



ABAC Adjudication Panel Determination No. 150/20

Product: Jack Daniels
Company: Brown-Forman
Media: TV – Pay
Date of decision: 16 November 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a television commercial for Jack Daniels shown on Fetch TV by Brown-Forman (“the Company”) and arises from a complaint received 19 October 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 Code”) – 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 and Policies – which place 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 other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 Ad Standards 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 19 October 2020.
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 completed in 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 obtained for the content of this marketing communication (Approval Number 18729).

The Placement

10. The complaint relates to the placement of an advertisement for Jack Daniels on Fetch TV at approximately 7:44pm during BBC UK TV Live at the Apollo.

The Complaint

11. The complainant objects to the placement of the marketing on Fetch TV at about 7:44pm during BBC UK TV Live at the Apollo, as it is too early and children are watching.

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.

As per Part 6 of the ABAC Code, **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 Placement Policy).
- (ii) A Marketer must utilise Available Age Restriction Controls to exclude Minors from viewing its Marketing Communications.
- (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.

Company Response

13. The Company responded to the complaint by emailed letter dated 5 November 2020. The principal points made by the Company were:
- We would like to assure you that Brown-Forman Australia takes very seriously our responsibility to market our products in accordance with all applicable laws, as well as the ABAC Code, and above all, responsibly, to Australian consumers. Therefore, it is always a matter of serious concern for us to receive a complaint that we are falling below the high standards we set for ourselves in this regard.

- The advertisement in question was part of a new marketing campaign for Jack Daniel's – "Make It Count", comprising a series of multiple advertisements. The series of advertisements was submitted to the AAPS for approval on 1 September 2020 and approvals for the submitted advertisements were issued on 10, 12 and 25 September, and 12 October 2020. The approval numbers are No. 18691, 18697, 18729 and 18796 respectively.
- We do not agree that the marketing communication is in breach Part 3(b)(iv) of the Code for the following reasons we set forth below.
- As background, Fetch TV is an IPTV provider that delivers a subscription or Pay to View television service over a user's regular internet service, and allows its subscribers control over their viewing choices, content upon demand, and viewing at the times they may choose at their discretion.
- According to Fetch TV's Terms of Use, the Service does have Parental Control settings which includes use of a Personal Identification Number (PIN). The user is "responsible for setting up and maintaining parental controls or any other controls that are available under the Service, should you desire to use such controls.", and therefore it is expected that subscribers will adopt such controls to exclude Minors from viewing any marketing communication they do not wish such Minors to view.
- We wish to assure ABAC that Brown-Forman Australia is committed and works to ensure that our communications are targeted to consumers above the legal drinking age. It is our corporate policy to place all advertisements in compliance with applicable codes and guidelines.
- The media purchase for the program in question, BBC UK TV Live at the Apollo, was arranged by Starcom, our agency with Foxtel, the media provider who also covers media purchase with Fetch TV.
- In addition to the Service's provided Parental Control, Foxtel took care to ensure the media purchase on Fetch TV during BBC UK TV Live at the Apollo was in compliance with the BBC Groups liquor placement requirements as follows:
 - Can air between 12:00-15:00 PG+ programming
 - Can air post 19:30 in PG+ programming.

- Further, Foxtel represents that they regularly adopt additional safeguards around alcohol content using historical data of the time zone with high child audience to restrict the category further if it is not already covered by Fetch TV channels' standard rules.
- Based on the most recent past two-months audience analysis our marketing agency has secured via eTAM (a media planning and analysis tool that analyses audience habits) for the Live at the Apollo program, it has been established that 94% of the audience that watch this program is 18+, with the following breakdown:

				P 0-12	P 13-24	P 25-39	P 40-54	P 55-64
UKTV	LIVE AT THE APOLLO	3	19:30:04 - 20:31:16	417	24	524	2,030	3,924
				6%	0%	8%	29%	57%

- Further, it has been established from historical demographics at conventional broadcast channels in the UK, such as ITV and Dave ja Vu that the audience composition for BBC UK Live at the Apollo is predominantly 18+. Please see the demographic breakdowns in the past three years.

	2018	2019	2020
	18+ impact %	18+ impact %	18+ impact %
ITV	99.21%	99.65%	100%
Dave ja Vu	99.15%	99.44%	99%

- BBC UK TV Live at the Apollo is not a program or content primarily aimed or intended for viewing by Minors. BBC UK TV Live is a series of British stand-up comedy programmes performed from the Hammersmith Apollo Theatre in London, generally with stand-up comedians performing adult-oriented or mature themed content. This program has received a Mature (M) Australian classification, which indicates that it is not recommended for minors and includes content that requires a mature outlook.

