly aware of the circumstances and the potential implications (Ponsford 2014). And significantly, even the ESC’s investigation into what information had been made available to the students, found ‘almost no agreement on this point between all of the students’ (ESC op cit: 18).

The disparity in accounts highlighted the complicated nature of obtaining consent; the BBC Trust finding indicated an inconsistent and undocumented process in this instance, making it difficult to establish whether fully informed consent had been given, or not, and by which parties. The ESC had to consider whether the students should be treated as contributors (it deemed they should, but their role was not ‘significant’ enough to warrant a formal contract) and what was told to whom, and when. While an extreme and unusual example, the BBC Panorama North Korea complaint highlights some of the complexities around securing consent to participate in journalistic process. News outlets depend on members of the public to contribute their opinions, knowledge and experiences, whether as ‘sources’ or ‘contributors’, but their role and the nature of the relationship is not clearly defined and can be antagonistic, with potential alienation of participants during the process and following transmission or publication. Furthermore, public participation is regulated according to media platform and the relationship is negotiated in varying ways by different journalists and organisations.

Regulatory role

Contributor consent, often documented in the form of a signature on a release form, is the mainstay of documentary film and television production in the UK. Both the Ofcom code and the BBC Guidelines deal with consent at some length, in sections relating to fairness and privacy (within Sections 7 and 8; and Sections 6 and 7, respectively). Furthermore, extensive discussion of the different types of contributors and the consent process can be found in the BBC Editorial Policy guidance note on ‘informed consent’ (BBC 2011). Within the ‘recruited participant’ category there are three categories of contributor: ‘the straightforward contributor’, the ‘collaborative contributor’ and the ‘the vulnerable contributor’ (ibid: 9-11). Particular care and attention should be paid to the latter. The guidance advises:

...when dealing with a long and involved project, (particularly if the contributors are vulnerable) it can be advisable to lay out details of the programme, its editorial intent, the expectations placed on the contributor, how the contribution will be used and any other relevant information relating to participation – including support for the contributor and any viewing rights (ibid: 5).

Generally, without consent a person’s personal contribution cannot be included. There are exceptions, especially in the context of news and current affairs (see BBC 2010: 6; BBC 2011: 3; Ofcom 2009: 2), but for most programmes, it will be necessary to obtain the consent of contributors to broadcast their contribution. At the lower end of the scale, consent to air a brief vox pop might be given on camera as ‘rushes consent’; at the other end of the spectrum, there are extensive and nuanced procedures.
for informing and obtaining consent from vulnerable people involved in intense and lengthy documentaries. Neither scenario is without its difficulties.

Channel 4, for example, received a complaint for airing a *vox pop* in Charlie Brooker’s fictional drama *Black mirror: The national anthem* (in November 2011); the complainant felt that she had not been made fully aware of the nature of the programme in which she was participating. In its ruling, Ofcom discussed the importance of obtaining ‘truly informed consent’ which did not necessarily rest on the existence of a signed consent or release form. In this instance, the regulatory body was satisfied there had not been a breach of the code, finding that it was ‘not unreasonable’ for the programme makers to conclude that the complainant ‘had given implied consent’ for her participation in the programme (Ofcom 2012a: 125-126).

A contrasting decision was reached over a complaint brought against Channel 4’s *Party Paramedics* programme (of January 2012), which had filmed the complainant receiving treatment from a doctor after suffering a fall and being knocked unconscious while on holiday in Corfu. The complainant felt his identity had not been sufficiently protected, causing him embarrassment and distress. In this case, Ofcom partially upheld the complaint: while it accepted that the obtaining of material was in the public interest, the intrusion into the complainant’s privacy ‘in broadcasting footage of him without his consent outweighed the broadcaster’s right to freedom of expression in the circumstances of this case’ (Ofcom 2012b: 73).

As with the *Panorama* North Korea finding, these cases reveal a number of points of tension and confusion in the consent obtaining process.

**Participant-producer tensions**

There is an overt friction between journalist and contributor at times; what the documentary maker wishes to share in his or her film, to develop the story and maximise its impact, might cause embarrassment or shame to the subject, who was unusually candid in an interview or caught in a compromising situation on camera. For Roger Graef, founder of the independent production company Films of Record, which specialises in films involving vulnerable contributors, such as those with mental health conditions, obtaining fully informed consent is absolutely crucial (Graef 2014). First, in many circumstances, such as filming young people, ‘it isn’t just us being nice’; it is mandatory in legal and regulatory codes. Second, he is guided by the belief that by taking somebody’s picture you are capturing his or her soul. There are, therefore, special obligations for looking after them.

