

ABAC Adjudication Panel Determination No 182/20

Product: XXXX
Company: Lion
Media: Radio
Date of decision: 24 December 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns radio marketing for XXXX (“the Product”) by Lion (“the Company”). It arises from a complaint received on 2 December 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 2 December 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 the XXXX radio advertisement (Approval Number 18260).

The Placement

10. The complaint relates to the placement of a XXXX alcohol advertisement on iHeartRadio's Bananas in Pyjamas station.

The Complaint

11. The complainant objects to the marketing as follows:
 - *My kids love the Banana in Pyjamas station however it is deeply concerning that there continues to be adult level ads being played including alcohol, sex toys, and sex products. Please address this with urgency as this is unacceptable for a children's digital radio station.*

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 4 of the ABAC Code 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.

14. Definitions in Part 6 of the ABAC provide:

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.
- (v) A Marketing Communication must not be sent to a Minor via electronic direct mail (except where the mail is sent to a Minor due to a Minor providing an incorrect date of birth or age).

Available Age Restriction Controls means age restriction, targeting or affirmation technologies available to restrict a Marketing Communication to Adults, but this does not require a third party platform, website or account that is not primarily related to alcohol to be age restricted in its entirety before it can be used to place a Marketing Communication.

Company Response

15. Lion responded to the complaint by letter emailed on 16 December 2020. The principal points made by Lion were:

- We reiterate our commitment to the ABAC Scheme and take our obligations to responsibly promote our products very seriously. As a responsible marketer, Lion maintains strict internal and external processes to help ensure this compliance with the ABAC Code, including taking all reasonable steps to ensure that the placement of our marketing communications do not appeal to minors. In this instance, we submit that complaint 182/20 should be deemed a no-fault breach by the ABAC Panel.

- We have corresponded with Australian Radio Network (ARN) on this matter. ARN is the exclusive licensee of the iHeartRadio platform in Australia. Since Lion received notification of this complaint, ARN has been unable to confirm whether the Advertisement was broadcast on the Bananas In Pyjamas channel on iHeartRadio. ARN has requested this information from iHeartRadio's head office in the United States, however due to a large number of their staff having COVID-19, they are unable to confirm this in time to submit this response, however, based on the nature of the complaint we are working on the assumption that the Advertisement did in fact run on this channel.
- In line with the current audio campaign we have running for XXXX, we believe the Advertisement referred to in the complaint received Alcohol Advertising Pre-Vetting Service Approval for its content.
- Whilst all activity booked on iHeartRadio had age gating applied to ensure we were only targeting channels with listeners over the age of 18, there were no exclusions in place on the dynamic "artist radio" inventory of which the Bananas in Pyjamas station is part of. We can confirm that when the deal for Lion was set up with iHeartRadio, they were briefed extensively on all Lion Brand Safety measures and confirmed that all activity would adhere to Lion's own and the ABAC placement guidelines. It was not communicated by ARN at this time that Dynamic Artist radio Inventory was to be included in Lion buys, thus the risk associated with this inventory due to the nature of it being dynamic was also not communicated.
- From a planning perspective the below measures are employed to ensure we target over 18s only:
 - We can confirm all Lion audio activity is planned with age gating to over 18s only.
 - Within these deals minors are excluded by targeting users over the age of 18 only and excluding impressions which do not have demographic data attached, for example, unknown users.
 - From a Spotify perspective, all playlists and genres that over-index in content aimed at minors are also excluded from Lion audio campaigns.
- I would also like to confirm that all digital audio activity for Lion was paused immediately on 2 December 2020 as soon as we received notification of this complaint. We continue to investigate this issue and will not re-commence activity until we have assurance from ARN and iHeartRadio that the situation has been addressed.

The Panel's View

16. iHeartRadio is a broadcast, podcast and streaming service which was launched in the United States in 2008. iHeartRadio Australia was launched in 2013 with the platform now owned by the Australian Radio Network (ARN). In short, iHeartRadio enables a consumer to access live to air radio stations, an extensive library of podcasts and curated 'radio' streaming of individual artists and genres of programming. One of the genres is children's programming and within this category is a 'station' devoted to songs from or related to the ABC characters 'Bananas in Pyjamas'. This content is self-evidently primarily directed towards minors, specifically children aged under 12.
17. The business model for iHeartRadio relies on the placement of advertising on the various channels and stations accessible on the iHeartRadio platform. The ARN appears to have a highly sophisticated system for advertisers which enables the targeting of audience segments based upon a range of data and user characteristics. This system, known as dynamically targeted advertising, is described by ARN as permitting 'advertisers to send the right message, to the right audience, at the right time...and in real time'. Since May 2020, some advertising is delivered with 'Shake me' capability which means a listener to the advertising can shake their smart device over which the ad is playing and a website or other link to the advertiser is opened.
18. Unfortunately, the 'right message, to the right audience' advertising mantra did not apply to the Bananas in Pyjamas station when the complainant came across alcohol ads (as well as other clearly adult only suitable advertising) being served to children listening to the station. There is no dispute that alcohol advertising should not have appeared on the Bananas in Pyjamas station, and the Company accepts this without reservation. Nor is there any question that the placement of alcohol ads on the station breached several ABAC Placement Rules. The issue is how this came about and what assurance can be given that the breach of the ABAC will not be repeated.
19. The Company explains that it did not select the Bananas in Pyjamas station to carry its advertising and upon receiving the complaint it has sought clarification from ARN as to how this occurred. Unsatisfyingly, as at the date of this determination a full explanation has not emerged. What is known:
 - ARN was unable to confirm the Company's ad for XXXX in fact was served on the station, although the Company accepts the complaint is completely genuine and hence it has operated on the basis the ad was accessed on the station;
 - the Company's instructions for its advertising over iHeartRadio channels was that it was to be targeted to channels with listeners over the age of 18 and

that the Company's 'Brand Safety' and ABAC placement requirements were to be followed;

- while iHeartRadio has age restriction capacity, this capacity was not in place on the dynamic 'artist radio' inventory of which Bananas in Pyjamas are part;
- the Company was not informed of the inclusion of its ads on the 'dynamic' channel nor of the lack of age gating on these channels;
- Company policy and practice is set to avoid ads appearing without over 18 age gating or with playlists and genres that 'over-index in content aimed at minors'; and
- given the delay in getting a proper explanation from the ARN as to what occurred, all digital audio activity was paused upon notification of the complaint.

20. The placement of alcohol advertising on the station breaches the following ABAC Placement Rules:

- Rule 2 - by failing to apply apparently available age restriction controls;
- Rule 3 - the ad appearing on a channel which would not be reasonably expected to have a 75% adult audience; and
- Rule 4 - the ad being placed with content primarily aimed at minors.

21. The Company has argued that the breach of the Rules should be designated a 'no-fault' breach. This is because it gave clear instructions to ARN which if followed would not have had the ad appear on the Bananas in Pyjamas station. It contends the breach was therefore beyond its reasonable control as it was the ARN which failed to follow its instructions. A no-fault finding does not diminish the fact that the ABAC has been breached and that the complainant's concerns have been found to be fully justified.

22. The complaint is upheld and a no-fault finding made.