



## ABAC Adjudication Panel Determination No. 81/14

**Product:** Birthday Cake Vineyards Wine  
**Company:** LNJ Imports LLC  
**Media:** Music video clip on youtube  
**Complainant:** Regan Marshall  
**Date of decision:** 19 December 2014  
**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 placement within a music video clip on youtube of Birthday Cake Wine which is distributed in the United States by LNJ Imports LLC (“the Company”) and arises from a complaint received 13 November 2014.
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. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don't go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
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 13 November 2014.
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 has been determined with 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 not obtained for this marketing communication.

## **The Marketing Communication**

10. The complaint refers to a music video clip for “Literally I Can’t” by Play-N-Skillz that includes a clear close up shot of Birthday Cake Wines at 1:56.
11. The music video clip is set in the United States and depicts a group of conservative young women from a sorority referred to as “LIC” who attend a wild party at a fraternity referred to as “STFU”. The women are repeatedly offered various things, including, a shot of vodka or tequila which they all refuse, but one by one (apart from their leader) succumb and are shown happily participating in the party, including, in one scene, drinking from a paper cup offered. At the party there are numerous paper cups and what appears to be jugs or bottles of alcohol.
12. In the scene where we see the product (from 1:56-2:00), there is a close up shot of an empty wine glass and an open bottle of Birthday Cake Vineyards Strawberry Shortcake Wine Specialty on a table with people sitting behind the table. We then see one of the singers “Redfoo” picking up the bottle and glass and holding them up before the scene changes. The accompanying lyrics to the scene showing the product are “Girl, I’m sipping on this drink trying to see what you got”. The product appears briefly in several other scenes.

## **The Complaint**

13. The complainant is concerned that the music video clip:
  - (c) Includes product placement of Dom Perignon and other liquors sold in Australia with a blatant product placement shot at 1:55;
  - (d) Shows offensive behavior caused by the consumption of alcohol;
  - (e) Encourages excessive consumption of alcohol and alcohol abuse;
  - (f) Challenges or dares people to consume alcohol;
  - (g) Has a strong appeal to Minors (dance music);
  - (h) Is located in an area accessible to Minors (Youtube);
  - (i) Shows that alcohol can have a significant change in mood;
  - (j) Depicts the drinkers achieving social or sexual success; and
  - (k) Says that if the girls drink they will relax, implying therapeutic benefit.

## The ABAC Code

14. Part 2(a) of the ABAC Code provides that The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:
  - brand advertising (including trade advertising)
  - competitions
  - digital communications (including in mobile and social media and user generated content)
  - product names and packaging
  - advertorials
  - alcohol brand extensions to non-alcohol beverage products
  - point of sale materials
  - retailer advertising
  - Marketing Collateral
15. Part 2(b)(vi) of the ABAC Code provides that The Code does NOT apply to the placement of a Marketing Communication, except to the extent that placement may impact on how the Marketing Communication is understood in accordance with Section 4.
16. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
  - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
  - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
  - (a)(iii) challenge or dare people to consume an Alcohol Beverage;
  - (b)(i) have Strong or Evident Appeal to Minors
  - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
  - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

(c)(iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

17. Definitions in Part 5 of the ABAC provide:

**Marketer** means a producer, distributor or retailer of Alcohol Beverages.

**Marketing Communications** means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile or social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

**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**

18. The Company has not responded to the complaint.

## **The Panel's View**

### ***Introduction***

19. Play-N-Skillz are an American music production house founded by two brothers, Juan 'Play' Salinas and Oscar 'Skillz' Salinas. The brothers have produced music from a range of artists, as well as being performers in their own right.
20. In mid-2014, the brothers teamed up with another American artist known as Redfoo to produce and perform with Redfoo the song "Literally I Can't". The video clip of "Literally I Can't" was apparently debuted on MTV in late October 2014 and was released for purchase in early November. The video clip became available on various platforms, such as YouTube, and it is this video which is the centre of the current complaint.

21. The complainant became concerned when viewing the clip as to how alcohol use was being portrayed. Of course, alcohol use is very commonly featured in popular culture, such as movies, television programs and music videos, and this of itself does not enliven the jurisdiction of an alcohol marketing scheme such as the ABAC. In other words, the mere fact that alcohol is seen or referred to within the narrative of a story does not make a movie, television show or music clip an alcohol beverage 'marketing communication' within the scope of the ABAC scheme.
22. The point raised by the complainant, however, is not confined to the generic portrayal of alcohol use within the scenario played out within the video, but relates to what the complainant infers to be an example of product placement. Put simply, product placement involves a commercial relationship between the owner or promoter of a particular product brand and the use of that product or brand within the content of an ostensibly unrelated broadcast controlled by a third party. In the "Literally I 'Can't" music video, the alcohol brand 'Birthday Cake Vineyards Wine' is specifically featured and gives rise to the implication that its appearance is as a result of a product placement.
23. In determination 85/11 dated 8 November 2011, the Panel considered the issue of product placement within the context of the ABAC scheme. That determination also involved a music video clip and the placement of the product, Midori, within the clip. The decision turned on the reach of the ABAC as it was then drafted and whether product placement could be fairly regarded as an alcohol beverage 'advertisement'. Since that decision, the ABAC has been substantially revised, with the current form of the Code coming into operation on 1 July 2014. The new ABAC has a broader reach than the previous version of the Code in terms of the type of marketing which it captures and goes beyond the notion of an 'advertisement'. As this is the first occasion that the question of product placement within the scope of the revised Code has been considered by the Panel, it is helpful for the ongoing understanding of the Code that the Panel deal with the issue thoroughly.

