



ABAC Adjudication Panel Determination No. 67/15

Product: Jack Daniels
Company: Brown Forman
Media: Digital
Complainants: Confidential
Date of decision: 29 May 2015
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an advertisement on Youtube for Jack Daniels and arises from a complaint received 5 May 2015.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - (b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
 4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and the ASB and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the ASB under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 5 May 2015.
8. The Panel endeavour 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. The complaint has been determined within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for this marketing communication (13256).

The Marketing Communication

10. The 30 second advertisement placed before a youtube video comprises a series of historic images that change quickly with accompanying voiceover (V/O):

- V/O – He sat in on countless legendary recordings.

Images:

- recording studio equipment being operated
 - a microphone
 - studio equipment
 - a black and white image of a recording studio that has a grand piano, a set of drums a man playing the guitar, a music stand, amplifiers and other equipment
 - a poster of two guitars and a picture of “Ernest Tubb Record Shop” with a billboard promoting “MID-NITE JAMBOREE with Top Opry Stars each Saturday night 12:00-1:00” and “Real country music lives here est 1947”
 - three record labels flashing past for “Mudhoney” “Touch me I’m Sick” recorded by SUB POP Records, “New Rose” “The Damned” recorded by Stiff Records and “Memphis Tennessee” recorded by Sun Record Company “The Label of Legends”
 - a neon sign “NASHVILLE”
 - recording studio equipment overlaid with a musical score and then the text “Play at Loud Volume!”;
- V/O – He shared the stage with Sinatra.

Images:

- black and white footage of Frank Sinatra smiling and nodding to the crowd as he walks across the stage with a band behind him
- a cropped image of a guitarist jumping into the air as he plays
- V/O – He played with some of the biggest names in rock'n'roll.

Images:

- footage of two singers on a dimly lit stage
- footage of a guitarist playing as the text “Sold out” and “?FS* Produce of USA” and a poster with the text “The Middle East” Wed April 18 Midnight” and “? JERKS ?MAD SOO?” is superimposed over the guitarist.
- A crowd at a very large venue at night
- A guitarist playing on an outdoor stage during the day
- A guitarist playing on a lit up stage at night
- A set of train tracks and country scenery moving by
- V/O He was there at CBGBs in '77, sunset strip in '81.

Images:

- A crowd dancing with their hands in the air at a venue with one man holding up a booklet or record sleeve for “The Shirts” which is then overlaid with three images of graffiti by an exit door, graffiti on a wall and a tiled wall
- A canopy with the text “CBGB 315 OMFUG 315”
- A band playing on stage in a dark venue with the singer dancing around and spinning his microphone stand and a guitarist dancing as he plays
- A street sign for Sunset Boulevard
- A hand with 3 rings, one of which is an eagle which is overlaid with a poster for “Whisky a Go Go Jan 25, 26, 27 fri, sat, sun” that includes the outline of a person
- V/O He's been on tour since 1866 and he's still going strong today.

Images:

- A very large crowd dancing at an outdoor venue with their hands in the air and being sprayed with water
- An airplane
- A female singer with a band performing in a dark venue
- A crowd dancing and raising their arms at a dark venue
- A man holding his guitar above his shoulders
- A drum kit on fire on a stage
- The bottom half of a guitarist
- The guitar and jacket of the guitarist lying on the stage next to a drum kit
- A crowd standing at a large outdoor venue at sunset
- A singer on stage raising his hand into the air
- An outdoor venue at which the crowd are swinging an American flag and a couple other flags from side to side
- An image of a few bottles and glasses of Jack Daniels partly obscured by people
- An image of a bottle and can of Jack Daniel's whisky with the text "#jdfuturelegends" on the top left hand side of the screen and in smaller print on the bottom left hand side of the screen "Play On. Drink Responsibly" followed by trademark information – V/O – His name is Jack.

11. On the bottom left hand corner of the footage during the first part of the ad is the text "#jdfuturelegends".

The Complaint

12. The complainant is concerned that the advertisement:
- (a) Is targeting viewers indiscriminately on a site popular with underage people;
 - (b) Attributes creativity and success in music to alcohol abuse in the context of a "rockstar" lifestyle.

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
 - (b)(i) have Strong or Evident Appeal to Minors;
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

