



ABAC Adjudication Panel Determination 150/21

Product: Ballistic Beer Co
Company: Sleep When You're Dead Black IPA
Media: Online Marketing
Date of decision: 29 June 2021
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 the online marketing of Sleep When You're Dead Black IPA ("the Product") Ballistic Beer Co ("the Company"). It arises from a complaint received on 26 May 2021.
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 26 May 2021.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

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 not obtained for the marketing communications.

The Marketing

10. This determination relates to online marketing for the product.



The Complaint

11. The complainant has the following concerns about the marketing:

The marketing appears to be marketing comics and cartoon characters to children in the guise of beer.

It appears to show a cartoon on the can and also a comic book.

These are children's or young adult works of art that appeal to minors.

The cartoon and comic look very much like those that children read.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (b)(i) have Strong or Evident Appeal to Minors.
13. Part 6 of the ABAC Code provides that:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionary or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

14. The Company responded to the complaint by letter emailed on 9 June 2021. The principal points made by the Company were:

Alcohol advertising pre-vetting service

- We did not seek Pre-vetting for any aspect of this beer. We have produced this beer for over three years, and this is the 13th iteration of this particular product. At no time previously have we been challenged over the appropriateness of this product and so have not sought pre-vetting.

Responsibility toward Minors

- I do not believe the marketing of this product breaches Part 3(b)(i) of the code and does not have a strong or evident appeal to a minor for the following reasons:
 - The beer, shirt and 8-panel black and white artwork package is a limited-edition release (24 only), available for a very limited time

(usually less than 2 weeks), only as a 3-piece package, and only on our own website.

- The package is only available on-line and requires the user to both confirm they are over 18 years old and have access to a credit card and a delivery address. The package is not available for sale in any venue.
- The package is \$75 dollars, placing it well outside the reasonable purchase capacity of a minor, or at least the preferred purchase of a minor acting illegally. If a minor chooses to illegally purchase beer, they will not spend \$75 on 4 cans of beer, when they can purchase a carton of 24 beers from a major online retailer (e.g. Dan Murphys On-line) for less than \$50. The beer itself would not be acceptable to a minor - it is not even attractive to more than 90% of our customers – it is a high ABV, hard, tannic, bitter, dark liquid which only a few serious craft beer drinkers will enjoy. Hence the very limited nature of the overall release.
- I contest the assertion that simply because artwork is used to portray a story, it is automatically an inducement to a child to purchase a beer. Similarly, I contest that using an outline image, rather than a filled-in picture, has a greater appeal to children. Most children's books are pictures, rather than comics. To say that a comic or an outline drawing drives purchase behaviour, (particularly illegal behaviour) is a gross simplification of the buying process at any age and is based simply on the premise that a child may read comics. Children also read books, Facebook, magazines, on-line books so having words would seem to be the common element, not pictures. Adults also read comics, manga, etc. We have several adults who have purposefully collected every one of these limited art works. Having an outline image on a can does not automatically make that can have a strong or evident appeal to children.
- The images used in this series of beers are hard, aggressive, dark pictures that are not naturally attractive to children. Bright, colourful, funny, cute, humourous, age-relevant images could perhaps be considered age-appropriate and motivating for children, but not the adult images we use on these cans. There is also no commentary anywhere in the advertisement that could be viewed as enticing a minor to make the purchase because of some sense of fun.

Conclusion

- A limited edition, short-term, expensive, black and white artwork, packaged with a beer, will not have evident appeal to a minor. To purchase the product would require a high level of intent to act illegally, a degree of planning and a spend of significant cash resources. If a minor were to jump through all the hurdles to make this purchase, the buying decision would have already existed, and no inclusion of any artwork would have had influence on that buying process. A minor, simply being on a brewery website, suggests the intent to act illegally already existed. This package is not an impulse buy option and not freely available to minors.
- Finally, at the risk of sounding like I am on my soapbox, as far as I am aware, there is no research to back up any assertions that a piece of art in any form drives children to purchase a beer, where previously they would not have. Further, these assertions and the complaints submitted are being promoted and adjudicated on, by people well outside the age range that is supposed to be affected. If ABAC is resolved to take these complaints seriously and respond to the continual complaints of a group of vexatious litigants, then it behoves ABAC to either commission, or more reasonably, ask the litigants to commission, credible independent research to prove their assertion that the simple inclusion of any artwork alongside a beer will drive a purchase decision in a minor.

The Panel's View

15. Ballistic Beer Co is a craft brewery founded in 2015 in Salisbury, Queensland. This determination concerns digital marketing for one of its products, 'Sleep when you're dead'.
16. The complaint concerns internet promotions for the product with the complainant's concern being that 'the marketing appears to be marketing comics and cartoon characters to children in the guise of beer'. This concern brings into play Part 3 (b) (i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.

17. The Company argues that its promotion does not breach the ABAC standard. It is submitted:
- the price of the limited-edition beer, T-shirt and comic package is \$75 which is well outside the purchase capacity of a minor;
 - comic artwork has broad appeal; and
 - this style of art is hard, aggressive and dark and would not appeal to minors.
15. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a different way is not 'unreasonable' but possibly their understanding would not be shared by most people.
16. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.

17. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element which shapes how a reasonable person will understand the item.
18. The Company responds to the complaint at two levels. Firstly, that the product is not accessible to minors given its limited availability and price point. Secondly, it is contended that the marketing does not appeal to minors given its hard edged and dark adult theme and style. It is strongly argued that it is simplistic to believe that illustrations of any kind will appeal to minors simply because it is an illustration.
19. While the first argument about the availability of alcohol and price are valid points, this is not directly relevant to the application of the ABAC standards. Public policy embodied in the National Alcohol Strategy 2018-2028 identifies a multi-focussed approach to minimising the risk of harm from alcohol misuse. Availability and the price of alcohol including tax treatment is part of the strategy, and requirements around the responsible promotion and marketing of alcohol is a separate and freestanding strategic direction.
20. The second line of argument from the Company is however relevant. It is possible that alcohol could be marketed in a manner that uses a form of storytelling which is highly relatable and strongly appealing to minors. And as expressly recognised in the definition of 'strong or evident appeal to minors' contained in Part 6 of the ABAC, this might involve the use of animation or cartoon characters. This does not mean, however, that the use of drawn characters means minors will be automatically attracted to the marketing. In the current case, the style employed is akin to an adult graphic novel, which uses themes and a storyline which is quite evidently adult in nature. The Panel does not believe the on-line marketing breaches the Part 3 (b) standard.
21. The complaint is dismissed.