



ABAC Adjudication Panel Determination No. 59/20

Product: Gordons, Baileys & Johnnie Walker
Company: Diageo
Media: Television (Digital)
Date of decision: 9 June 2020
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 advertisements for Gordons, Baileys & Johnnie Walker by Diageo (“the Company”) with the 9Now on demand broadcast of Lego Masters Season 2 Episode 10 between 7 and 8.30pm on 23 May and arises from a complaint received on 25 May 2020.
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 25 May 2020.
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.

Pre-vetting

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 of the advertisements (17563 & 18316).

The Placement

10. Advertisements for Gordons, Baileys & Johnnie Walker were seen by the complainant during a 9Now on demand broadcast of Lego Masters between 7 and 8.30pm on Saturday, 23 March 2020.

The Complaint

11. The complainant is concerned that the ad was shown with Lego Masters which is a children's show.

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. Diageo responded to the complaint by letter dated 3 June 2020. The principal points made by Diageo were:

- a) In partnership with our media agency, Spark Foundry, we conducted a thorough investigation into our advertising activities for Diageo during the period of May 2020. Diageo takes an industry leading approach to alcohol advertising, which complies with both local and global policies and practices. At a global level, we work with digital partners to tackle current and emerging digital challenges. In 2018, we built and implemented an industry-leading approach to digital marketing, called the Trusted Marketplace, which amongst other elements ensures compliance by digital publishers with our 75% LPA+ control.
- b) The placement of Diageo advertisements with 9Now's on demand platform takes into consideration the following controls:
- **Use of age-verification & targeting:** As per Diageo's digital guidelines, Diageo only places advertisements where the audience is 75%+ above the legal purchase age (LPA) and where demographic targeting of all placements to people above the LPA can be applied. 96% of 9Now's audience is 18+ above the 75% minimum. According to OzTAM VOD data from April 2020, Lego Masters on 9Now achieved an audience of 95% 18+.
 - **Avoiding programs 'primarily aimed at minors':** Diageo does not purchase media space where our advertisements are placed next to or within programs primarily aimed at children. This would not only breach ABAC, but our own marketing code and digital guidelines. Programming that is deemed to be primarily aimed at children is classified by 9Now as 'children's programming'. This type of programming is automatically housed within their 'Go Kids' platform. Diageo does not purchase any media within this platform. Programming that is not primarily aimed at minors is categorised as 'general entertainment'.
 - **Increased controls & categorisation:** In 2018, an unintended breach of ABAC for a digital advertisement placed by Diageo (Determination 135/18) demonstrated that some programming may be more likely to be co-viewed by families, such as documentaries or special events. As a result, Diageo worked with broadcasters via Spark Foundry to establish a new category for classifying such programming. The new 'Family' category applied a higher level of control to ensure that programs which are likely to be co-viewed by families are not served alcohol ads for Diageo brands. This is applied even where viewership programs via broadcast platforms indicates an audience 75+% above the LPA. The categorisation of programmes is executed manually by the broadcasters and we have written commitment by our partners Nine, Seven, Ten and SBS of their commitment to implementing the new 'Family category'.
- c) The 9Now advertising buy was done on behalf of Diageo by our agent Spark Foundry. An investigation into this complaint revealed that Lego Masters was incorrectly categorised by the 9Now on demand platform. It was categorised under 'General Entertainment' rather than 'Family' which is how Diageo ads came to appear alongside the programme.

- d) In placing the advertising buys with 9Now, Diageo relied on adherence by our agency partners and by 9Now to the agreed controls (as listed above), which satisfy the ABAC placement rules. This includes adherence to the additional control put in place which would see programs that are likely to be in a co-viewing format being assigned to the 'Family' category. The manual incorrect categorisation by 9Now was out of Diageo's reasonable control.
- e) It is within the control of Diageo, however, to choose where it places its advertisements. As a result of this incorrect categorisation, we immediately stopped all advertising on 9Now's on demand platform and pulled all remaining budget for this financial year from the platform. Diageo will not resume advertising on 9Now's on demand platform until we can be assured that ABAC's placement rules and Diageo's own codes will be satisfied.
- f) These three ads originally aired on traditional broadcast TV and were in compliance with the Commercial Television Industry Code of Practice. As this complaint is in relation to the ads that appeared on 9Now's digital platform, the Code of Practice does not apply.
- g) The audience breakdown of 9Now's on demand platform and viewership of Lego Masters via the 9Now platform indicates that both the platform and the program attract an audience in excess of 75% adults. The total audience for Lego Masters is 95% above the LPA.

<i>Source:</i>		Lego Masters	
<i>OzTAM VOD</i>			
<i>+ Live VPM,</i>			
<i>April 2020,</i>			
<i>metric:</i>			
<i>minutes</i>	<i>–</i>		
<i>provided by</i>	<i>Nine to Spark</i>		
<i>Foundry</i>	<i>9Now</i>		
<i>Platform</i>			
18-24	9%	18-24	7%
25-39	33%	25-39	42%
40-54	35%	40-54	37%
55-64	13%	55-64	6%
65+	6%	65+	3%

- h) Lego Masters is a program that has been designed as escapism for adults, allowing them to delve into their childhood and inspire them to get creative with Lego once again. The audience composition for the program indicates that it is directed at an adult audience. However, whilst we do not think that the program is primarily aimed at minors, we recognise that the program may have appeal across age groups, including children and adolescents. It may therefore be a program that is enjoyed in a co-viewing format with families.

