



ABAC Adjudication Panel Determination No. 77/17

Product: Beluga Vodka
Company: Synergy Group
Media: Music video clip on youtube
Complainant: Regan Marshall
Date of decision: 1 May 2017
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns placement within a music video clip on youtube of Beluga Vodka which is produced by Synergy Group (“the Company”) and arises from a complaint received 20 March 2017.
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 20 March 2017.
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 with 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 Communication

10. The complaint refers to a music video clip for a song named "Swalla" by Jason Derulo that includes shots of Beluga Gold Line Vodka at 1:29-1:35 and 1:55-2:07. The link to the video and extract with product shown was posted on a Beluga Vodka facebook page at:

<https://www.facebook.com/belugavodka/videos/1459192740789762/>

11. The music video clip can be seen in full at:

<https://www.youtube.com/watch?v=NGLxoKOvzu4>

12. The music video clip features a song by American singer, songwriter and dancer Jason Derulo and depicts the singer dancing with a group of female dancers and two other singers, Nikki Minaj and Ty Dollar \$ign. At various times through the clip the dancers are depicted with sweets and non alcoholic soda.
13. At 1:29 one of the women is holding a bottle of Beluga Gold Line Vodka up to the camera, and then we see one of the singers holding the bottle and a plastic cup dancing with his arm around the same woman. The woman is then shown holding the bottle over her shoulder and in a couple scenes the singer holds the blue plastic cup. At 1:55 the same woman is seen holding up a martini glass as the singer generously pours from the Beluga vodka bottle into the glass. At 2:00 the glass looks about half full. At 2:07 the same singer is depicted dancing with the woman and he is holding the bottle of vodka and a blue plastic cup. The Martini glass is not shown again.
14. The lyrics that accompany the clip are:

Drank
Young Money
Love in a thousand different flavors
I wish that I could taste them all tonight
No, I ain't got no dinner plans
So you should bring all your friends
I swear that to all y'all my type
All you girls in here, if you're feeling thirsty
Come on take a sip 'cause you know what I'm servin', ooh
Shimmy shimmy yay, shimmy yay, shimmy ya (drank)
Swalla-la-la (drank)
Swalla-la-la (swalla-la-la)
Swalla-la-la
Shimmy shimmy yay, shimmy yay, shimmy ya (drank)
Swalla-la-la (drank)

Swalla-la-la (swalla-la-la)
Swalla-la-la
Freaky, freaky gyal
My freaky, freaky gyal
Shimmy shimmy yay, shimmy yah
Bad girls gon' swalla-la-la
Bust down on my wrist in this bitch
My pinky-ring bigger than his
Met her out in Beverly Hills, ay
Dolla got too many girls, ay
Met her out in Beverly Hills
All she wear is red bottom heels
When she back it up, put it on the Snap
When she droppin' low, put it on the 'Gram
DJ poppin', she gon' swallow that
Champagne poppin', she gon' swallow that
All you girls in here, if you're feeling thirsty
Come on take a sip 'cause you know what I'm servin', ooh
Shimmy shimmy yay, shimmy yay, shimmy ya (drank)
Swalla-la-la (drank)
Swalla-la-la (swalla-la-la)
Swalla-la-la
Shimmy shimmy yay, shimmy yay, shimmy ya (drank)
Swalla-la-la (drank)
Swalla-la-la (swalla-la-la)
Swalla-la-la
Freaky, freaky gyal
My freaky, freaky gyal
Bad gyal no swalla nuttin', word to the Dalai Lama
He know I'm a fashion killa, word to John Galliano
He copping that Valentino, ain't no telling me "no"
I'm that bitch, and he know, he know
How y'all wifing these thots? You don't get wins for that
I'm having another good year, we don't get blimps for that
Pussy game still cold, we don't get minks for that
When I'm poppin' them bananas, we don't link chimps for that
I gave these bitches two years, now your time's up
Bless her heart, she throwing shots but every line sucks
I'm in that cherry red foreign with the brown guts
My shit slappin' like dude did LeBron's nuts
All you girls in here, if you're feeling thirsty
Come on take a sip 'cause you know what I'm servin'
Shimmy shimmy yay, shimmy yay, shimmy ya (my love) (drank)
Swalla-la-la (my love) (drank)
Swalla-la-la (swalla-la-la)
Swalla-la-la
Shimmy shimmy yay, shimmy yay, shimmy ya (drank)
Swalla-la-la (drank)
Swalla-la-la (swalla-la-la)
Swalla-la-la
Swalla-la-la

(J.D)
Freaky, freaky gyal
Swalla-la-la
My freaky, freaky gyal
Swalla-la-la
My freaky, freaky gyal
Swalla-la-la
My freaky, freaky gyal
Derulo

The Complaint

15. The complainant is concerned that:
- the Beluga Vodka facebook page is not age restricted
 - the music video clip:
 - shows Beluga Gold Line Vodka being served at an irresponsible serving size at 1:55-2:01
 - the song and video is a double (or single) entendre for swallowing/ejaculating and:
 - depicts the metaphor in a way that is extremely degrading to women;
 - ties in the product placement to this theme by constant repetition of the words “swalla” and “drank”, maybe implying sexual and social success as a result of the vodka (although noting the women seem just as attracted to this ‘buffoon’ before and after the vodka is served).
 - The product was placed in another video clip by Jennifer Lopez as referred to in the My Bottleshop website:

<https://www.mybottleshop.com.au/beluga-gold-line-vodka-700ml>

The ABAC Code

16. Part 2(a) of the ABAC Code provides that The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:
- brand advertising (including trade advertising)
 - competitions
 - digital communications (including in mobile and social media and user generated content)
 - product names and packaging

- advertorials
 - alcohol brand extensions to non-alcohol beverage products
 - point of sale materials
 - retailer advertising
 - Marketing Collateral
17. Part 2(b)(vi) of the ABAC Code provides that The Code does NOT apply to the placement of a Marketing Communication, except to the extent that placement may impact on how the Marketing Communication is understood in accordance with Section 4.
18. 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;
 - (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;
19. Definitions in Part 5 of the ABAC provide:

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Marketing Communications means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile or social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

The Company's Response

20. The Australian Distributor, ARS Trading responded to the complaint:
- We are the importer and distributor of Beluga Vodka. Our relationship with the producer is one of the buyer and seller. I.e. we purchase the product and re-sell in Australia.
 - ARS Trading has no input or involvement in the way Beluga Vodka is advertised globally. Nor do we have any say in what endorsements

with celebrities are agreed on. The producer of Beluga Vodka is Synergy Group.

- ARS Trading had no input into production of this video clip, nor have we distributed this material in Australia.

21. The producer, Synergy Group, responded to the complaint on 18 April 2017:

- Synergy Co is part of the Synergy group of companies. Which is engaged in the production and sale of strong alcoholic beverages of high quality. Synergy key brands are Beluga, Veda, Myagkov, Belenkaya and many other brands of vodka.
- Beluga Gold Line Vodka is being produced on Mariinsk Distillery (Russia), which is part of Synergy group of companies.
- Synergy Co is not involved in product placement in the Music video clip.
- As a consequence, Synergy Co was not involved or didn't control the way in which Beluga Gold Line vodka was portrayed in the Music video clip.
- The question of removal of images of the product from the Music video clip requires deep analysis as it belongs to jurisdiction matters. However, generally, we do not see that such removal would have much changed the theme of the Music video clip.
- We don't think that placement of the product in the Music video clip breaches Section 3 (a)(i) of the Code. At 1:55 Beluga Gold Line vodka is being poured in a martini glass and there is no further consuming such martini glass full of vodka. It is a well-known fact that vodka can be served in shots and in cocktails and Martini glass with vodka assumes drinking a long drink (vodka mixed with some other non-alcoholic drinks). In this case volume of the drink (in martini glass) can't encourage excessive or rapid consumption or abuse of alcohol.
- We don't think that placement of the product in the Music video clip breaches Section 3 (c)(ii) of the Code. While we haven't seen any suggestion of the consumption or presence of alcohol which may create or contribute to the achievement of social or sexual success, song's lyrics don't mention vodka, but mentions champagne, the whole Music video clip is an author's idea (including metaphor for sexual activity). Moreover, being a responsible business we analysed Youtube channel that placed the Music video clip. All the comments

of Music video clip audience do not mention vodka or any reference to the creation or contribution of social or sexual success.

The Panel's View

Introduction

22. Jason Derulo is an American rap performer and songwriter. Mr Derulo has produced a rap entitled 'Swalla' for which a music video has been created. In a small number of scenes in the video, the product Beluga Vodka is seen and it is this depiction of the product which is the centre of this determination.
23. The ABAC Scheme is based upon the commitment of Australian alcohol industry participants to adopt the standards of good marketing practice embodied in the Code and comply with decisions of the Panel when a public complaint leads to a determination that a Code standard has been breached.
24. There are two alcohol companies involved with the issues raised in the complaint, namely ARS Trading which is an Australian distributor of imported alcohol products and Synergy Co, the Russian based producer of the product Beluga Vodka. Neither company is a signatory to the ABAC Scheme and hence neither are contractually bound to abide by Panel decisions. Both companies have however co-operated with the Panel processes and this has enabled the determination to be made.
25. It should also be noted that the ABAC Scheme operates based on the commitments made by alcohol companies. The Scheme does not directly purport to bind media outlets which might convey a marketing communication from an alcohol company. Some media e.g. Free to Air television, adopt codes of practice which mean that an alcohol company must provide evidence that a proposed TV advertisement has been pre-vetted against the ABAC standards before it will be broadcast. Enforcement of the decisions of the Panel however rely on the relevant alcohol company taking actions e.g. withdrawing an advertisement from showing on TV or at the cinema, rather than the TV network or cinema owner removing the advertisement from broadcast or screening. Some media outlets choose not to broadcast advertisements found to breach the ABAC Code but they cannot be compelled by ABAC to do so.
26. It is necessary to canvass these operational aspects of the ABAC Scheme because of the nature of the issues raised by the complaint. Those issues and relevant facts can be summarised as follows:
 - Jason Derulo and the producers of the music video are not bound by the ABAC Scheme as they are neither an alcohol industry participant nor persons within Australia;
 - Facebook and Youtube are social media platforms. While alcohol marketing accessed via social media falls within the ABAC Scheme, a Panel determination concerning a marketing communication on social media will be complied with through the actions of the relevant alcohol

company e.g. the alcohol company removing the marketing communication from a Facebook page;

