



ABAC Adjudication Panel Determination No. 117/17

Product: Carlton Draught
Company: Carlton & United Breweries
Media: Digital
Complainant: Confidential
Date of decision: 4 January 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of an advertisement for Carlton Draught by Carlton & United Breweries (“the Company”) which was accessed in conjunction with the online game, “Rodeo Stampede Sky Zoo Safari and arises from a complaint received on 27 November 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. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
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 27 November 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 was determined within this timeframe.

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of the content of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval is not generally sought for the placement of a marketing communication and was not sought in this case.

The Placement

10. A full screen Carlton Draught advertisement appeared in conjunction with the online game, Rodeo Stampede Sky Zoo Safari.

The Complaint

11. The complainant believes that it is inappropriate to have alcohol advertised during an online game designed for primary school aged children.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
(b)(iv) be directed at Minors through a breach of any of the Placement Rules.

13. Part 6 of the ABAC Code includes definitions including:

Placement Rules means:

- (ii) If a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience
- (iii) If a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding Minors from the audience, a Marketing Communication may only be placed where the audience is reasonably expected to comprise at least 75% Adults (based on reliable, up to date audience composition data, if such data is available)
- (iv) A Marketing Communication must not be placed with programs or content primarily aimed at Minors

The Company's Response

14. The Company responded to the complaint by letter dated 8 December 2017. The principal points made by the Company were:
 - a) CUB is committed to, and a firm believer in, the ABAC scheme, and we are supportive of the introduction of the new Placement Rules. We understand the importance of monitoring the placement of alcohol advertising and take our obligations to responsibly promote our products very seriously. This is demonstrated by our strong record of dismissed

complaints in 2017. However, in this instance the placement of an advertisement was handled by a number of external parties, and despite our best endeavours, was displayed on a platform and within content that does not meet our standards. CUB acknowledges that this game is primarily aimed at minors and the Carlton Draught advertisement should not have appeared in this content.

- b) The new section 4 of ABAC, “*No fault breach*”, provides that “*a breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the Marketer or their agency will be classified as a no fault breach.*” The placement of the advertising material in question was both reasonably unforeseeable and outside of CUB’s reasonable control, so this No Fault Breach clause should be applied as:
 - i. The application in which this advertisement was placed was not correctly coded as a children’s game. Had it been, the advertisement would not have appeared there. 🚫
 - ii. CUB and its agents selected available settings to prevent the placement of its advertisements with children’s content.
- c) Media planning was handled by CUB’s agents, MediaCom, who have undergone extensive training to understand advertising in the alcohol industry, the ABAC code, and more specifically the recent changes relating to placement rules. MediaCom is briefed by CUB’s internal teams and advised CUB’s local digital media team on the advertising spots it recommended for a particular Carlton Draught digital campaign. The CUB local team then sent this information on to representatives of a global team (within AB InBev, the company that owns CUB) in New York, where the purchasing of digital advertising spots is managed. AB InBev at a global level abides by its internal Responsible Marketing Compliance Code (RMCC), which follows the same principles as the ABAC, and includes the same rules. For example, the RMCC includes a rule that audiences must be at least 75% adults. In Australia, CUB enforces an 80% rule to be even more conservative. ABInBev then brief TubeMogul, a local vendor on a global contract developed in the US (to which CUB is a demand partner affiliate), to purchase digital media spots.
- d) TubeMogul buy CUB’s programmatic placements through their own DSP network. Programmatic advertising is the use of software to assist the advertising space buying process. CUB approve a category of websites or applications that we deem to be appropriate platforms for our advertising. If a website is marked as being appropriate for alcohol advertising, then our advertising may appear in advertising spots on that website. CUB (and AB InBev globally) instruct all parties in this process to avoid particular categories, including children’s content, children’s games, gambling, violence and pregnancy among others. We have included a screenshot below showing the coding of the Carlton Draught advertisement as an Alcoholic Beverages advertisement in Sensitive and Restricted categories. When TubeMogul submits advertisements on CUB’s behalf in the digital placement platform, they mark the advertisements as alcoholic, and declare that the advertisements would

fall into a sensitive category so that publishers can filter our advertising away from potentially risky environments. In this instance, the application in question was not flagged as a risky environment due to the way it had been set up and coded.

