

ABAC

ABAC Complaints Panel Determination No: 85/11

Complaint by Cancer Council WA & McCusker Centre for Action on Alcohol and Youth Product: Midori Advertiser: Suntory

Professor The Hon Michael Lavarch – Chief Adjudicator
Debra Richards – Member
Professor Richard Mattick – Member

8 November 2011

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a music video clip for Cobra Starship that includes product placement of Midori, which is distributed in Australia by Suntory (“the Advertiser”) and arises from a complaint received 4 October 2011.

The Quasi-Regulatory System

2. Alcohol advertising in Australia is subject to an amalgam of laws and codes of practice which regulates and guides the content and, to some extent, the placement of advertisements. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising as quasi-regulation. The most important provisions applying to alcohol advertising are found in:
 - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB);
 - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and complaints mechanism established under the ABAC Scheme;
 - (c) certain broadcast codes, notably the Commercial Television Industry Code of Practice (CTICP) which restricts when direct advertisements for alcoholic drinks may be broadcast; and
 - (d) The Outdoor Media Association Code of Ethics and Alcohol Guidelines which includes provisions about Billboard advertising.

3. The complaint systems operated under the ABAC scheme and the ASB are separate but inter-related in some respects. Firstly, for ease of public access, the ASB provides a common entry point for alcohol advertising complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.
4. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
5. The complaint raises concerns under the ABAC and accordingly will be considered by the Panel.

The Complaint Timeline

6. The complaint was received by ABAC on 4 October 2011.
7. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. This complaint was decided within the timeframe.

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this video clip.

The Advertisement

9. The complaint refers to a music video clip, "You Make Me Feel" by Cobra Starship, an American pop group.
10. The video clip is set in a nightclub or at a party. As the music commences the clip shows slides in quick succession featuring different people with the text "Feeling Fierce", "Feeling Frisky", "Feeling Pushy", "Feeling Cheeky". We then see the man from the final slide holding a photo leaving a photo booth with the text "Feeling..." on it. The female singer then walks up to the booth, looks at the mirror on the booth, sits in the booth and moves around as photos are taken. The clip then shows slides in quick succession featuring different people with the text "Feeling Strong", "Feeling Steezy", "Feeling Saucy", "Feeling Spacey", "Feeling Saweeet!". We then see the man from the final slide leaving the booth and taking his

photograph and another woman look in the mirror on the booth and enter the booth.

11. The clip then moves to the male singer sitting in the booth and singing. He leaves the booth and takes a photo from the booth which shows a photograph of the female singer with the text "Feeling Incomplete" and a second photograph of himself with the same text. We then see the female singer dancing in the booth and the male singer sitting at a table with a group of people. The table has several bottles of Midori in or next to ice buckets and there are glasses of a green drink on the table and in people's hands. We then see the female singer dancing, sitting with a group of women holding green drinks and then dancing again. We then see a photo of the female singer with her moving surrounded by glasses of a green drink that move around as if the film has been sped up as people pick up and put down glasses. We then see the male singer jump over the table containing the drinks and then sitting in the booth singing. The nightclub/party scene continues throughout the clip with people mingling, dancing and having fun and the table with the drinks and people holding green drinks is shown from time to time throughout the clip.
12. During the clip further slides are shown in quick succession at various times featuring different people with the text "Feeling Just", "Feeling Bubbly", "Feeling Hollywood", "Feeling Cheeky", "Feeling Spicy", "Feeling Tipsy", "Feeling Needy", "Feeling Sexy", "Feeling Loud", "Feeling OMG! OMG!" "Feeling Disco", "Feeling Cuddly", "Feeling Grizzly", "Feeling Jersey", "Feeling Guilty", "Feeling Funky", "Feeling Spunky", "Feeling Flashy", "Feeling Naughty", "Feeling Nice", "Feeling Nasty", "Feeling Classy", "Feeling Love", "Feeling Boo-ya", "Feeling Perky", "Feeling Munchy", "Feeling Kinky", "Feeling Thirsty".
13. At one point during the fast moving video clip the camera focuses on the Midori label and bottle for a full second.
14. In the last part of the clip the male and female singers find one another and go into the photo booth together and we see shots of lots of different people in the booth. In the last scene the female singer is shown sitting on the male singer's lap and a slide of the scene with the text "Feeling Complete" is shown.