- i) We are pleased to have had this opportunity to confirm our long-standing commitment upholding the ABAC as well as our best practice global marketing standards, the Diageo Marketing Code.

The Panel's View

15. Lego is the world's largest and most profitable toymaker. It commenced operations in Denmark in the late 1940's with its instantly recognisable coloured blocks aimed at children from the age of 3 upwards. Over the decades the range and complexity of Lego sets expanded and in 1999 Lego started a licensing arrangement with the owners of the Star Wars franchise which saw a movement from open ended play towards branded sets. Similar licensing arrangements with companies such as Disney and Marvel has kept the toymaker competitive in the era of computer games.
16. A key of Lego's recent success has been a pivot towards the adult market. This has gone hand in hand with Lego reaching into other entertainment formats with the Lego Movies being one example. A more recent illustration has been the television series Lego Masters which originated in England and now has versions made in other countries including Australia. This determination concerns alcohol advertising screened with an episode of season two of the Australian series of Lego Masters.
17. Lego Masters is screened by the Nine Network and is hosted by the popular television and radio personality Hamish Blake. A member of the reality TV genre, Lego Masters pits eight teams of two against each other in scenarios where the contestants have to build models. The ages of the contestants in the two Australian series has ranged from 17 to 71 with most being aged from mid 20's to early 40's. The program has been broadcast on both the free to air primary Channel 9 and the network on- demand digital channel 9Now. The complaint concerns an episode accessed by the complainant on 9Now on 23 May 2020.
18. The complainant identified several ads for alcohol products which were placed with the show. Each of the products -Gordons Gin, Baileys and Johnnie Walker - are within the stable of alcohol brands of the Company. The concern of the complainant was not with the content of the individual ads but that the ads were placed with Lego Masters which was contended to be a children's show and hence unsuitable for alcohol advertising given that children will be viewing the program.
19. The ABAC Placement Rules have the policy aim that to the extent possible alcohol marketing will be directed towards adults and away from minors (under 18 year olds). For a broadcast medium such as digital television there are two relevant rules namely:
 - a marketing communication may only be placed where the audience is reasonably expected to comprise at least 75% adults (Rule 3); and
 - a marketing communication must not be placed with programs or content primarily aimed at minors (Rule 4).

20. Good data on the demographics of television audiences is available through the ratings system. The data for Lego Masters supplied by the Company indicates the program attracted well in excess of 75% adults. Publicly available ratings for the program when screened on the primary Channel 9 also indicate the show is very popular across age groups and its series two topped both the 16-39 age group and the 25 to 54 age group. It is reasonable to conclude that while the program attracted a strong following amongst minors its overall audience was predominately adult and met the 75% adult benchmark required by Placement Rule 3.
21. The issue then turns on whether Lego Masters is 'content primarily aimed at minors'. Some factors to weighed in assessing this question include:
- the actual audience of the program;
 - the subject matter of the program and whether the subject matter has themes likely to predominately 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.
22. The Company contends Lego Masters is designed 'as escapism for adults' and is not primarily aimed at minors. The Company does accept the program may have appeal across age groups including children and adolescents and would be enjoyed in 'a co-viewing format with families'. It is pointed out the Company did not seek to specifically have its advertising placed with Lego Masters but this occurred as a result of the program being wrongly categorised as 'General Entertainment' by the Nine Network as opposed to 'Family'. The Company had intended that its ads on 9Now not appear with programs in the 'Family' category.
23. The Panel does believe the program falls in a space between the two tests within the ABAC dealing with minors. The content standard found in Part 3(b) of the Code provides that an alcohol marketing communication must not have strong or evident appeal to minors. Given the history and continuing primary market of Lego as a children's toy, there could be little doubt that a program based upon constructing items with Lego blocks would have evident appeal to minors. The Placement Rule test is, however, at a higher level than 'strong and evident appeal' and requires the Panel to be reasonably satisfied that the program is 'primarily aimed' at minors. This requirement is more than minors being interested in a program and requires the program to have minors as its primary focus as opposed to a primary focus towards adults with minors having a discernible but secondary interest in the program.
24. The program is not primarily aimed at minors. Its reality program format, the nature of the scenarios which contestants must grapple with, the age of the contestants and actual audience of the program tend to indicate the program has a family focus which certainly captures minors but is not primarily aimed at them as such. This means the Panel cannot find the placement of the ads with the program is in breach of the Placement Rules.

25. The Company has advised that it has withdrawn advertising from 9Now until further processes are undertaken to ensure that its ads will not appear with 'family' categorised program. The Company rightly has concluded that it was not desirable that its advertising should have been placed with the program. While dismissing the complaint, the Panel agrees with the Company that the nature of Lego Masters means it was inappropriate for alcohol advertising to have appeared with the show.