

Investigation Report

No. 2544 – 2548

File No.	ACMA2011/175
Licensees	Channel Seven Sydney Pty Ltd (ATN) Channel Seven Brisbane Pty Ltd (BTQ) Channel Seven Melbourne Pty Ltd (HSV) Channel Seven Adelaide Pty Ltd (SAS) Channel Seven Perth Pty Ltd (TVW)
Stations	ATN 86 BTQ 109 HSV 102 SAS 122 TVW 10161
Type of Service	Commercial television broadcasting
Name of Program	McDonald's advertisement/Channel 7 station identifier
Date of Broadcast	19 October 2010 to 18 November 2010
Relevant Legislation/Code	<ul style="list-style-type: none"> • CTS 26(2), 28 and 35(1) of the <i>Children's Television Standards 2009</i> made under subsection 122(1) of the <i>Broadcasting Services Act 1992</i>. • Clause 7(1)(b) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>.

Findings

The ACMA makes the following findings:

- Each of the five licensees breached CTS 26(2) of the *Children's Television Standards 2009* (CTS 2009) by broadcasting an advertisement during the P period on 28 October 2010, which period commenced at 15:30 and finished at 16:00;
- Each of the five licensees breached CTS 28 of the CTS 2009, by broadcasting on 33 occasions an advertisement that was not clearly distinguishable as such to a child viewer during C periods between 19 October and 18 November 2010; and
- Each of the five licensees breached CTS 35(1) of the CTS 2009, by broadcasting on 39 occasions during or immediately after C periods between 19 October and 18 November 2010, material that contained a promotion of commercial products and services by proprietary characters.

With respect to each breach of the CTS 2009, the licensees breached the licence condition set out at clause 7(1)(b) of Schedule 2 to the *Broadcasting Services Act 1992* (the BSA).

The matter

On 18 January 2011 the ACMA received a complaint regarding the broadcast of non-program material described in this report as the McDonald's/Channel 7 Playground advertisement. This non-program material was alleged to have been broadcast by the following Seven Network licensees (the licensees) during children's (C) and/or preschool children's (P) program periods:

- Channel Seven Sydney Pty Ltd (ATN);
- Channel Seven Brisbane Pty Ltd (BTQ);
- Channel Seven Melbourne Pty Ltd (HSV);
- Channel Seven Adelaide Pty Ltd (SAS); and
- Channel Seven Perth Pty Ltd (TVW).

The advertisement was alleged by the complainant to have been broadcast by the licensees identified above between 19 October and 18 November 2010 and to have breached provisions of the CTS 2009.

The complaint raised issues of compliance with CTS 26(2), 28 and 35(1) of the CTS 2009.

The CTS 2009 are program standards determined under subsection 122(1) of Part 9 of the BSA. Under clause 7(1)(b) of Schedule 2 to the BSA, a licensee must comply with program standards applicable to the licence under Part 9 of the BSA. Failure to do so is a breach of that licence condition.

The ACMA investigated this matter under section 149 of the BSA on the basis that the licensees may have failed to comply with a condition of their licences. A copy of the relevant provisions of the CTS 2009 and of Schedule 2 to the BSA are included in Attachment A to this report.

The material

The 'McDonald's/Channel 7 non-program material' (the non-program material) broadcast by the licensees can be described as follows:

The non-program material is of fifteen seconds duration.

For fourteen seconds, the non-program material shows a camera panning around a brightly coloured playground, showing adults playing on the playground equipment, including swings, slides and other equipment.

Some of the equipment represents McDonald's characters, namely the Hamburglar and Grimace. During the initial seconds of the material, the camera pans across a piece of equipment that resembles the McDonald's 'Golden Arches'.

In the closing one to two seconds of the material, the perspective created by the camera panning forms a '7' logo which is used by Network Seven as an identifier.

The following stills, taken from the segment, are indicative of key features of the material examined by the ACMA:

Figure A: Still images from the McDonald's/Channel 7 non-program material



McDonald's 'Golden Arches'



The 'Hamburglar' character



The 'Grimace' character shown to the left



The Channel 7 logo shown at the end.

Issues

Two threshold issues exist in this matter, which are:

- whether the non-program material is an advertisement; and
- whether the non-program material was broadcast during a C and/or P period.

