



ABAC Adjudication Panel Determination No 116/23

Product: Jack Daniels
Company: Brown-Forman
Media: Digital – YouTube
Date of decision: 30 August 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 19 July 2023 in relation to YouTube marketing for Jack Daniels (“the Product”) by Brown-Forman (“the Company”).
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 the 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 meet 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 July 2023.
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 an 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 placement of the marketing.

The Marketing

10. The complaint relates to placement of the marketing on YouTube, alongside Fortnite content which was being watched by children.

Complaint

11. The complainant objects to the marketing as follows:
 - *This ad came up while my two children were watching YouTube. They are 11 and 8 and they were watching kids stuff like Fortnite gaming and I was shocked to see an ad for alcohol come on. It's unacceptable.*

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 provides that:

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).

The Company Response

14. The Company responded to the complaint by email on 28 July 2023. Its primary comments were:
- Brown-Forman Australia takes very seriously our responsibility to market our products in accordance with all applicable laws, 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 contending that we are falling below the high standards we set for ourselves in this regard.
 - We appreciate the ABAC Panel giving us the opportunity to offer our responses as set forth below to each of the questions you have asked in your letter.

Alcohol Advertising Pre-vetting Service Approval

- It is not clear from the complaint to which Jack Daniel's advertisement the complaint refers. However, in accordance with ABAC requirements, all of our paid above the line advertising for Jack Daniel's on YouTube has received and receives Alcohol Advertising Pre-Vetting Service Approval.

Age Restriction Controls

- We do not believe that the marketing breaches Part 3(b)(iv) of the Code by being directed at Minors through a breach of the Placement Rules.
- YouTube does have available Age Restriction Controls which were utilised to exclude Minors from viewing the Marketing Communication. On YouTube (owned by Google), Brown-Forman employs Google's logged-in user data to ensure we only target ads to logged-in users who are 18 years or older. When creating a YouTube account, users have to provide their age via date of birth. Users who are not logged in are not targeted with our marketing

communications. By logging in, a user confirms that they are of the age they claim in their profile registration.

- In addition to YouTube's age restriction controls, Brown-Forman also includes additional measures in our ad buys on the YouTube platform including:
 - adopting a categories exclusion list, where we exclude certain categories of content. Our ads do not appear next to any content that is geared specifically to children (e.g. we avoid appearing next to cartoons on the main YouTube platform);
 - implement time targeting, which avoids times of the day when children are more likely to be viewing content on YouTube; and
 - adopting a negative keyword list where we can also exclude specific terms on YouTube to further refine the content in which we appear, thereby avoiding anything non-brand safe (e.g. we avoid content related to the Ukraine conflict with terms on our exclusion list)
- In summary, we don't just rely solely upon the logged-in user data, but we also aim to ensure that we are more likely to appear next to content that is likely to be viewed by an LDA+ audience.

Placement with Fortnite

- As mentioned in our responses above, Brown-Forman and its agency has placed Marketing Communications for Jack Daniel's in social media channels (including YouTube) where the target audience (i.e. the account user has self-declared their age) is confirmed Adults.
- We do not purchase advertisements in the Fortnite video game. In fact, in Australia we do not purchase any advertisements in any video games. We also do not seek out to explicitly target Fortnite-related content on YouTube or any other platform with our advertisements - any placements of our ads beyond our age and other brand-safety rules and instructions are determined by the YouTube algorithm to seek out our desired target audience of LDA+.
- Notwithstanding our response above, with respect to Fortnite, we confirmed that it is not gaming content that is primarily aimed at Minors. Fortnite is a third-person shooter game where up to 100

players compete to be the last person or team standing. (Source: <https://en.wikipedia.org/wiki/Fortnite>)

- The Australia Classification Board (ACB) gives the computer game Fortnite an 'M' rating which means it is recommended for players ages 15 and up (and under 13s are not allowed to play).
- However, as of 30th January 2023, Fortnite on iOS and Google Play was classified as 18+.
- According to Verto Analytics, the majority of Fortnite users are aged 18 years or older, with 85% being between the ages of 18-43 years.

WHO IS PLAYING FORTNITE?

A study by Verto Analytics has given players a much better look at who is part of the Fortnite player count.

- On top of 62.7% being 18-24, 22.5% are 25-43.
- Men are 72.4% of the player base, with only 27.6% being women.

Concluding observations

- In conclusion, we believe that we have not acted contrary to the ABAC code. Our alcohol marketing communication content on YouTube is pre-vetted by ABAC, and our placement on YouTube utilises not only user-declared age gating, but goes further by also using the category exclusion list, time targeting, and negative keyword list to limit any opportunity for our communication to be exposed to children. Thus, if someone under the legal drinking age did in fact see an ad on YouTube, we would need more specifics to be able to address further.

