



ABAC Adjudication Panel Determination No. 102/16

Product: Various
Company: Vino Mofo
Media: Digital
Complainant: Rodney Pritchard
Date of decision: 8 September 2016
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 digital advertising by Vino Mofo (“the Company”) and arises from a complaint received 10 August 2016.
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 10 August 2016.
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 not obtained for this marketing communication.

The Marketing Communications

10. The advertising complained of is an email sent to a subscriber that had the subject line "Free shipping for 24 hours, because Wednesday, I guess?"
11. The body of the email included an abstract drawn image of liquid splashing up out of a wine glass interspersed with wine bottles, wine glasses, people surfing, a corkscrew, some grapes and some birds. Above the image is the text "VINOMOFO" then "TODAY ONLY! FREE SHIPPING Because we're doing you a solid.* Well, a liquid.** You know what I mean..." Across the image is the text "Yay for liquid wine! >" that has a click through to the Company's website. Below the image is the following text when we say solid we mean [image of two joined hands] not [image of emoji poo]" and "***and when we say a liquid, we mean [image of glass of red wine].
12. Below the main advertisement is an image of five people standing against a wall with graffiti. Each person has the text "\$25" above their heads and the caption across the image is "Invite your friends 5 friends = \$125 = free wine. Yew!". Below the image is a click through with the text "Start inviting".
13. Various other material is included with company details, privacy information and then there is the text "Hey Kids! Seriously – Vinomofu encourages the legal and responsible consumption of alcohol, so be smart and be safe." Below is a warning about it being an offence to supply minors with alcohol and the penalties.

The Complaint

14. The complainant is concerned that:
 - the operator, Vinomofu, clearly calls out the legal restrictions (and potential penalty) of selling to persons under the age of 18, however, they have recklessly used the headline "Hey Kids!", in the previous paragraph, before encouraging "the legal and responsible consumption of alcohol, so be smart and be safe".
 - given the legal and ethical standards preventing the marketing of alcohol to minors, Vinomofu have been negligent in this instance, and should remove any reference to "Kids" from their advertising to avoid unintended connection to underage drinking / drawing adverse attention from anti-alcohol campaigners, as a consequence.

The ABAC Code

15. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(i) have Strong or Evident Appeal to Minors;

16. Definition in Part 5 of the ABAC provide:

Strong or Evident Appeal to Minors means:

(i) likely to appeal strongly to Minors;

(ii) specifically targeted at Minors;

(iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;

(iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or

(v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

A 'Minor' means a person who is under 18 years of age and therefore not legally permitted to purchase an alcohol beverage in Australia.

The Company's Response

17. The Company responded to the complaint by letter dated 25 August 2016. The principal points made by the Company were:

- We note that the complaint is regarding the wording used in the footer of our emails which are sent to all our members who have subscribed for daily or weekly emails (see Attachment 1 for example). Vinomofo take our legal and ethical responsibilities in relation to the marketing and availability of alcohol to minors very seriously. All members confirm they are 18 years or over upon signing up with Vinomofo and we reiterate this again in our terms and conditions.
- The use of the term "Hey Kids!" in the footer of the email is in no way used to attract attention from minors to our emails. As is evident in the way that our emails are designed and written, all Vinomofo articles and wine reviews are written in a cheeky and irreverent nature. This is what our members love about Vinomofo and why we have such a huge and loyal following. This term is reflective of our writing style which is very unique to our business.

- This wording has been used on our emails and website for many years now with no adverse reactions from our members. Therefore we believe the removal of this reference in order to avoid an unintended connection to underage drinking or to draw adverse attention from anti-alcohol campaigners is extreme and unwarranted.

The Panel's View

18. The Company is an online wine marketing and distribution business. The Company has adopted a particular style of communication which is irreverent and 'in your face'. By all accounts, the business model has been successful, with the Company expanding into international markets.
19. The complaint relates to an email communication to the Company's subscriber list. The email contains a 'footer' which is described as containing 'all the boring (but important) stuff. In part, the footer information has a heading 'Hey Kids!' which goes on to explain that the reference to 'kids' is not serious and that the Company encourages responsible and legal consumption of alcohol. Information about it being an offence to supply alcohol to persons under 18 years of age is supplied.
20. In the complainant's view, the email should not make the 'Hey Kids' reference as this is 'negligent' and may cause an unintended connection to under-age drinking. In part, the concern of the complainant appears to be to the Company's reputation in 'drawing adverse attention from anti-alcohol campaigners'.
21. The ABAC provides that an alcohol marketing communication must not have strong or evident appeal to minors. In assessing if this standard has been breached, the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person.
22. The Panel does not believe that the email is in breach of the standard. The reference to 'kids' is qualified and explained by the surrounding text, which in essence makes clear that the Company has legal responsibilities to ensure that it does not supply alcohol to under 18 year olds. A reasonable person, viewing the material as a whole, would not believe the email was promoting alcohol to 'kids'. In fact, the opposite interpretation would be drawn.
23. It is noted that the Company is not a signatory to the ABAC Scheme. It would be highly advisable for the Company to take this step and, in particular, take advantage of the ABAC pre-vetting service.
24. Accordingly, the complaint is dismissed.