The Company's Response

14. The Company responded to the complaint by letter dated 14 May 2015. The Principal points made by the Company are:
 - (a) Brown-Forman Australia takes very seriously our responsibility to market our products in accordance with all applicable laws, as well as the ABAC Code, and above all, responsibly, to Australian consumers. Therefore, it is always a matter of serious concern for us to receive a complaint that we are falling below the high standards we set for ourselves in this regard.
 - (b) We do not consider that the advertisement breaches either section 3(a)(i) or (ii) of the ABAC Code. The advertisement takes the form of a narrated montage of scenes from, and references to, renowned music events, artists and venues in American music history. The advertisement celebrates musical legends and creativity, and exciting moments in musical history, and alludes to the fact that it has been a brand of choice for certain entertainers over decades. These images do not, as suggested by the complainant, equate to some form of a negative "rockstar" lifestyle. We would suggest that while some "rockstars" may well bring to mind misuse and abuse of alcohol or offensive behaviour, it is too simplistic and unrealistic to apply this bias to all musicians. It defies credibility to suggest that all musicians are of the same ilk – abusers of alcohol, or promoters of offensive behaviour. Our advertisement celebrates legends in the music industry - an industry that is inclusive of many types of musical styles: blues, hip-hop, rock-n-roll, and musical icons such as Sinatra. They cannot be summarily categorized as abusers of alcohol or promoters of offensive behaviour. While the script narration does imply, through simple metaphor, that the product was enjoyed by

music icons of the relevant period (1950's to 1980's) at the referenced events and venues, in no sense does the script, imply or encourage excessive, irresponsible or rapid consumption of the product, or irresponsible offensive behavior resulting from consumption. The advertisement contains no visuals depicting consumption and the audio/script references to the product do not directly or implicitly reference consumption.

- (c) Brown-Forman Australia is committed and works to ensure that our communications are targeted to consumers above the legal drinking age. It is our corporate policy to place all advertisements in compliance with applicable codes and guidelines; in this case, the following provisions of ABAC's Best Practice Digital Marketing Guidelines:

"8. Digital marketing communications should be placed only in media where at least 75% of the audience is reasonably expected to be of legal purchase age or over." and

"6. Age Restriction, Targeting or Affirmation Technologies should be used, where available, for all digital marketing controlled by alcohol beverage advertisers, to restrict access to users of legal purchase age or over."

In this case, we understand that the complainant viewed the advertisement as a pre-roll video on Vevo. We have confirmed with our advertising agency that where we booked media directly with Vevo or where we bought advertisements using the Google ad platform that the advertisement was served only to Vevo account holders who are 18+, based on their log-in records (see demographics report below).

+ DEMOGRAPHICS		Change status...				
<input type="checkbox"/>	Age range	Targeting group	Max CPV	<input type="checkbox"/> Impressions	Views	View Rate
<input type="checkbox"/>	18 - 24	All	A\$0.15	933,669	132,223	14.16%
<input type="checkbox"/>	25 - 34	All	A\$0.15	722,462	124,603	17.25%
<input type="checkbox"/>	35 - 44	All	A\$0.15	450,535	59,912	13.30%
<input type="checkbox"/>	45 - 54	All	A\$0.15	239,358	30,023	12.54%
<input type="checkbox"/>	55 - 64	All	A\$0.15	112,119	15,665	13.97%
<input type="checkbox"/>	65+	All	A\$0.15	109,616	13,918	12.70%
<input type="checkbox"/>	Unknown	All	A\$0.15	0	0	0.00%
Total - all demographics				2,567,759	376,344	14.66%

[Negative targets](#)

For your information, the advertisement is also located on the Jack Daniel's YouTube channel, which also has appropriate age access restrictions in place for content. In this regard, our agency has also confirmed to us that, even without utilization of the age targeting mechanisms which we use, YouTube and Vevo both meet the paragraph 8

threshold under the ABAC Best Practice Guidelines under which advertisers may regard them as appropriate for placement of alcohol advertisements. Therefore, with the age access restrictions, only LDA consumers appropriately logged in would have viewed this advertisement on Vevo.

- (d) We have addressed the question of whether this advertisement amounts to a description, or an implied endorsement, of a 'rock star lifestyle', in a way which could amount to a breach of the ABAC Code. This question incorporates an additional element; i.e. the possibility that the content of the advertisement should have strong or evident appeal to minors. We do not believe that this advertisement would have strong or evident appeal to minors. The advertisement shows music icons, events and occasions in the American music from the 1950s to the 1980s. It is our belief that the particular artists depicted, the style of music, events, venue and broad time period referenced would all appeal primarily to baby boomers or individuals who were already of an age to appreciate music and feel a connection to those events at the relevant time. None of the artists nor the venues and events referenced reflects current youth culture, thereby making it unlikely that this advertisement would appeal to those under the age of 18. In the event that assessors require further information on this point, we will be pleased to supply a list of artists featured, and their ages.
- (e) We do not believe that the advertisement and the narrative therein breaches section 3(c)(ii) of the Code. Although the advertisement asserts that Jack Daniel's whiskey had been present at various music events, and implies that it was often favoured by artists of the era, it does not go so far as to imply in any way that alcohol was the reason for the success of those artists of American music or was part of the musical achievements in American music history. We think it is fair to infer that the advertisement presents Jack Daniel's as a brand of note in the relevant 'scene', but do not believe that the advertisement makes any further claim.