Many of Graef’s films have involved an extra layer of consent; a two-stage consent that requires preliminary permission to film, and then secondary permission to use it. While risky for the fate of the film, certain circumstances necessitate showing footage to a participant and allowing them opportunity to withdraw consent. On one occasion, he says, this led to 70 hours of unusable footage and the scrapping of the film. One further condition, which has been stipulated in the contribution agreements for some of his films, is that material cannot be re-used in different contexts (in news packages, for example) without additional consent of a contributor. While there may be risks and disadvantages in the short term, this approach appears to provide long-term benefits; it can help filmmakers gain the trust of contributors and their facilitators (such as hospital staff), which can lead to better and continued future access.

Graef was one of several participants at a round-table discussion for documentary makers working in hospitals hosted by the European arm of the Dart Centre for Journalism and Trauma in the spring of 2012; another was Chris Rolfe, deputy director of communications at King’s College Hospital NHS Foundation Trust, which has hosted filming of numerous documentaries, including Channel 4’s *24 hours in A&E*. In Rolfe’s view, it is crucial that filmmakers ‘understand that every institution is unique, and will have different expectations when it comes to the issue of consent. Not all hospitals are the same in this regard, and can’t be lumped into one homogenous group’. King’s College Hospital will develop a consent protocol with the production team, with an important role for the clinical team as well as the press office. This protocol is useful when there is disagreement between filmmakers and the clinical team as to which patients would benefit from participating. ‘Essentially, we are the people who bring the filmmakers and the patients together,’ he says. ‘It couldn’t happen without us. As a result, our duty of care as a hospital extends to making sure patients understand what they are signing up to, and what the potential ramifications of taking part in a documentary could mean for them’ (Rolfe 2014).
The Dart Centre Europe discussion highlighted many of the everyday pressures involved in the consent process, underlying the importance of a well-developed and thoughtful approach to obtaining consent, which recognises the anxieties of contributors and allows them to change their mind during the filmmaking process.

**Digital speed**
In a digital environment, obtaining consent is even more complicated: where impenetrable walls once existed between participant and journalist, social media tools and online platforms provide an instant, two-way communication channel, affecting each party’s emotional engagement in the process. There is less distance between producers, contributors and consumers of media, as categories become harder to distinguish. An increasing consideration for filmmakers should be the impact of digital interaction and transmission: audiences can now provide live commentary on documentaries as they air; and films are no longer dusty reels in archives, following a few repeats; they may be stored permanently online, and perhaps discoverable with a Google search on an individual’s name.

In a print context, contributors may not have considered the full implication of participation, as Muller has previously identified in this journal (Muller 2013: 40). He described how some survivors of the ‘Black Saturday’ bushfires north-east of Melbourne in February 2009 ‘did not make the connection between giving an interview and appearing in the newspaper or television’. One interviewee said that she ‘had no grasp of reality, really that our pictures would be in every major newspaper across the country, that my niece [overseas] would see me on YouTube’ (ibid).

Furthermore, there is less time for deliberation and consideration of ethical factors. Graef is unequivocal that the digital technology changes journalists’ ethical approach to journalism: the competition of a 24/7 news environment and the speed of technology ‘destroys the window of opportunity to reflect’, with ‘no intervening moment’ for the journalists to make critical editorial decisions. The role of editors is ‘almost eradicated when it’s that fast’, he says (Graef 2014).

Of course, non-broadcasters, such as digital and print journalists, are not bound by the same considerations as documentary makers and are free from the stringent requirements of the broadcasting code. Nonetheless, consent does feature in press regulation, including digital formats. The Press Complaints Commission, which was due to continue its ‘transition’ operations until the end of April 2014, pays regard to consent in its code, in relation to privacy (clause 3) and children (clause 6) and in the accompanying Editors’ Code Handbook, which discusses the notion of ‘implied consent’ in the context of a decision involving Zoo magazine in 2006, for example. A father complained that he had not consented to the publication of photographs of him and his 10-year-old daughter making ‘offensive gestures’ at a football match. The PCC decided that while he had not ‘actively consented’ to the publication, ‘it was not unreasonable to assume he was unconcerned about publication’ because of the event’s public nature. Consent was, therefore, deemed to be ‘implied’ and the complaint rejected (Beales 2009: 53).

**Legal provisions**
Beyond regulatory codes, there is the law, which does affect non-broadcasters. Consent provides a defence in misuse of private information and breach of confidence cases, and features in copyright and data protection law. Consent could provide a common law defence in defamation – it was used successfully in Warren v Marsh (1992 QB), for example (SRB ND) – and aspects of consent are touched upon in the ten factors of Reynolds privilege (now replaced by the new public interest defence in the Defamation Act 2013), which considers whether subjects had been approached for comment, and the way in which their contribution was used. With regard to automatic anonymity for the victims of sexual offences, under the Sexual Offences (Amendment) Act 1992, the media can identify a victim if the individual gives consent in writing and is over 16 years old; this will not be valid if it can be proved that the media ‘interfered unreasonably with the peace or comfort of the person giving the consent, with intent to obtain it’. While legal and ethical consent issues clearly overlap, it is necessary to separate out the legal from the ethical in editorial decision-making; the latter may require a more extensive and involved process.