If the non-program material is an ‘advertisement’, the following issues require consideration:

- whether the advertisement was shown during a P period, contrary to CTS 26(2);
- whether the advertisement (which was shown during C periods) was clearly distinguishable as an advertisement by a child viewer, as required by CTS 28; and
- whether the advertisement contained an endorsement, recommendation or promotion of commercial products or services by proprietary characters and was broadcast during or immediately before or after a P or C period, contrary to CTS 35.

Assessment

This assessment is based on the following:

- the letter of complaint dated 18 January 2011;
- analysis of the application of CTS 26(2), 28 and 35, to the facts before the ACMA;
- submissions received from Seven Network (Operations) Ltd (the Seven Network) on behalf of the licensees dated 18 February and 24 May 2011 (addressed below in the ACMA’s reasons for its decision);
- a recording of the non-program material provided to the ACMA by the Seven Network;
- information provided in the Trade Marks database at IP Australia;
- copies of each licensee’s broadcast schedules for the relevant dates in October and November 2010; and
- C and P program schedules submitted by the licensees to the ACMA in accordance with CTS 3 of the CTS 2009.

Reasons

Is the non-program material an advertisement?

While the complainant characterised the non-program material as an advertisement, the Seven Network characterised the non-program material as a “station identifier”. In its submission of 18 February 2011, the Seven Network submitted that a station identifier is distinct from an advertisement. It further submitted that:

Station identifications are not defined in the CTS, nor are they defined in the Commercial Television Industry Code of Practice (“**Code**”). Therefore, Seven

believes it is necessary to use the ordinary dictionary definition of “identification” which is provided in the *New Shorter Oxford English Dictionary* as follows:

“the action or an act of identifying; the fact of being identified...”

In accordance with this definition, Seven produces and broadcasts its station identifications to “identify” its television network. Seven believes it is clear to viewers the station is being identified in the Station ID, rather than McDonald’s because the main focus of the Station ID is on the Seven logo which prominently features at the end of the Station ID. McDonald’s only features incidentally to this final image as the camera swiftly pans through its playground to reach the final still image.

In considering this matter, the ACMA is mindful that the CTS 2009 define neither ‘advertisement’ nor ‘station identifier’.

The Macquarie Dictionary defines an advertisement as “any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign, etc., designed to attract public attention, bring in custom, etc.”

The Macquarie Dictionary defines an identification to be (relevantly) “the act of identifying, the state of being identified, or something that identifies one”.

In the ACMA’s opinion, the non-program material in question contains a substantial amount of McDonald’s promotional material. Indeed the ACMA has observed that only 1 to 2 seconds of the 15 seconds of the non-program material shows the Seven Network logo. The remainder of the non-program material consists of the camera panning around playground equipment, including prominent representations of McDonald’s characters and the recognisable yellow brand identifier, the ‘Golden Arches’, such that viewers familiar with McDonald’s would understand the adults to be playing in a McDonald’s playground.

The ACMA considers that the non-program material is designed to attract public attention to the McDonald’s brand and bring in custom for McDonald’s restaurants. This is due to the non-program material featuring the following images associated with the McDonald’s brand:

- the Golden Arches;
- Grimace;
- Hamburglar; and
- a McDonald’s playground;
(together, the “McDonald’s Images”).

According to the trade marks database maintained by IP Australia, each of the first three of these McDonald’s images is a registered trademark of McDonald’s in Australia.

In addition, the Seven Network advised that it received consideration for the broadcast of the non-program material. The Seven Network stated that this consideration was not in relation to the promotion of any McDonald’s *products* or *services* (the Seven

Network's emphasis), but as an acknowledgement of the commercial sponsorship arrangement that then existed between the Seven Network and McDonald's.

The receipt of consideration is not a necessary element for promotional material to fall within the meaning of the term 'advertisement'. However, the fact that consideration was received by Channel 7 tends to suggest that the non-program material was more than merely a station identifier.

In the ACMA's view, the non-program material has a dual character and is properly considered to be both a station identifier for Channel 7 and an advertisement for McDonald's.

As the non-program material is properly considered to be both a station identifier and an advertisement, the material needs to comply with the provisions that apply to advertisements under the CTS 2009.

Was the non-program material broadcast during a C and/or P period?