***Is a product placement a marketing communication within the scope of the ABAC?***

24. The new Code, in contrast to its predecessor's treatment of the term 'advertisement', does provide a framework as to what type of activities are to be taken as a marketing communication. This is done by adopting a combination of giving specific examples of the activities that are to be regarded as marketing communications and also by having a provision which expressly states some activities to which the Code is not to apply.
25. Part 2(a) and the definition of a 'marketing communication' in Part 4 of the Code provide a non-exhaustive list of activities which are within the scope of a marketing communication. A product placement is not included in the listed items, however, marketing communications for ABAC purposes are not limited to the activities mentioned in Part 2(a) or the definition provision. Part 2(b) provides a list of activities that the Code does not apply to, however, a product placement is not mentioned in this Part.

26. Part 2(b)(vi) does state that the Code does not apply to the placement of a marketing communication, except to the extent that placement may impact on how the marketing communication is understood in accordance with section 4. The Panel takes this reference to establish that the ABAC is a content rather than placement Code as explained in paragraph 3, above. This means that a marketing communication will not be in breach of an ABAC standard by reason alone of its placement in a particular medium or at a particular location. It does not mean that the Code does not apply to a product placement, as a product placement is merely a form of marketing, rather than an example of a marketing communication being placed in a particular medium.
27. Accordingly, the Panel needs to decide if a product placement is a marketing communication based upon the proper interpretation of the Code having regard to the language used in the Code and its structure as a whole. The Panel is also mindful of the sentiment expressed within the Code Preamble which commits signatories to the Code to ensuring that their marketing complies with the Code's spirit and intent.
28. The Panel believes that on a proper interpretation of the ABAC a product placement is a form of marketing that falls within the concept of a marketing communication and, hence, is capable of falling within the scope of the ABAC.

***Is the video clip a marketing communication in Australia generated by or within the reasonable control of a marketer?***

29. On the basis that a product placement is capable of being a marketing communication for ABAC purposes, the next issue whether this particular marketing communication is from a 'marketer' to which the ABAC scheme applies. The Code in Part 2(a) is stated to apply to all marketing communications in Australia generated by or within the reasonable control of a marketer. A 'marketer' is defined in Part 4 to mean a producer, distributor, or retailer of alcohol beverages.
30. On its face, the product placed within the music video clip is Birthday Cake Vineyards Wines. The complainant also mentioned the product Dom Perignon, but the Panel's review of the music clip could not establish any identification of Dom Perignon as a specific and recognisable brand used within the clip.
31. The Panel has made enquiries in relation to Birthday Cake Vineyards Wines. These enquiries indicate that Birthday Cake Vineyard Wines is a product produced and retailed in the United States. The Panel was unable to find any evidence that the product is available for sale within Australia. A letter to the American producers of Birthday Cake Vineyard Wines asking questions such as the product's availability within Australia and how the brand came to be specifically identifiable within the music video clip resulted in no reply.
32. In these circumstances, it appears the position is as follows:
  - Birthday Cake Vineyard Wines is a wine produced in the United States of America;

- The product is not sold in Australia, at least in terms of being accessible through an Australian located retailer (it is of course quite conceivable that an Australian resident might be able to acquire the product through placing an order directly with the American producer or distributor of the product);
  - There is no producer, distributor, or retailer of Birthday Cake Vineyards Wines which is a signatory to the ABAC scheme;
  - There is no available information as to the basis of the product's appearance within the music video clip. It is a reasonable assumption, however, that the producers of the music video would not have shown the Birthday Cake Vineyards Wine product in the clip without some form of agreement with the alcohol company.
33. Alcohol is a global product. The internet and digital platforms, such as YouTube, are also global. The ABAC scheme is of course not global, but its reach is confined to Australia. The scheme can only purport to apply to marketing communications "in Australia generated by or within the reasonable control of a marketer".
34. This territorial limit on the scheme does not mean that to be captured a marketing communication has to be physically created in Australia, but it does mean that the marketing communication must have a direct connection with an alcohol industry entity which has a presence in Australia.
35. The ABAC scheme equally does not have jurisdiction over non-alcohol music entities, such as the music producers Play-N-Skillz. Even if the alcohol company in this case was an Australian related entity, the impact of a Panel decision would be on the alcohol company and not the music producers. It would be the responsibility of the alcohol company in such a case to take steps to have the marketing communication available in a form consistent with the Code standards and not the music producers directly.
36. As the marketing communication is not generated by or within the reasonable control of a marketer of an alcohol product that appears to have any connection to Australia, it follows that the ABAC does not apply to the music video clip and the portrayal of the alcohol product within the clip.
37. In these circumstances, the complaint must be dismissed on the basis that the ABAC scheme does not apply to the video clip and, hence, the Panel is not empowered to make a decision.