The Complaint

15. The complainant argues that the music video:
 - (a) is popular viewing for children and adolescents and is shown during children's television viewing hours, particularly Saturday mornings on Rage (ABC) & Channel [V] and it is currently in the Top 40.
 - (b) Is widely accessible online, including the sites for the popular 'Video Hits' programme,

- (c) is dominated by shots of Midori bottles, including close-ups of the label and shots of green cocktails that are unmistakably Midori-based. Actors in the clip repeatedly consume Midori cocktails and pour drinks from Midori bottles. Midori is the only drink consumed.
- (d) Depicts excessive consumption as it contains countless references to excessive drinking, including tables laden with Midori cocktails, sped-up shots of multiple drinks being picked up from a table to be consumed and numerous actors topping up their drinks straight from Midori bottles. Consumption greater than NHMRC guidelines of two drinks per day is depicted.
- (e) The actors appearing in the music video are not depicted as over 25 years of age – in fact some look considerably younger. Zelda Williams, the actor Robin Williams' daughter, appears in the video drinking Midori and she is 22 years old.
- (f) The Midori advertising appears in a party/nightclub scene in the video where Midori is consumed by people sitting around a table and dancing to music. The Midori has clearly created or contributed to the celebratory mood. In addition, the singers in the video are looking for love, as their 'photos' describe them as 'incomplete' when separated at the beginning and 'complete' when together at the end. Clearly the consumption and presence of Midori contributed to their successful union.

The Code

- 16. The ABAC provides at Section (a) that advertisements for alcohol beverages must:
 - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - i) must not encourage excessive consumption or abuse of alcohol;
 - ii) must not encourage underage drinking;
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - iv) must only depict the responsible and moderate consumption of alcohol beverages
- 17. The ABAC provides at Section (b) that advertisements for alcohol beverages must:
 - b) not have a strong or evident appeal to children or adolescents and, accordingly –

- i) adults appearing in advertisements must be over 25 years of age and be clearly depicted as adults;
 - ii) children and adolescents may only appear in advertisements in natural situations (e.g. family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and
 - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene;

- 18. Section (c) of the ABAC provides that advertisements for alcohol beverages must:
 - c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly –
 - (i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success.

- 19. Section (f) of the ABAC provides that advertisements for alcohol beverages must comply with the Advertiser Code of Ethics adopted by the Australian Association of National Advertisers.

- 20. Section (g) of the ABAC provides that advertisements for alcohol beverages must not encourage consumption that is in excess of, or inconsistent with the Australian Alcohol Guidelines issued by the NHMRC.

The Advertiser's Comments

- 21. The Advertiser responded to the complaint and questions posed by the Panel by email received 14 October 2011. The points made by the Advertiser in relation to the advertisement were:
 - a. The sole purpose of the music video is to promote the sale of the artist's record or album. The brand is not the owner of the music video and does not have control over the production, creative decision, or marketing behind a music video. The music label (nor brand) control when a distributor plays a video; it is up to each broadcast outlet to blur a video as needed and decide when and where the video is to be shown. This particular instance is mostly a broadcaster issue, which would be the networks which aired the video

 - b. The Midori product and brand was featured in the clip with the knowledge of the owner of the brand. However, Midori do not own the media and therefore Midori could not control the use of the brand.