The Panel's View

15. The complaint raises three distinct concerns about the Company's digital advertisement, which was accessed by the complainant on the media platform, Vevo. Vevo is a hosting service for music videos and was launched in Australia in April 2012.
16. The three concerns raised by the complainant will be dealt with in turn. These concerns are:
 - The advertisement indiscriminately targets viewers on a site popular with underage people;
 - The advertisement attributes creativity and success in music with alcohol use; and

- The advertisement also attributes music creativity to alcohol abuse in the context of a rock star lifestyle.
17. In assessing whether a marketing communication is consistent with an ABAC standard, the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person, taking its contents as a whole. The reasonable person test is drawn from the Australian common law system, and means that regard is to be had to the attitudes, opinions, and beliefs that are common in a majority of the community.

Appeal to minors

18. The first concern raised is that the advertisement targets viewers indiscriminately, and utilises a site that is popular with under 18 year olds. As mentioned in paragraph 3, the ABAC is a content, rather than a placement, code. This means that an advertisement will not be in breach of an ABAC standard solely for the reason that its audience will include under 18 year olds. Rather, to breach the standard relating to appeal to minors, the content of the advertisement must have elements which can be said to be strongly or evidently appealing to under 18 year olds.
19. In response to this concern, the Company explains that it has placed restrictions on accessing the Vevo site, which should mean that the advertisement will not be seen by significant numbers of under 18 year olds. Whether these restrictions are effective or not is, however, not the determinative point in assessing appeal to minors. The critical element is whether the content of the advertisement could be said to appeal to under age persons.
20. The content of the advertisement features a series of short, historic clips of famous music artists and notable events and venues. This visual aspect of the advertisement is then accompanied by a narration which explains the association of the product with the music industry during the period from the 1960s to the early 1980s. The Panel believes that the advertisement would not be particularly appealing to a younger audience, as the artists featured, such as Frank Sinatra, would be far more associated with people growing up in the 1960s and the 1970s. To be under 18 years old, a person will have been born after 1997, and none of the artists or scenes depicted could reasonably be said to be strongly appealing to this demographic. Accordingly, this part of the complaint is dismissed.

Alcohol and success

21. The next element of the complaint goes to the argument that the advertisement attributes creativity and success in music with alcohol. Part 3(c)(ii) of the Code provides that a marketing communication must not show the consumption or presence of an alcohol beverage as a cause of or contributing to the achievement of personal, business, social or other success.
22. The key concept in this standard is that of causation. The standard permits successful and creative people to be depicted in an alcohol advertisement,

provided it is not suggested that a reason why a person is successful or creative is the presence or use of alcohol.

23. The Company contends that the advertisement does not breach this standard. While the Company accepts that the advertisement places the product at various music events, and concedes that the product was favoured by artists of the era, it is asserted that the advertisement goes no further than this and does not imply that alcohol was the reason for the artists' success.
24. The standard goes beyond restricting a marketing communication implying that alcohol is the sole, or even a primary reason, for the achievement of success. The standard is framed widely, and does not permit an advertisement from suggesting alcohol was "a" cause of or contributor to the achievement of success.
25. The Panel believes that the advertisement does breach the Part 3(c)(ii) standard. In reaching this conclusion, the Panel has noted:
 - The product is described as a person by the narrator, i.e. 'he' (Jack Daniels) is stated to be present and involved at the various events and music milestones portrayed.
 - The level of involvement of the product in the events and milestones is described in an active voice, with the product making a direct contribution, as evidenced through expressions such as:
 - He 'sat in' on countless legendary recordings;
 - He 'shared' the stage with Frank Sinatra;
 - He 'played' with some of the biggest names in rock 'n roll;
 - He's 'been on tour' since 1866.
 - The story arc suggests that the product was part of the common working routine of the artists and not, for instance, only used to mark a successful event at its conclusion.
 - The active participation described by the narration, combined with the visual depiction of the important events and artists, creates a distinct impression that the product was not only present at the events, but was a contributor to the success of the events and the artists who are depicted.

Abuse of alcohol

26. The final concern expressed by the complaint is that the advertisement associates alcohol abuse, in the context of a rock star lifestyle, with creativity and success. Part 3(a)(i) of the Code provides that a marketing communication must not encourage the excessive or rapid consumption of an alcohol beverage, or the misuse or abuse of alcohol. If the advertisement can fairly be

said to be glorifying the abuse of alcohol as part and parcel of a rock star lifestyle, then this standard would not be satisfied.

27. The Company argues that it is true that some rock stars do have a reputation in relation to the abuse of alcohol but that it would be unreasonable to infer an endorsement of such behaviour by the advertisement.
28. The Panel does not believe that this standard has been breached. In reaching this conclusion, it has been noted:
 - No alcohol consumption is actually depicted during the advertisement, although the presence of alcohol at the various events and milestones is stated to have occurred;
 - There is no depiction of antisocial or other behaviours in the short clips used in the advertisement which imply the abuse of alcohol;
 - It is too long a bow to draw to conclude that the advertisement is encouraging alcohol abuse by merely depicting prominent music artists and events.
29. Accordingly, the complaint is dismissed in relation to Part 3(a)(i) and (b)(i) and is upheld in relation to Part 3(c)(ii).