The Panel's View

14. This determination concerns an ad for Jack Daniels which was accessed by the complainant during a broadcast of the program 'Live at the Apollo' screened on BBC UKTV via the media platform Fetch TV. The ad was seen by the complainant at 7:44pm. The basis of the concern is not the content of the ad, but that it was screened prior to 8:30pm which the complainant believes is "too early" and while children are more likely to be watching.
15. The nature of the complaint raises the ABAC Placement Rules which have the goal that to the extent possible, alcohol marketing should be directed towards adults and away from minors. The rules create a cascading set of obligations which are linked to the technical capacity of the medium by which the marketing is conveyed, to age restrict potential audiences. This means that digital platforms generally have a greater capacity to exclude minors while marketing over broadcast mediums such as free to air TV do not have the same restrictions available. The rules accordingly have requirements on broadcast mediums about expected audience reach or restricting advertising in locations where there will be high concentrations of under 18-year old's such as prohibiting advertising on billboards near schools.
16. By way of background, Fetch TV is media platform which acts as a hub for selected streaming services (e.g. Netflix and Stan) as well as free to air TV stations and a range of pay TV channels. BBC UKTV is a pay TV channel available via Fetch TV on channel 112. The channel is based on content produced or screened originally by the BBC and ITV. The program, 'Live at the Apollo' is a stand-up comedy show recorded at the Apollo Theatre in Hammersmith London. The program has been screened on the BBC since 2004 and features well known British and international comedians.
17. The applicable ABAC Placement Rules require:
 - that all requirements in codes applying to the media platform be complied with (in this case the Subscription TV Code) - Rule 1;
 - that any available age restriction controls to exclude minors from accessing the ad be used - Rule 2;
 - that if minors can't be excluded, then the ad only be shown with a program likely to have at least a 75% adult audience - Rule 3; and
 - irrespective of the actual audience, the ad cannot be placed with a program or content primarily aimed at minors - Rule 4.

18. In making the complaint, the complainant alluded to a rule which required that alcohol ads not be screened before 8:30pm. There is a rule of this nature, but it is contained in the Commercial Television Industry Code of Practice (CTICP) and applies only to the free to air TV stations. BBC UKTV is a paid or subscription TV channel and the CTICP does not regulate advertising over the channel. The code which applies to Subscription channels does not contain any time-of-day restrictions on when alcohol ads might be screened.
19. The Company notes in its response to the complaint that BBC UKTV has its own requirements regarding time-of-day placement of alcohol ads. These requirements permit an ad to be shown after 7:30 pm if in conjunction with a program carrying a classification which is higher than "PG". Live at the Apollo carries a "M" classification for mature audiences and hence under the BBC UKTV requirements it is allowed to show an alcohol ad at 7:44pm. This means that the ABAC Placement Rule 1 has not been breached.
20. Placement Rule 2 requires that available age restriction controls be used to exclude minors. Fetch TV does give subscribers the ability to set a PIN on its use however the service does not appear to give advertisers the ability to age restrict the serving of alcohol ads to only adult subscribers. In any event, it is likely that in a household with children, the Fetch account will be in the name of a parent and the parent will be over 18 years old. As a pay TV channel, BBC UKTV, programs are broadcast at scheduled times and not on demand. Platforms of this type do not have age restriction capacity as such. This means Placement Rule 2 has not been breached.
21. Placement Rule 3 requires that alcohol ads only be shown with programs expected to attract at least a 75% adult audience. The Company supplied data both from the audiences obtained for Live at the Apollo as shown on BBC UKTV and on free to air BBC channels in the Britain. Based on this data it is reasonable to expect that the audience for the program is overwhelmingly adult in the range of 94% or greater. Accordingly, Placement Rule 3 has not been breached.
22. The final Placement Rule provides that alcohol ads cannot be placed with a program which is primarily aimed at minors. The subject matter of Live at the Apollo is stand-up comedy routines from adult comedians. The program carries a "M" classification. The humour employed on the show is adult in nature and often the language used, and themes explored would not be regarded as suitable for children. It is evident the program is aimed squarely at adults and not minors and hence the Placement Rule has not been breached.
23. The complaint is dismissed.