- c. There is no consumption in the clip. Only pouring and holding glasses. It doesn't showcase excessive drinking as they are not drinking and no one looks drunk. (And there are the mixer containers on the table and they are not supposed to pour Midori to drink straight.)
- d. This is the Cobra Starship video and the members of the Cobra starship are all over 25 yrs old. Again, it is not a Midori owned media thus Midori cannot control the media including cameos who appear in the media.
- e. No one looks drunk. They are just having fun. Midori is not the owner of this media nor the lyrics. The lyrics talk about a guy who wants his girl back. There is no reference to alcohol. He explains that he misses her and what he is ready to do to gain her back. So that's why they are going from "incomplete" to "complete. The video has been shot in the US. FCC does not prohibit product placement of alcohol. youtube.com is a US based website - US laws apply.
- f. Midori doesn't control where the clip is being broadcast. It is the broadcaster's responsibility to blur or even censor content.

The Panel's View

- 22. The complaint concerns the marketing technique of "product placement" and is the first occasion upon which the Panel has been called to make a decision on the use of product placement and the relationship between this type of marketing and the ABAC scheme. The critical threshold issue which the Panel must decide is whether the placement of the alcohol product Midori in the music video clip falls within the scope of an "alcohol beverage advertisement" for ABAC purposes. If the product placement within the clip is "an ad", then the Panel will need to decide if the portrayal of the alcohol product and the use of alcohol in the clip are consistent with the relevant ABAC provisions.

Is the depiction of Midori within the music clip "product placement"?

- 23. In simple terms, the marketing practice of product placement involves a commercial relationship between the owner or promoter of a particular product brand and the use of that product and/or brand within the content of a broadcast or published work developed by a third party. For instance, the fictional character, James Bond, is well-known for drinking a vodka martini (shaken, not stirred). A product placement relationship might result in the Bond character asking for a martini made from a specific brand of vodka, or show the bartender making the martini with the specific brand of vodka.
- 24. In the case before the Panel, the music video clip produced for the band "Cobra Starship" is set in a nightclub or party. The video shows the characters at the nightclub/party at various points with drinks. The drinks are green in colour, which is the colour of the alcohol product Midori; and in at least one shot the label of a Midori bottle is clearly seen. The advertiser has confirmed that the Midori product and brand was used in the clip with

the knowledge and approval of the brand owner. The advertiser did not answer a question put to it as to the commercial terms of the use of the Midori product and brand, on the basis that it does not disclose commercial arrangements.

25. The Panel concludes that the use of the Midori product and brand within the video clip can be accurately described as “product placement”.

Is product placement an “Alcohol Beverage Advertisement” for the purposes of the ABAC scheme?

26. The ABAC does not define the term “advertisement”. The preamble to the ABAC refers to the commitment of the sponsoring industry associations “to the goal that all advertisements for alcohol beverages produced for publication or broadcast in Australia comply with the spirit of this code”. The term “alcohol beverage” is defined as including “any particular brand of alcohol beverage”.

27. In the great majority of matters considered by the Panel, it is clear that an “alcohol ad” is involved. In some cases, however, it is not entirely straightforward that the promotional activity complained of is an “advertisement” or, if it is clearly an advertisement, whether it can fairly be described as an “alcohol beverage advertisement”.

28. As the ABAC does not give a precise definition of “advertisement”, nor does it describe in fine detail what activity is or is not covered by the scheme, the Panel is required to make decisions as to whether a complaint is raising a matter upon which it has jurisdiction to make a determination. Examples of Panel determinations involving the coverage of the scheme include:

- Surrogate advertising of alcohol products or brands within an advertisement for a non-alcohol product or service:
 - Vines Golf Club and Pure Blonde Beer (Determination 49/07)
 - Domino’s Pizza and Jim Beam (Determination 7/09)
 - Schweppes Soda and Johnnie Walker (Determination 63/11);
- Facebook Fan Sites:
 - Skinny Blonde Beer (Determination 38/09)
 - Bundaberg Red Rum (Determination 37/10)
 - Maxx Blonde (Determination 27/11)
- Sponsorship of events, teams or organisations by an alcohol company:

- NSW Rugby Union and Tooheys Beer (Determination 41/05)
 - Australian Motor Cross and Woodstock Bourbon (Determination 26/08)
 - Australian Cricket and Johnnie Walker (Determination 52/10).
29. In the examples of surrogate advertising and Facebook Fan Sites, the Panel concluded that the concept of “Alcohol Beverage Advertising” captured the activity. In contrast, the Panel has concluded that a sponsorship arrangement is not “advertising”, although it is possible that an “ad” might be produced as a result of the sponsorship relationship, and this ad would be within the ambit of the ABAC scheme.
30. In essence, the Panel has recognised that alcohol companies, and indeed companies in all segments of the economy, engage in a variety of marketing activities to promote their products and brands. Advertising is a subset or a particular type of marketing. The ABAC scheme and similar alcohol advertising codes of practice in other countries reflect a design which draws distinctions between advertising on one hand and other marketing on the other.
31. The ABAC itself embodies different approaches to the marketing activities of:
- Alcohol beverage advertising
 - Product labeling and packaging, and
 - Various promotional activities at “events”.
- For each marketing activity, the code sets out different standards and different processes to be followed.
32. Equally, the schemes applying to alcohol marketing and advertising in New Zealand, England, the United States of America and Canada all draw distinctions between “advertising” and other forms of marketing and promotion. In most instances, the broadly comparable codes to the ABAC do not expressly deal with product placement, for instance:
- The New Zealand ASA Code defines Liquor Advertisement as “an advertisement, by whatever means it is disseminated, that promotes liquor by product, brand or outlet, but does not include a sponsorship credit or a sponsorship advertisement or an advertisement in which reference to or the depiction of liquor or liquor packaging or a liquor outlet is incidental to its purpose.”
 - In Canada, alcohol promotion is largely regulated at a provincial level and, as a result (like the USA), the position varies considerably

from place to place. However, Advertising Standards Canada is a national not-for-profit advertising self-regulatory body (akin to the ASB) and its code provides as follows:

- “Advertising” is defined as any message (the content of which is controlled directly or indirectly by the advertiser) expressed in any language and communicated in any medium (except those listed under Exclusions) to Canadians with the intent to influence their choice, opinion or behaviour.
 - “Scope of the Code”: The authority of the Code applies only to the content of advertisements and does not prohibit the promotion of legal products or services or their portrayal in circumstances of normal use. The context and content of the advertisement and the audience actually, or likely to be, or intended to be, reached by the advertisement, and the medium/media used to deliver the advertisement, are relevant factors in assessing its conformity with the Code. In the matter of consumer complaints, Councils will be encouraged to refer, when in their judgment it would be helpful and appropriate to do so, to the principles expressed in the *Gender Portrayal Guidelines* respecting the representations of women and men in advertisements.
- In England, the use of product placement has been the subject of a major policy review process with the outcome that alcohol beverage product placement is not permitted within UK-produced television programs (this is canvassed below). For current purposes, it is clear that the English system recognizes a distinction between “advertising” and other marketing, such as product placement.
 - In the USA, the position varies considerably from State to State and there is no overarching national scheme. It is evident, however, that product placement is not treated nor considered as “advertising” as such.
33. In the wider Australian electronic media, both codes of practice and the stance adopted by the Australian Communications and Media Authority (ACMA) endeavour to draw a distinction between “advertising” and programming, so that a consumer of media is able to discern if views and content expressed are fact, opinion or advertising. The “cash for comment” controversy involving several prominent radio broadcasters highlighted the problems when advertising is disguised as programming.
34. Drawing this together, a majority of the Panel concludes that the intention of the ABAC scheme is to cover “advertising” and not all types of activity which are designed to market and promote alcohol products and brands. While the Panel approaches its task with a “spirit and intent” outlook, it cannot unilaterally extend the coverage of the scheme to reach activity which the clear design and parameters of the ABAC scheme do not capture. The

Panel believes that product placement within a music video clip is not “Alcohol Beverage Advertising” within the scope of the ABAC.

