



ABAC Adjudication Panel Determination No. 12/18

Product: Smirnoff
Company: Diageo
Media: Digital
Complainant: McCusker Centre for Action on Alcohol & Youth
Date of decision: 14 March 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel ("the Panel") concerns digital advertisements for Smirnoff ("the Company") and arises from a complaint received 31 January 2018.
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.
2. 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.
 3. 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.
 4. 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.
 5. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

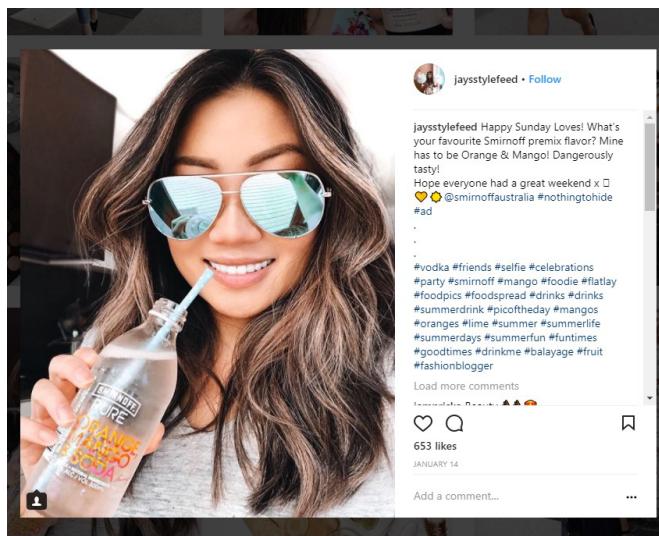
3. The complaint was received on 31 January 2018.
4. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was determined within this timeframe.

Pre-vetting Clearance

5. 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 these marketing communications.

The Marketing Communications

6. The complaint relates to posts by @anastasiamyra, @jaysstylefeed and @Rapunzil that feature the Smirnoff Pure premix alcohol drink. A screenshot of each profile and the post complained about is included following.





The Complaint

7. The complainant objects to the marketing as it appears to be paid advertising and anyone following the influencer, including children and adolescents under 18 years, would be able to see the ads as these accounts do not appear to use age restriction controls. Also the women all appear to be under the age of 25

The ABAC Code

8. Section 3(b) of the ABAC Code provides that a Marketing Communication must NOT:
- (iii) depict an Adult who is under 25 years of age and appears to be an Adult unless:
 - they are not visually prominent;
 - they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted environment; or
 - (iv) be directed at Minors through a breach of any of the Placement Rules.
9. The definitions in Part 6 of the ABAC provide that 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);...

The Company's Response

10. The Company responded to the complaint by letter dated 9 February 2018. The principal points made by the Company were:

- a) The advertisements in question relate to three separate posts (imagery and supporting comments) featuring Smirnoff Pure by the Instagram account holders @anastasiamyra, @jaysstylefeed and @Rapunzill.
- b) The three Instagram account holders are considered "influencers" and have been selected based on their brand alignment and ability to communicate in an authentic way to their audiences about Smirnoff Pure. The influencer accounts on Instagram are independently owned, and the content published by the account holders is created and posted at their own discretion.
- c) There are two posts by each of the influencers. The first post by @anastasiamyra features two bottles of Smirnoff Pure, with a third being poured into a glass. The bottles appear in a picnic scene on blanket, next to a hat, and sunglasses. No people are featured in the image. The second post by @anastasiamyra features her relaxing on a picnic blanket, with a hat shading her face and a Smirnoff Pure in her hand.
- d) The first post by @jaysstylefeed features a bucket with four bottles of Smirnoff Pure., with two other bottles within shot. The bucket and bottles appear in a snack/dining setting, with a cheese board, antipasto tray and fresh fruit. The second post by @jaysstylefeed features her looking at the camera with a Smirnoff Pure in hand.
- e) The first post by @Rapunzill features a basket of oranges and three bottles of Smirnoff Pure. The other bottles of Smirnoff Pure also appear in the image. The scene is set on picnic blankets, alongside oranges and flowers. The second post by @Rapunzill features her sitting on a picnic blanket on the sand, next to a sun umbrella. She has a Smirnoff Pure in her hand.
- f) The complaint references three sources of content, specifically the Instagram accounts of @anastasiamyra, @jaysstylefeed and @Rapunzill, which are independently owned. Neither the content nor the placement of the advertisements in question were submitted for AAPS approval.