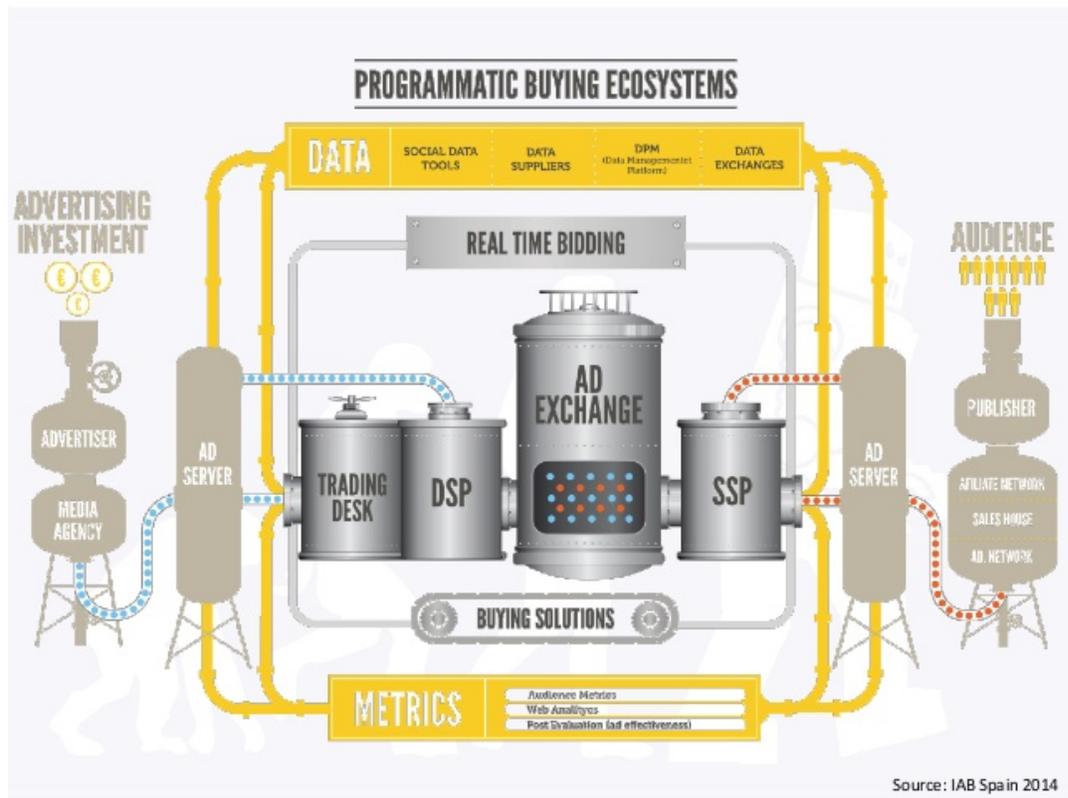
Options:	Basic	Pixel	Admin	Debug
Product Category	<ul style="list-style-type: none"> Advertising & Marketing Agriculture Air Travel Airline Tickets, Fares & Flights Airport Transportation Services Alcoholic Beverages Alternative, Non-Western & Complementary Care 			
Sensitive Category	<ul style="list-style-type: none"> Choose a Sensitive Category: Ad has no sensitive categories Alcohol Consumer Loans Cosmetic Procedures & Body Modification Dating Debt & Credit 			
Restricted Category	<ul style="list-style-type: none"> Choose a Restricted Category: Ad has no restricted categories Alcohol Gambling 			

e) A simplified explanation of the programmatic buying process.

- Think of the ad exchange as a big pool of fish. The fish are digital platforms like websites and apps. TubeMogul are our fisherman. We give TubeMogul a brief (via the various agencies and partners) to only catch red fish – red fish being ‘brand safe inventory’; appropriate places for our ads to appear. We tell them to stay away from blue fish: children’s content, violence, pregnancy, etc. The search for red fish by TubeMogul is automated across thousands of fish (websites and apps) – it’s not an individual choosing individual red fish. We use categories (as in the screenshot above), ABAC rules and internal guidelines to be able to fish in bulk (for example, 80% adult audience rule). The only way TubeMogul can tell the difference between blue fish and red fish is from their appearance. On the odd occasion, a blue fish may be disguised as a red fish, which is out of TubeMogul’s control and therefore our control. TubeMogul’s automated process can’t tell if it’s a blue fish if it has declared itself to be a red fish. In this case, Telaria’s Rodeo Stampede app was disguised as a red fish even though it’s really blue. It appeared to be brand safe so

the automated fishing process bought advertising space there thinking it was an appropriate environment.

