



ABAC Adjudication Panel Determination No. 135/18

Product: Johnnie Walker
Company: Diageo
Media: Digital Television
Date of decision: 28 November 2018
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the placement of a Johnnie Walker television advertisement on 9Now on Sunday 11 November in the morning during the Adelaide Christmas Pageant by Diageo (“the Company”) and arises from a complaint received on 12 November 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.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing 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 the other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards (AS) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by AS, 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 AS 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 Ad Standards Community Panel 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 12 November 2018.
8. The Panel endeavours 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 was obtained for the content but not placement of the marketing communication (16218).

Placement of the Marketing Communication

10. The complainant refers to the broadcast of an advertisement for Johnnie Walker on 9Now on Sunday 11 November in the morning during the Adelaide Christmas Pageant.

The Complaint

11. The complainant is concerned that the advertisement was shown during a children's program.

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:

- (i) A Marketing Communication must comply with codes regulating the placement of alcohol marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Alcohol Guidelines).
- (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 21 November 2018. The principal points made by the Company were:
 - a) We wish to confirm our longstanding support and commitment to upholding the ABAC Responsible Alcohol Marketing Code (ABAC), as well as our best-practice, global marketing standards, the Diageo Marketing Code (DMC).
 - b) The content of the advertisement is based on a story of a mature age

student who decides to leave his Computer Science bachelor degree to pursue his passion for art as a living. The storyline follows him as he takes a series of steps towards this goal, from pitching his art to several galleries, to collaborating with a designer who turns his artwork into a design for women's apparel. The story finishes at the launch party of this new line of women's clothing and then sees the scenes told in reverse bringing the story all the way back to the beginning and his first step. The content of this advertising is speaking to a 25-45 year old audience and serves to inspire the audience to feel more confident about their progress journey, and not get overwhelmed by an end goal but to focus on the small steps along the way.

- c) The Commercial Television Industry Code of Practice (Code of Practice) regulates the broadcast content of commercial free-to-air television. The Johnnie Walker advertisement was placed on 9Now, which is an online video on demand service by Nine and is not governed by the same legislation. Therefore, advertisement placed on 9Now cannot breach the Code of Practice.
- d) Diageo does not believe that the advertisement in question breaches Part 3(b)(iv) of the Code. More than 75% of the audience viewing content on 9Now are 18+. For the Adelaide Christmas Pageant, the audience was reasonably expected to comprise at least 75% adults 18+ based on data from previous years:
 - i. 2017: 80% audience viewers were 18+
 - ii. 2018: 79% audience viewers were 18+
- e) The projected audiences for 2018 were similar to the figures from the previous consecutive years. Furthermore, as per our digital guidelines, all digital activities are targeted at adults 18+ based on various sources of data that are provided by the publisher.
- f) Diageo would like to reiterate that it takes the placement of its advertisements very seriously when it comes to ensuring advertisements are only placed where 75%+ of the audience is above the legal purchase age. The advertisement in question appeared across general content on 9Now. The media buy was purchased on the basis that our advertisements would only be served to those who are 18+ as confirmed through publisher data and during content with an audience comprising more than 75% 18+. We have been advised by 9Now that anything classified as 'children's programming' is automatically housed within 'Go Kids'. As such, based on the classification of 'children's programming' it is assumed that all content primarily aimed at minors is included in the 'Go Kids' section. Advertising (alcohol or otherwise) cannot advertise on Go Kids unless actively targeting the show, which would only be done by a direct buy/sponsorship through Nine. As this would breach Diageo's own marketing and digital guidelines

this would never be done.

The Panel's View

15. The Adelaide Christmas Pageant has since 1933 been a major parade through the streets of Adelaide held annually in November. The 2018 event was held on Saturday 10 November and according to news reports attracted a crowd of some 300,000 people. The Pageant was broadcast on channel 9 in Adelaide and was made available on the sister digital channel 9Now where it was seen by the complainant the following day on the morning of 11 November. While viewing the Pageant an alcohol advertisement from the Company was seen.
16. The complainant wasn't concerned about the content of the advertisement but rather the argument advanced was that the Pageant is a children's program and no alcohol ad should be seen with it. This means that the Code placement rules and not the content standards for alcohol marketing are the relevant considerations for this decision.
17. There are three rules which could be of relevance to the complaint namely:
 - have media industry codes regulating placement been complied with - rule (i);
 - was the audience of the program with which the ad was placed in excess of 75% adult- rule (iii); and
 - can the program ie the Pageant broadcast be regarded as being 'primarily aimed' at minors- rule (iv).
18. Rules (i) and (iii) can be dealt with easily. While free to air television has specific rules regarding the times of day alcohol ads might be broadcast, there are no time restrictions applying to when alcohol ads can be shown on digital channels such as 9Now. This means rule (i) has not been breached. Rule (iii) goes to the audience of a program. TV ratings information indicates that the Pageant attracts in excess of 75% adults and hence this rule also has not been breached.
19. The issue then turns on whether the broadcast of the Pageant can be said to be primarily aimed at under 18 year olds. Some factors to be considered in assessing this question include:
 - the actual audience composition of a program;
 - the subject matter of the program and whether the subject matter has themes likely to predominantly appeal to children or adolescents;
 - the use of familiar children's characters or the use of children and adolescents within the program;
 - the storyline and whether the complexity of the plot suggests its target audience is adult; and
 - the use of language and the presence of adult themes such as violence and the portrayal of sexuality.
20. The Panel has not been able to see the broadcast itself but there is ample material available about the Pageant on which a reasonable judgement can be made including a website for the Pageant and news reports. A video of highlights of the 2018 Pageant was able to be accessed. It is evident that the major focus of the

Pageant is families with younger children. The floats in the parade are heavily themed on children's characters including Santa Claus, Mary Poppins and Little Red Riding Hood. There are numerous child entertainers such as clowns.

21. The Panel concludes that the Pageant would have appeal across age groups but its particular focus is on children. The adults both attending the Pageant in person and watching broadcasts would very likely be doing so in conjunction with children. A reasonable person would probably understand the primary aim of the Pageant is to be the entertainment and engagement of children.
22. The Panel notes that the Company did not make a specific marketing decision to target the broadcast of the Pageant with which to show its ad. Rather the Company sought to place ads with the channel 9 platforms and relied on the 9 network to spread its ads with appropriate programming. That said, this is not a case where a no fault breach ruling has been made out. Care needs to be taken by the Company and its agents in ensuring the ABAC placement rules are satisfied and the placement of the ad with the broadcast of the Pageant cannot be said to be outside the reasonable control of the Company or to have been unforeseeable.
23. Accordingly the complaint is upheld.