This necessary separation is emphasised by the BBC guidance on informed consent, which advises that for long projects, particularly those involving vulnerable contributors, conversations about editorial and viewing rights, for example, ‘may be in addition to, or instead of, using the standard contributor consent form’ (BBC
Tension between contributor and producer expectations is unavoidable in certain circumstances, but to ignore its existence is unwise and can damage both journalists and contributors. Instead, as Richards and Rees have suggested, ‘a more self-reflective and consistent understanding’ of journalism’s emotional dimensions ‘can only help journalists report the world more clearly’ (2011: 865). Furthermore, it will help them clarify and understand the objective and impact of their work. As part of this process, journalists need to think about the implications of publication for the source and practical means of obtaining consent that involves contributors and collaborators fairly, and the way this should change in different circumstances. Highly developed consent processes, which go beyond minimum legal requirements and communicate and document the expectations of all parties, can only improve quality journalism and avoid unnecessary anguish and antagonism for those involved in its production.

Informed consent for digital participation

Despite the increasing proximity of journalists to their sources, contributors and consumers, there is often a reluctance to pay attention to the emotional dynamics of interaction, or the impact of participation on the source or contributor. Given the lack of regulatory guidance for non-broadcasters, and the challenges of the fast-paced digital environment, digital and print – as well as broadcast – journalists could learn from the emotionally literate and nuanced techniques used by experienced documentary filmmakers when obtaining consent from contributors, especially those who might be described as ‘vulnerable’. Some sharing of resources occurs informally – for example, BuzzFeed’s new editorial guide (Favilla and Paolone 2014) hyperlinks a Dart Centre Europe guide to reporting sexual violence – but there is scope for further education and training of digital journalists and writers, especially valuable when contributors have no recourse to complaint or the impact of participation on the source, or contributor. The forms are also legalistic in tone, when a more informal approach may be more useful’ (ibid).

However, as seen in the BBC Panorama North Korea case, this ‘informal’ process can lead to misunderstandings and ambiguity. This indicates that informed consent requires a more involved and sensitive approach than that required by the law, but that documentable evidence and release forms still have a role to play in clarifying the agreement between the contributor and broadcaster. That said, the signature on the consent form or on-camera consent should be the formalisation of a much deeper and extensive interaction and not the sole focus of the process.

Notes

1 By way of disclosure and context, the author worked with Gavin Rees, director of Dart Centre Europe on a freelance basis in 2011-12, to develop resource materials and organise a series of events, including the seminar on hospital documentaries mentioned in this paper. Earlier versions of this paper were given in July 2013 at the IAMCR annual conference in Dublin and in October 2013 at the Institute for Communication Ethics Annual Conference. The author thanks participants at those events for their helpful comments and feedback.

2 For a more detailed examination of the philosophical and professional development of notions of consent and the emergence of a ‘hierarchy of types of consent’ (informed, simple and instinctual), see Muller 2013. He argues that informed and even simple consent may not be feasible in all journalistic circumstances and suggests that ‘what is ethically required is valid consent’ p. 42

3 An international organisation which provides training and resources for reporting violence, conflict and tragedy; more details at: http://dartcenter.org/europe

References


Graef, Roger (2014) Interview with author by telephone, 21 March 2011: 5). Separately, a consent form may also be needed ‘to demonstrate that the BBC has a full assignment of copyright in the contribution before a programme can be resold’ (ibid). Importantly, the BBC guidance recognises that legal forms ‘contain only basic information about the programme and the nature of the contribution’. … ‘Informed consent will often require more detailed information for the contributor. The forms are also legalistic in tone, when a more informal approach may be more useful’ (ibid).

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Muller, Denis (2013) Black Saturday bushfires and the question of consent, Ethical Space, Vol. 10, No. 1 pp 36-42


Ofcom (2012a) Ofcom Broadcast Bulletin, 10 September, No. 213 pp 117-128

Ofcom (2012b) Ofcom Broadcast Bulletin, 11 June, No. 207 pp 73-82


Rolfe, Chris (2014) Interview with author by email and phone, 28 March 2014


Note on the contributor
Judith Townend is a lecturer in journalism at City University London and research associate at the University of Westminster. Her doctoral research, based at City University London’s Centre for Law, Justice and Journalism, examines everyday media interactions with law, policy and regulation. She has authored articles in journals including Ethical Space, the British Journalism Review and the Journal of Media Law and presented at a range of academic conferences. She has recently contributed to a variety of online publications and worked for organisations including Dart Centre Europe and Index on Censorship. She is currently researching policy issues around media plurality and power as part of an AHRC-funded project at the University of Westminster.