- g) Leo Burnett, Diageo's advertising agency, engaged the influencer marketing company Visual Amplifiers (VAMP) to support the Smirnoff Pure Campaign. VAMP secured a commercial arrangement with the three Instagram account holders (@anastasiamyra, @jaysstylefeed and @Rapunzill ("the influencers").
- h) The selection of influencers is based on a brief provided to VAMP by Leo Burnett, which details, among other things, adherence to the principles within the Diageo Marketing Code and ABAC Code. Diageo and Leo Burnett approve all influencers with whom commercial agreements are established, in this instance, the Instagram account holders @anastasiamyra_, @jaysstylefeed and @Rapunzill.
- i) Diageo believes that the posts made by the three Instagram influencers are marketing communications as defined in the ABAC Code. Whilst the commercial agreement is between the Instagram account holders and VAMP, Leo Burnett and Diageo have a reasonable level of control over the selection of the influencers and references to Smirnoff Pure. In addition, the commercial arrangement entitles Leo Burnett and Diageo the right to object to any content that is not DMC or ABAC compliant through VAMP, and to provide guidance to alter/remove the post if required.
- j) In accordance with the Diageo Marketing Code and ABAC, all three Influencer account holders are 25 years of age or older:
- @jaysstylefeed is 33 years of old;
 - @anastasiamyra_ is 25 years of old; and
 - @rapunzille is 26 years of old.
- k) All three Instagram account holders in question (@anastasiamyra_, @jaysstylefeed and @Rapunzill) received Smirnoff Pure to feature in their posts as well as financial remuneration in support of the creative efforts by the influencer in referencing the product.
- l) Instagram does have age restriction controls for Instagram Brand Account pages and Instagram Paid Advertising which are capable of excluding minors from viewing alcohol marketing communications on that platform.
- m) At a general level, there are three scenarios that the user will experience:
- If Instagram knows that the user is over the legal age (i.e. a user logs in with Facebook and their age data is available) – _the user

experience will not change. They will still be able to access all content and all accounts they are already following.

- If Instagram knows that the user is under the legal purchase age – Instagram will automatically make the user unfollow all brand accounts that have opted into age-gating. They will not be able to follow them again or view their content until they reach the legal purchase age.
 - If Instagram does not know the users age, the user will be asked to confirm their date of birth the first time they try to access a brand account that has opted into age-gating. Additionally, Instagram also has age-gating in place that restricts alcohol advertisements from being served to minors using a similar approach to above.
- n) The above controls are for Instagram accounts held by alcohol brands and paid for Instagram advertising by alcohol brands. The complaint deals with influencers who have posted on Instagram from their own accounts, and therefore the above controls are not available. Influencers and our agency partners do have the ability to view the gender and age demographics of the influencers fan-base – and it is this that we use to determine that the audience for an influencer could reasonably expected to comprise at least 75% adult.
- o) Due to confidentiality, we are unable to supply audience composition data for Instagram on behalf of Facebook, Instagram's parent company. We can confirm, however, that over 75% of account holders on Instagram are 18 years of age or older.
- p) The audience composition of all three Influencer account holders shows that over 75% of their audiences are above the legal purchase age. Corresponding Instagram profile audiences:
- @anastasiamyra_ - 83.47% of her audience is over 18 years old, with the average age being 29;
 - @jaysstylefeed age - 91% of her audience is over 18 years old, with the average age being 28;
 - @rapunzille - 91.74% of her audience is over 18 years old, with the average age being 29.

- q) We are pleased to have had this opportunity to confirm our long-standing support for the ABAC Scheme and commitment to uphold the Responsible Alcohol Marketing Code (ABAC).

The Panel's View

Introduction

11. Instagram is one of the world's most popular social media platforms. This determination concerns three Instagram accounts, namely:
 - a) Anastasia Myra – 27,600 followers;
 - b) Jays Style – 5,472 followers; and
 - c) Rapunzille – 12,800 followers.
12. The complainant has identified that the alcohol product Smirnoff Pure is featured in several of the posts of the three Instagram accounts. It is argued that the posts breach both the content standards and the Placement Rules contained in the ABAC.
13. This determination deals with three questions arising from complaint mainly:
 - a) Are the posts 'marketing communications' for the purposes of the ABAC?
 - b) Do the accounts depict a person under the age of 25 in breach of content standard 3(b)(iii)?
 - c) Is the use of the Instagram accounts consistent with the ABAC Placement Rules?

Are the posts marketing communications?

14. On their face, the three Instagram accounts are not self-evidently controlled by the Company, i.e. they are not company branded accounts. Rather, the accounts appear to be from private individuals and the mere referencing of alcohol by individuals, even through a public medium such as Instagram will not make the posts alcohol marketing to which the ABAC scheme applies.
15. To fall within the ambit of the ABAC scheme, the references to an alcohol product must:
 - a) Be generated or within the reasonable control of an alcohol marketer; and
 - b) The alcohol marketer must have a discernible link to an Australian company or entity.

