



ABAC Adjudication Panel Determination No. 41/18

Product: Somersby Cider
Company: Asahi Premium Beverages
Media: Digital (Instagram)
Complainant: Ms Kennedy
Date of decision: 9 April 2018
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 digital advertisement for Somersby Cider (“the Company”) and arises from a complaint received 13 March 2018.
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.
2. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol 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.
 3. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 4. 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 Ad Standards under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 5. The complaint raises a concern under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

3. The complaint was received on 13 March 2018.
4. 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 was determined within this timeframe.

Pre-vetting Clearance

5. 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. As the specific advertisement has not been identified in the complaint it is not possible to identify whether it was pre-vetted.

The Placement

6. The complaint relates to the appearance of an advertisement for Somersby Cider on the complainant's 13 year old son's Instagram feed.

The Complaint

7. The complainant objects to the placement of the alcohol advertisement on her 13 year old son's Instagram feed

The ABAC Code

8. Section 3(b) of the ABAC Code provides that a Marketing Communication must NOT:
 - (iv) be directed at Minors through a breach of any of the Placement Rules.
9. The definitions in Part 6 of the ABAC provide that Placement Rules means:
 - (ii) if a media platform on which a Marketing Communication appears has age restriction controls available, the Marketer must utilise those age restriction controls to exclude Minors from the audience;
 - (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);...

The Company's Response

10. The Company responded to the complaint by letter dated 23 March 2018. The principal points made by the Company were:
 - a) Asahi Premium Beverages Pty Ltd (APB) takes responsible advertising of alcohol seriously. We are aware of the Code requirements and our policy and practice is in line with ensuring compliance with all relevant alcohol and marketing guidelines.

b) Somersby does engage the age restriction controls available for Instagram. These controls are designed to ensure that communications on the platform are only displayed to users above 18 years of age. The complaint does not identify the specific advertisement that is the subject of the complaint. However, the following controls apply broadly to all marketing communications by the Somersby brand account on Instagram:

- Only users who have listed their age as 18 or above can view alcohol related communications. These users can access all content and accounts.
- If Instagram knows a user is under the legal purchase age, Instagram will automatically make the user un-follow brand accounts that have opted into age restriction controls. The user will not be able to follow the brand account again or view its content until the user reaches legal purchase age.
- If Instagram does not know a user's age, the user will be asked to confirm their date of birth the first time they try to access a brand account that has opted into age-gating.
- All paid reach on the Instagram platform is purchased to target consumers 18 years and over in the buying process with Facebook.

The above controls are in place for Instagram accounts held by alcohol brands and paid for Instagram advertising by alcohol brands.

c) There are a few possible explanations as to how this issue may have occurred:

- Explanation 1 – It is possible that the minor in question has incorrectly submitted their age on their profile as 18 or over. In this case, age restriction controls will not apply to the minor and the user will be able to see all Somersby communications.
- Explanation 2 – It is possible that the minor in question may have seen the communication in their feed through a re-post or share from a user/s they follow who is over 18 years. The Somersby Instagram account includes a clear instruction to *“Please only share our posts with those who are of legal drinking age”*. However if a Somersby follower chooses to re-post or share a communication using their private account, placement of the communication is outside of APB's control.
- Explanation 3 – As part of our investigation into this complaint, we have identified that 2% of Somersby's Instagram followers may be under 18 years old. We have contacted Instagram for an urgent verification of this information as we are unsure how this can be correct given we have age restriction controls in place. It is possible that there has been a technical, back room error by Instagram. If this

information is verified as correct, we will ensure that all users under 18 years old are removed as a priority.

- d) We are still waiting on a response to our request from Facebook's legal department (on behalf of Instagram). In the meantime, out of an abundance of caution, we have temporarily shut down our Somersby Instagram account.
- e) We are still verifying audience composition data with Instagram. We can provide this information to ABAC as soon as this process is complete.
- f) We believe we have taken all appropriate measures to ensure that our Somersby communications can only be viewed by users of legal purchase age. We are making urgent enquiries with Instagram to verify the information we have about a small number of underage followers and, if this is correct, we will take all necessary steps to promptly remove these followers and ensure this cannot happen again. In the meantime, we have taken the precaution of temporarily shutting down the Somersby Instagram page.

The Panel's View

11. Instagram is a photo and video sharing digital media platform. It is a hugely popular platform with over 800 million registered users. This complaint concerns the accessing of an advertisement from the Company on the Instagram feed of the 13 year old son of the complainant.
12. The ABAC Placement Rules put requirements on alcohol companies in relation to their use of digital platforms. These requirements are such that if they are followed, then a 13 year old should not receive an alcohol advertisement directly from an alcohol company. The issue in this case is how did the complainant's son receive the advertisement and did the Company take reasonable action to comply with the ABAC requirements.
13. In theory at least, the age restrictions controls available on Instagram should not have permitted a 13 year old to access alcohol advertising. For the controls to work however, several pre-conditions are necessary such as:
 - The Instagram account of the minor needs to be accurately established with a correct date of birth entered. Clearly if a date is entered which shows the user to be 18 years or older, then the age controls will not come into play;
 - If the minor is accessing Instagram on an adult's computer or smart device using the adult's settings then Instagram will operate on the basis that the user of the account is the adult and not the minor; and

- Instagram employs differential age restriction controls with those able to be selected by an alcohol company for their own Instagram posts not being available for 'private' account holders. This means a company advertisement which is reposted from a private account will not be subject to the age restriction controls.
14. In this case it is unclear as to what has happened. The Company provided advice that it applied the available age restriction controls but in making its inquiries in investigating the complaint it discovered that a small percentage (2%) of the followers of its Somersby's Instagram account may be under 18. It has sought advice from Instagram as to how this could have occurred and has suspended its Instagram account while further investigations are made.
 15. The Panel's Executive officer also made further enquiries with the complainant to see if details of the 13 year olds account could be provided so inquiries could be made with Instagram. Also which actual advertisement was accessed by the child is unknown. The complainant as at the date of this determination had not responded to this request for further information.
 16. In light of the lack of clarity, the Panel is unable to make a finding as to what has occurred. It will be assumed that the child's account was accurately established and it does seem the Company has acted properly and with both the intent and with reasonable diligence to follow the ABAC requirements. There are several possibilities as to how the advertisement came to appear on the 13 year old's Instagram account, but which of these is the explanation is unknown.
 17. Given the identified possibility that, contrary to Placement Rule 2, there are followers of the Company's Instagram account under 18, the complaint is upheld. It is also reasonable to make a finding of a no fault breach, as the breach appears to have occurred at the level of Instagram and the Company took the steps open to it to comply with the Code requirements.