Policy considerations for the Management Committee

35. While the Panel is unable to deal with the substance of the complaint as it raises matters which are not “advertising”, there is no doubt that the practice of product placement raises important policy considerations for Industry, Government, Health Professionals and the broader community. In essence, an assessment might be made if product placement should be subject to a code of practice or regulation of some kind.
36. As mentioned, a major review of product placement has been conducted in England by the British Department of Culture, Media and Sport. As a result of this review, product placement restrictions previously in place were relaxed, but a prohibition on alcohol product placement within British produced television content was retained.
37. Of note, the submission to the review by the Portman Group, which is an alcohol producers’ body, argued for either a prohibition on product placement or, if it was to be allowed, then the same requirements applying to “advertising” should also apply to product placement for alcohol products. The Portman Group’s submission in part stated:

“We would normally argue that the drinks industry should be allowed responsibly to market its products primarily to an adult audience using the same marketing channels as other industries. But we acknowledge that product placement raises particular issues not associated with other forms of marketing. In particular, it does not necessarily allow a company the same degree of control over messaging as do other forms of marketing. This means that it might be impracticable to make product placement subject to detailed restrictions. If, however, there is insufficient control on alcohol product placement, it could lead to some less scrupulous companies abandoning other strictly-regulated media in favour of high-profile product placement through which they could convey brand association (for example, with excessive or inappropriate consumption, sexual success, etc) that they could not convey through other forms of marketing.

We would be deeply concerned if alcohol product placement was allowed to undermine the careful safeguards applied to all other forms of alcohol marketing.

We therefore do not necessarily argue in favour of allowing the product placement of alcohol. We do argue strongly, however, that if product placement is allowed, it be subject to exactly the same strict standards that currently apply to television advertising through the BCAP Code (and which are mirrored in the Portman Group’s Code applying to various other forms of marketing).”

38. In the USA, the Beer Institute is an industry body representing brewers. The Institute maintains an Advertising and Marketing Code which

specifically deals with product placement. Relevant provisions from this Code provide:

“With regard to those producers who seek Brewer approval or those Brewers who seek placement opportunities, product placement will be guided by the following principles:

- a. Case-by-Case Approval: *Brewers will approve or reject product placement in specific projects or scenes on a case-by-case basis, based upon the information provided by the movie or television program’s producers.*
- b. Portrayal of drinking and driving: *Brewers discourage the illegal or irresponsible consumption of their products in connection with driving. Consistent with that philosophy, Brewers will not approve product placement where the characters engage in illegal or irresponsible consumption of their products in connection with driving.*
- c. Underage drinking: *Brewers discourage underage drinking and do not intend for their products to be purchased or consumed illegally by people below the legal drinking age. Consistent with that philosophy, Brewers will not approve product placement which portrays purchase or consumption of their products by persons who are under the legal drinking age.*
- d. Primary appeal to persons below the legal drinking age: *Brewers discourage underage drinking and do not intend for their products to be purchased or consumed illegally. Consistent with that philosophy, Brewers will not approve product placement where the primary character(s) are under the legal drinking age or the primary theme(s) are, because of their content or presentation, specially attractive to persons below the legal drinking age beyond the general attractiveness such themes have for persons above the legal drinking age.*
- e. Portraying alcoholism/alcohol abuse: *Brewers do not want their products to be abused. Consistent with that philosophy, Brewers will not approve product placement where characters use their products irresponsibly or abusively or where alcoholism is portrayed, unless the depiction supports a responsible-use message.*

Conclusion

39. The Panel has concluded:

- That the ABAC scheme does not apply to product placement within the music video clip which is the subject of the complaint as the practice of product placement is not “Alcohol Beverage Advertising” for the purposes of the ABAC Scheme.

- Accordingly, the Panel does not have jurisdiction to make a finding on the substance of the complaint in terms of the consistency of the music video clip within the standards contained in the ABAC.
40. The Panel recognises that important policy considerations arise from the marketing practice of product placement and the appropriate policy response is referred to the ABAC Management Committee for assessment.