16. In Determination 133/16, the Panel considered Instagram posts from 'social influencers'. An influencer is a social media account holder generally with a large number of followers. The person's views on fashion, activities, politics e.t.c are influential as the person is an opinion leader to their followers. A key to the appeal of an influencer is that their opinions and lifestyle choices are authentic. An endorsement of a product by an influencer can be a powerful contributor to the standing and appeal of the product's brand attributes.
17. In that Determination, the Panel held that the posts of the social influencer were a marketing communication for ABAC purposes. This was because there existed a relationship between the Company (via its advertising agency) and the social influencers which enabled the Company to have a reasonable measure of control over the use of the Company's product on the Instagram account and the Company had an ultimate right to remove posts if they did not like the way in which their product was portrayed.
18. In the current case, a very similar relationship to that considered in the earlier Determination is in place. Indeed the Company itself accepts that the posts are marketing communications for ABAC purposes. Accordingly, the posts need to be consistent with ABAC requirements.

Are the posts in breach of standard 3(b)(iii)?

19. Section 3(b)(iii) provides that a marketing communication must not depict an adult who is under 25 years of age. The complainant contended that the three account holders each appeared to be under 25 years old.
20. The Company has advised that the three Instagram account holders are age 25, 33 and 26 respectively. As the standard is essentially a question of fact and the account holders are aged over 25, then this ground of the complaint must be dismissed

Are the posts consistent with the Placement Rules?

21. The Placement Rules have been a feature of the ABAC since November 2017. The Rules apply to alcohol marketing in broadcast and digital settings with two of the Rules relevant to the current complaint. These rules are:
 - a) If a media platform on which a marketing communication appears has age restriction controls available, these must be utilised to exclude minors from the audience; and
 - b) If a digital media platform does not have age restriction controls available, then a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults.

22. The Company has advised that Instagram operates three potential avenues by which alcohol products could be promoted, namely:
- a) A branded Company Instagram account;
 - b) Through the placement of a paid advertisement in the Company's name; and
 - c) Through private individuals promoting the product in their personal posts on their own account.
23. The Company then goes on to submit an argument that age restriction controls are available to the two categories of marketing directly branded by the Company, but the controls are not available in relation to the third category concerning private individual accounts. It is this third category that a social influencer falls i.e. posts on a private account.
24. The Panel through its Executive Officer has made repeated attempts to gain advice directly from Instagram as to how the age restriction capability operates. In particular, whether a private account holder can seek to limit access to their posts so that they're not able to be viewed by under 18-year-olds. As of the date of this determination, no satisfactory answer has been given. Nor does the publicly available information on the Instagram website readily answer the question.
25. The Panel is obliged to interpret how Placement Rule (ii) is to operate in these circumstances. In applying the Code, the Panel adopts a common sense non-legalistic approach which is guided by the spirit and intent of the scheme. In relation to the Placement Rules, it is noted:
- a) It is not possible in an open society that under 18-year-olds can be excluded from potentially viewing alcohol marketing;
 - b) The weight of the scheme has always been and continues to be on the standards going to the content of alcohol marketing irrespective of the medium by which the marketing item is communicated, or where it is found; and
 - c) The aim of the Placement Rules in relation to digital platforms is to endeavour to at best exclude and at least restrict the access of minors to alcohol marketing. If this can be done expressly via age restriction controls then these controls are to be used (Rule (ii)). If there are no available age restriction controls, then the 75% adult audience reach benchmark applies (Rule (iii)).

26. The Panel interprets the Rule and its application in the current case with these considerations in mind and believes that the Rule is to be given its plain meaning i.e. if the media platform has available age restriction controls, then the marketer must use them. This means:
- a) The Rule mandates the use of age restriction controls when these are available;
 - b) Instagram has age restriction controls but it seems the ability to utilise the controls varies between ‘business’ and ‘private’ accounts;
 - c) This means the age restriction controls are able to be utilised when companies advertise alcohol products through their branded business accounts and when branded ‘advertisements’ are booked to appear in the feeds of private accounts;
 - d) The posts of the three social influencers that reference the alcohol product are subject to the reasonable control of the Company and fall within the ambit of an alcohol marketing communication for ABAC purposes;
 - e) The Rule states that age restriction controls are to be used for an alcohol marketing communication, where such controls are ‘available’.
 - f) The advice the Panel currently has is that the controls are not available for private account holders.
27. It follows that the social influencers, being private Instagram account holders, do not have available age restriction controls. In this event, Placement Rule (ii) is not applicable.
28. Placement Rule (iii) applies when Placement Rule (ii) does not. It imposes a benchmark that a marketing communication may only be placed where the audience is reasonably expected to comprise of 75% adults.
29. The Company has provided data which indicates that the adult followers of the 3 social influencers ranged from 83% to almost 92%. In some cases the Panel is able to source publicly available data to verify advice from a company e.g. television ratings or cinema audiences but such data is not publicly accessible for private Instagram account holders.
30. In dismissing the complaint, the Panel notes the intention of the Scheme Management Committee to review the operation of the Placement Rules after 12 months of their commencement. The interplay of the Rules, particularly Rule (ii) with social influencers should be further examined. As a first step, discussions should be held with Instagram and its parent Facebook to pursue

the extension of age restriction controls to private accounts when such accounts are used to promote alcohol.