For CTS 26(2), 28 and 35 of the CTS 2009 to apply, the ACMA has to determine whether the non-program material was broadcast during or around a C and/or P period. C and P program periods are those dates/times notified by the licensees to the ACMA in schedules in accordance with CTS 3 of the CTS 2009. The Seven Network has provided the relevant schedules for the licensees in question.

The ACMA compared the dates/times the complainant alleged the licensees broadcast the non-program material with the broadcast schedules provided by the Seven Network for those licensees.

The broadcast schedules indicated that the non-program material was broadcast on the dates alleged, subject to some slight discrepancies of 2-5 seconds. However, this very small discrepancy between the times the non-program material was alleged to have been broadcast and the times which the schedules indicate that the non-program material was broadcast makes no material difference when considering compliance with the relevant provisions of the CTS 2009.

On each of the occasions where the non-program material was broadcast (according to the broadcast logs provided by the Seven Network), it was broadcast during the C program 'Spit It Out', with two exceptions:

- The non-program material was broadcast by the licensees on 28 October 2010 during the P program 'Toybox'; and
- On 7 November 2010, the non-program material was broadcast by HSV at 13:00:35, which was during the break immediately after the C program 'Spit It Out'.

The ACMA reviewed the P program schedules submitted by the licensees to the ACMA in accordance with CTS 3 of the CTS 2009. These schedules confirmed that the P program, 'Toybox', was broadcast on 28 October 2010 during a P period. As such, the non-program material was broadcast by the licensees during a P period on 28 October 2010.

The C program schedules submitted to the ACMA (per CTS 3 of the CTS 2009) indicate that on each occasion when the C program ‘Spit It Out’ was broadcast on the dates alleged, it was broadcast during a C period. As such, the non-program material was broadcast during a C period on each date alleged, except on 7 November 2010 when it was broadcast immediately after a C period.

CTS 26 (2) – Advertisements during P periods

In its submission of 18 February 2011, the Seven Network stated that the non-program material was broadcast during a P period on 28 October 2010 at 15:59:45pm in each of the five markets covered by the five licensees. This is confirmed by the ACMA’s review of the schedules discussed above.

As it is the ACMA’s view that the non-program material is an advertisement (as well as including a station identification), the broadcast of this material was prohibited during a P period by CTS 26(2) of the CTS 2009.

Accordingly, the ACMA finds that each of the five licensees breached CTS 26(2) of the CTS 2009 by broadcasting an advertisement for McDonald’s during a P period on 28 October 2010.

CTS 28 – Separation of advertisements and sponsorship announcements

CTS 28 requires that advertisements broadcast during C periods must be clearly distinguishable as such to a child viewer.

The ACMA notes the Seven Network’s submission that the non-program material was clearly distinguishable from program content by a child viewer. It was submitted that the station identifier was in stark contrast to the main program content and that a child would have been able to discern that the non-program material was clearly unrelated to the main program content. It was also argued that the non-program material was scheduled to appear after that program finished or before it commenced and that accordingly a child would have either seen the closing credits of the preceding program prior to the broadcast of the station identifier or would not have begun watching the subsequent program. As such, it was submitted that a child would have been able to distinguish the station identifier from the main program.

In its submission of 24 May 2011, the Seven Network also stated that if the non-program material ‘... clearly advertised the McDonald’s and Seven Network brands...’ it is difficult to see how the ACMA could also find that the licensees breached CTS 28. The Seven Network argued that the ACMA’s proposed finding that the segment was an advertisement is inconsistent with the finding that it was not distinguishable as an advertisement to a child viewer.

The ACMA does not agree with this assertion.

CTS 28 requires advertisements to be clearly distinguishable:

- as advertisements;
- to a child viewer

Even if the material is distinguishable from the main program content, it may not be clearly distinguishable as an advertisement and may be seen by a child to be part of the continuing television entertainment.

After reviewing the non-program material, the ACMA has formed the view that it is not clearly *distinguishable as an advertisement to the child viewer*.

The non-program material does not display the usual, obvious characteristics of an advertisement in that it does not refer specifically to (or obviously depict) any products or services, or provide information about their prices, availability, or location. Rather, the non-program material is a short video where the camera pans through a playground, where some of the playground equipment represents recognisable McDonald's icons, and would in the ACMA's opinion not be clearly distinguishable as an advertisement to a child viewer.