The Panel's View

Introduction

15. This determination has arisen from a complaint about marketing for Jack Daniels seen on YouTube, in particular when viewing Fortnite gaming content, which the complainant contends is primarily watched by minors.

The Placement Rules

16. The obligations in the ABAC in relation to minors are essentially twofold. Firstly, alcohol marketing in its messaging and content is not to be strongly appealing to minors (Content Standards). Secondly, alcohol marketing

material, to the extent possible, is to be directed towards adults and away from minors (Placement Rules).

17. The concern expressed by the complainant was that alcohol marketing was shown on YouTube during gaming content, particularly Fortnite. This means the issue is not the ABAC content standards but the ABAC Placement Rules.
18. The ABAC Placement Rules seek to have alcohol marketing directed toward adults and to the extent possible away from minors. The rules consist of five separate, but interrelated obligations imposed on alcohol marketers:
 - Rule 1 - the placement of marketing must comply with codes published by the Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy);
 - Rule 2 - available age restriction controls are used by the marketer to exclude minors from viewing alcohol marketing;
 - Rule 3 - if a digital, television, radio, cinema or print media platform does not have age restriction controls available that are capable of excluding minors, then alcohol marketing may only be placed where the audience is reasonably expected to comprise 75% adults;
 - Rule 4 - irrespective of the utilisation of available age restriction controls and the expected audience, alcohol marketing must not be placed with programs or content primarily aimed at minors; and
 - Rule 5 – a marketing communication must not be sent to a minor via electronic direct mail.
19. Working through the Placement Rules, and applying them to the specific circumstances of this complaint, it is clear that:
 - The Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy do not apply and therefore Placement Rule 1 has not been breached; and
 - The marketing was not sent via electronic direct mail, therefore Placement Rule 5 has not been breached.
20. Placement Rule 2 requires the use of Available Age Restriction Controls, the Code definition of which refers to “age restriction, targeting or affirmation technologies...”

21. In relation to Placement Rule 2, the Company has advised that:
- YouTube does have available Age Restriction Controls which were utilised to exclude Minors from viewing the Marketing Communication.
 - Brown-Forman employs Google's logged-in user data to ensure it only targets ads to logged-in users who are 18 years or older.
 - When creating a YouTube account, users are required to provide their age via date of birth. Users who are not logged in are not served with the Company's marketing communications.
 - In addition to YouTube's age restriction controls, the Company also includes additional measures in their ad buys on the YouTube platform including:
 - adopting a categories exclusion list, where it excludes ads from appearing next to any content that is geared specifically to children (e.g. cartoons on the main YouTube platform);
 - implementation of time targeting, which avoids times of the day when children are more likely to be viewing content on YouTube; and
 - adopting a negative keyword list where we can also exclude specific terms on YouTube to further refine the content in which we appear, thereby avoiding anything non-brand safe (e.g. we avoid content related to the Ukraine conflict with terms on our exclusion list).
22. Following further enquiry by ABAC, the complainant advised that their children were watching YouTube using an adult's login. This, combined with the Company's advice that available age restriction controls were utilised means that the Panel is unable to find that Placement Rule 2 has been breached.
23. The availability and utilisation of age restriction controls as described above means that the requirements of Placement Rule 3 to place alcohol marketing where the audience is reasonably expected to comprise 75% adults does not apply. That said, the Company supplied data which indicates that the players of Fortnite are predominantly adults.
24. Placement Rule 4 requires that irrespective of the utilisation of available age restriction controls, alcohol marketing must not be placed with programs or content primarily aimed at minors. Even if a user has registered an account with an inaccurate date of birth or a minor has logged in using an adult's

account, if they are watching a program or content primarily aimed at minors, alcohol advertising should not be served.

25. The Company has advised that it does not place its marketing with Fortnite, or any other gaming content shown on YouTube. Due to the complainant not providing a link to the specific content being viewed, it is not possible to investigate how their children came to be served alcohol advertising when watching Fortnite gaming content. Nonetheless, the Company has provided the following information to support their understanding that Fortnite gaming content is not primarily aimed at minors:
 - Fortnite is a third-person shooter game where up to 100 players compete to be the last person or team standing;
 - the Australia Classification Board (ACB) gives the computer game Fortnite an 'M' rating which means it is recommended for players ages 15 and up (and under 13s are not allowed to play);
 - as of 30th January 2023, Fortnite on iOS and Google Play was classified as 18+; and
 - according to Verto Analytics, the majority of Fortnite users in 2018 were aged 18 years or older, with 85% being between the ages of 18-43 years.
26. While acknowledging the information provided by the Company, Fortnite is a game that is played by minors and has a strong following with minors. That said the game is not primarily aimed at minors and its concepts, experiences, imagery and characters are engaging across age groups. It is not possible to hold that Placement Rule 4 has been breached on the available information.
27. The complaint is dismissed.