- In this instance Telaria are a publisher and are putting inventory through an SSP (supply-side platform) to the ad exchange. TubeMogul is the trading desk selecting inventory from the ad exchange through a DSP (demand-side platform). TubeMogul apply a whole range of targets/filters to decide what inventory they will bid on from the ad exchange (refer the screenshot above).
- If inventory is in the ad exchange and is not clearly labelled/segmented, it will not be filtered out by TubeMogul's targeting. So in this instance, there was inventory in the ad exchange that appeared to fit our brand safe criteria so we bid against it to place our ads there. We apply filters as we deem reasonable, to balance responsible marketing of alcohol (under ABAC and internal guidelines) to create a brand safe environment, whilst also allowing us to get scale.



- f) In addition, advertising in mobile and tablet applications can be unpredictable as many devices, particularly tablets as in the instance of this complaint, are shared devices used by multiple members of a household who all view and use different content using that device. The

complainant in this instance has advised that a child was using an iPad that is shared between adults and children. Therefore the patterns of behaviour for that device may mislead the technical back-end system into displaying advertisements that are suitable for some users of the device but not others.

- g) We have investigated how we may change processes to avoid similar situations in future. Since this incident was brought to our attention, we have undertaken a review of our digital advertising purchasing practices to ensure our advertising is not placed within content or on platforms that may appeal to minors. CUB certainly does not condone the placement of this advertisement in this forum, and is committed to ensuring all advertising material and the placement of that material does not appeal to minors. As such, we will put in place additional measures that will ultimately restrict the overall reach of our advertising, but may allow us to more closely curate the placement of our digital advertisements.
- h) 95% of all impressions for the entire 2017 Carlton Draught digital campaign were served to people over 18. This has been verified by Nielsen DAR.

The Panel's View

Introduction

- 15. Rodeo Stampede Sky Zoo is a popular game which is able to be accessed via multiple platforms for use on smart devices and PC's. The premise of the game is that the player is a cowboy who rides various animals with a lasso to chase and wrangle numerous exotic animals. The captured animals are then displayed in a zoo. Numerous obstacles and challenges are confronted as the player secures the animals and builds up their zoo.
- 16. The complainant explains that the game is played by children in the household using an iPad. The game is available by an app through iTunes or can be accessed online. The advertisement for Carlton Draught appeared while a child was playing the game. The game is apparently subject to various advertisements which in the complainant's experience have been often for other games.
- 17. The complainant contends that an alcohol advertisement shouldn't appear in conjunction with an online game 'designed for primary school aged children'. No objection is taken to the content of the advertisement as such. Rather it is argued that no alcohol advertisement of any kind should be placed with the game.
- 18. On 1 November 2017 a new version of the ABAC came into effect which included Rules going to the placement of alcohol marketing and the introduction into the Code of Section 4 which enables the Panel to make a finding of a no fault breach. Both the Placement Rules and the potential for holding a no fault breach are brought into play by the nature of the complaint and the response of the Company.

The Placement Rules

19. In essence, the Placement Rules create a cascading and interlinked series of requirements which a marketer must satisfy in placing an alcohol marketing item in broadcast and digital locations and platforms. These requirements are:
- Compliance with all applicable media specific codes regulating the placement of alcohol marketing;
 - The use of available age restriction digital controls that permit the exclusion of under 18 year olds from the potential audience of the marketing communication;
 - If an age restriction control is not available on the digital or other media platform, then an alcohol marketing item may only be placed where the audience is reasonably expected to comprise at least 75% adults;
 - In addition to the availability of age restriction controls and the placement of a marketing item where the audience will likely be predominately adult, an alcohol marketing communication must not be placed with programs with content primarily aimed at under 18 year olds; and
 - Finally, a marketing communication must not be sent to a minor via electronic direct mail (noting this may occur if an incorrect date of birth has been entered).
20. In its response to the complaint the Company 'acknowledges that this game is primarily aimed at minors and the Carlton Draught advertising should not have appeared in the content'. Given this concession, the Company did not seek to supply demographic data or other information to argue that Placement Rules (ii), (iii) and (iv) were complied with.
21. In light of the Company's response, the Panel finds that the Placement Rules have been breached and that the complaint will be upheld. The issue then turns to the Company's contention that the breach should be found to be a "no fault breach".