- ARS Trading is an Australian alcohol industry company and a distributor of alcohol products. ARS Trading stated that while it is the Australian distributor of Beluga Vodka it does not market the product through public advertising and the like and it has no connection with Jason Derulo and the placement of his music video on the Beluga Vodka Facebook page; and
- Synergy Co is the producer of Beluga Vodka. It has control over the Beluga Vodka Facebook page. It is an alcohol company, however the company is Russian and not Australian. It does not appear that Synergy has an Australian entity or that the company is directly marketing its products through Australian based media outlets. Clearly global social media platforms such as Facebook and YouTube are accessible in Australia and operate within Australia.

27. With these background facts in mind, the following issues need to be determined:

- Is the music video a 'marketing communication' for ABAC purposes;
- If it is a marketing communication, then is this marketing communication 'within the reasonable control' of an Australian producer, distributor or retailer of alcohol beverages; and
- If both the above pre-conditions are satisfied, then does the portrayal of the alcohol product in the music video meet the standards in the ABAC.

Is the video a 'marketing communication'?

28. The mere fact that alcohol use is shown in a music video or indeed a film or TV program does not necessarily make the video, film or TV program an alcohol marketing communication. In fact, alcohol use is often shown or alluded to in popular culture. What will convert a reference to alcohol from part of the narrative into an advertisement is whether the presence of the alcohol product is a result of a product placement.

29. A product placement occurs when there is a commercial arrangement between the owners of the specific alcohol brand and the producers of the video or film or TV program to depict the alcohol brand. The complainant not unreasonably assumed that the depiction of Beluga Vodka within the Jason Derulo video was a result of a product placement.

30. The Panel has previously considered product placements in music videos and concluded that a product placement is capable of being a marketing communication for ABAC purposes. When asked directly if the appearance of Beluga in the video was a product placement, ARS Trading said 'it had no involvement in the marketing of the product' while Synergy stated 'it is not involved in product placement in the music video clip'.

31. It is difficult to accept the statement of Synergy on this point. The Beluga Facebook page contains a post which reads 'Welcome our new # Swalla Video'. Common sense suggests that the producers of the video were unlikely to randomly pick Beluga Vodka to show as a recognised brand within the video. Possibly in the translation between the Panel's questions in English and the Company operating in Russia, a misunderstanding has occurred. In any event, the Panel concludes on the balance of probabilities that Beluga Vodka was shown in the video as a result of a product placement and therefore on its face, the video is a marketing communication which can fall within the ABAC Scheme.

Is the video within the reasonable control of Australian alcohol markets?

32. The next issue is whether the video is a marketing communication in Australia generated by or within the reasonable control of an alcohol beverage marketer. This issue recognises that while alcohol is a global product, social media platforms such as Facebook are global and presumably Jason Derulo aspires to have his music reach a global audience, the ABAC Scheme is not global. Rather the ABAC Scheme can only operate within the territorial confines of Australia.
33. As stated in paragraph 26, Synergy Co does not appear to operate in Australia either directly or via related entities. ARS Trading is an Australian company which imports Beluga Vodka and then distributes it to alcohol retailers in Australia. It states it has no input or involvement in the way the product is marketed and specifically no input into the production of the video.
34. The Panel think it's likely that Synergy had some form of arrangement with the producers of the video which results in a product placement. Synergy states it 'didn't control the way in which Beluga was portrayed in the video'. This may reflect that creative control of the video resided solely with Jason Derulo and producers of the video, but this would not excuse the responsibility of the alcohol company if alcohol use is portrayed in the video in a manner inconsistent with the Code Standards. In short, if an alcohol company agrees to a product placement, then it must take responsibility for the way in which its product is then portrayed.
35. That said, the fact that Synergy has no Australian connection is highly problematic for the effective operation of the ABAC Scheme. The ubiquitous nature of social media and the potential for alcohol marketing to be accessed in Australia irrespective of where the marketing was created and the owner of the brand involved, cannot of itself enliven the jurisdiction of the ABAC Scheme. In other words, there must be an Australian based or related alcohol company with reasonable control over the marketing communication for the scheme to operate.
36. In this case, neither the video or the alcohol company which likely caused the product placement to occur is connected to Australia. As a result, the ABAC Scheme cannot purport to assert jurisdiction over the company and the item of marketing.

37. This is but one tiny example of regulatory schemes based upon the legal underpinnings of a nation state, struggling with the reality of a global industry. Governments attempt to deal with these limitations through international agreements in fields as diverse as the environment, finance, national security, crime and trade. There is no international architecture in relation to alcohol marketing.
38. Given this conclusion, the Panel is not empowered to make a determination on the substance of the complaint and accordingly the complaint must be dismissed for this reason.