No fault breach

22. As mentioned, the ABAC was revised in November 2017 to include Section 4 which states that a breach of this Code that is reasonably unforeseeable by or outside the reasonable control of the marketer or their agency will be classified as a no fault breach. This determination is the first occasion that the Panel has considered the operation of this new provision.
23. A finding of a no fault breach does not alter the Panel's decision that a complaint has raised a concern about either the content or the placement of a marketing communication which has been upheld. The marketer remains obligated under the rules and procedures applying to the scheme to take steps to remove the offending marketing item or modify the content of the item so

that it becomes compliant with the applicable Code standard. The effect of a “no fault” finding is that the breach will not be recorded against the Company on the ABAC website and in the ABAC Annual Report.

24. Beyond this, an alcohol company such as CUB places value on its reputation as a responsible corporate citizen. Adverse conclusions on a Company’s marketing practices impact on a Company’s social licence.
25. In making its case for a finding of a no fault breach, the Company has provided detail of its internal processes in placing advertisements on digital game and other platforms. Further, the Company also explains the complexities of “programmatic buying ecosystems”. In basic terms the explanation of how the advertisement came to be seen with the game on the complainant’s iPad is put down to:
 - The incorrect coding of the Rodeo Stampede game (or at least its enabling app) so that its children’s appeal was not identified to intending advertisers;
 - The fact that individual content such as a game is not selected by advertiser’s on a case by case basis but through classifications and categories of very large amounts of potential content accessible via digital platforms;
 - The selection by the advertising agency of classifications and categories of content that should have excluded the game if the game had been correctly coded; and
 - The likelihood that the iPad used by the complainant’s child was also used by adults in the family and hence the age gating features which should exclude identified under 18 year old users would not have been activated.
26. While the circumstances when it will be appropriate to make a no fault finding will develop over time, at this point some general observations can be made:
 - while the intention of a marketer to comply with the ABAC standards inclusive of the Placement Rules will always be a necessary element of a no fault finding, having good intentions will not be sufficient;
 - a marketer’s internal processes and separation of roles between say an Australian owned entity of a global company and the global parent itself will not excuse the Australian entity even if the breakdown occurred at the global parent. The actions of the marketer as a whole will be considered; and
 - the obligation on the marketer is to take reasonable steps to meet the Code standards and only occurrences leading to a breach that is ‘reasonably unforeseeable’ or ‘outside reasonable control’ can support a no fault finding.

27. The core of the breakdown in this case appears to be the alleged incorrect coding of the game so that the selection of alcohol advertising appropriate categories of content did not filter the game from being content capable of being used for alcohol marketing. Coding decisions seem to rest with the controllers of the content e.g. Google and not individual advertisers.
28. The Panel does not believe it is unforeseeable that a child will access an adult's smart device to play a game and hence reliance on age gating alone will not generally support a no fault finding.
29. On balance, the explanation provided establishes that the Company did not intend to have its advertisement appear in conjunction with a game which the Company accepts was primarily designed for minors. It is also reasonably established that the content of the game was not properly identified so that selected filters excluded it from alcohol advertising. This breakdown did not occur at the level of the Company or its advertising agency.

Conclusion

30. The complainant has raised a valid concern about an alcohol advertisement appearing in conjunction with a game that the complainant reasonably believed was designed for children. The appearance of the advertisement with the game is inconsistent with the ABAC Placement Rules and accordingly the complaint is upheld.
31. The Company has provided an explanation as to how the advertisement came to appear within the game. This explanation supports a conclusion that the breakdown, which allowed this to occur, was outside the reasonable control of the Company. Accordingly, a finding of a no fault breach is made.