The Seven Network provided an article titled *Marketing to Children: a time-bomb*, by Patricia Edgar, in its submission of 24 May 2011. The ACMA notes that in the article, while discussing an advertising industry code, Ms Edgar states:

Although the purpose of advertising to children is to persuade kids to want the products advertised, the code does not address the fact that children's lack of experience and cognitive ability makes them more susceptible to influence – even if the messages are honest, truthful, clear and understandable – because children do not understand advertising's persuasive intent...

It is the ACMA's view that the non-program material is likely to be viewed by children as a form of continuing television entertainment rather than as an advertisement. In forming this view, the ACMA has also been informed by the research into television advertising to children examined during its review of the Children's Television Standards in 2007¹.

As such, the ACMA finds that each of the five licensees breached CTS 28 by broadcasting the non-program material during C periods between 19 October and 18 November 2010. The ACMA notes, however, that HSV did not breach CTS 28 by broadcasting the non-program material on 7 November 2010, as it was not broadcast during a C period.

CTS 35 – Promotions and endorsements by popular characters

CTS 35 prohibits the use of, amongst other things, proprietary characters in endorsing, recommending or promoting a commercial product or service, during any material broadcast during or immediately before or after a C or P period. As discussed above, the non-program material was broadcast by the five licensees during C and P periods (and in the case of HSV, immediately after a C period on 7 November 2010) between 19 October and 18 November 2010 on a total of 39 occasions.

¹ This research can be found on the ACMA's website at http://www.acma.gov.au/WEB/STANDARD/pc=PC_310262.

The non-program material contains depictions of two characters which meet the definition of ‘proprietary characters’ under CTS 2009. A proprietary character is “a character used by its owner in the promotion or advertising of products or services”. As discussed above, the Grimace and Hamburglar characters are owned by and are the registered trade marks of McDonald’s.

The question for the ACMA is therefore whether the non-program material contains an endorsement, recommendation or promotion of a commercial product or service by either or both of these proprietary characters.

The Macquarie Dictionary defines ‘promotion’ (relevantly) as activity, especially in advertising, designed to increase public awareness of, and hence the sales of, a product.

The Seven Network submitted that there is no depiction within the non-program material of a commercial product or service offered for sale in that there is no information provided relating to prices, availability and location of the products and services. It is submitted that the mere depiction of proprietary characters does not meet the endorsing, recommending or promoting element required by CTS 35(1) of the CTS 2009. Seven Network submitted that having regard to the meaning of ‘endorsement, recommendation or promotion’ in the Macquarie Dictionary, the terms should be understood as including an act or activity by the proprietary characters in order to endorse, recommend or promote a product or services (for the purposes of CTS 35(1)). In the case of the non-program material, the Seven Network contends that the proprietary characters are merely presented as inanimate objects and that there can be no increase in public awareness of a product or service by mere association.

While the ACMA agrees that the proprietary characters are not animated and are depicted in the form of playground equipment, the ACMA considers the non-program material contains a promotion of a commercial product or service by those proprietary characters. In this case, the ACMA considers that animation is not necessary for promotion of a product or service to occur – the simple presence of the proprietary characters is sufficient for them to promote (that is, increase public awareness of) a product or service by increasing recognition of the brand and increasing brand awareness. Brand awareness refers to a customer’s ability to recall and recognise a brand under different conditions and to link the brand name, logo and in this case, the Golden Arches and the proprietary characters of the Grimace and Hamburglar, to the commercial products and services sold under the brand name.

McDonald’s is widely known and recognised as a fast-food restaurant chain and provider of associated commercial products and services. The proprietary characters’ appearance in the non-program material, in the ACMA’s opinion, constitutes the promotion of, or increases the public awareness of, the McDonald’s brand, which because of McDonald’s wide brand recognition, allows people and children to associate the McDonald’s Images with the commercial products and services it offers, such that ultimately this increases sales of McDonald’s products and services.

Accordingly, the ACMA finds that the McDonald’s proprietary characters’, the Grimace and Hamburglar, presence in the advertisement promotes commercial products and services of McDonald’s in breach of the requirements of CTS 35(1). As

such, it is the ACMA's finding that the five licensees breached CTS 35 by broadcasting the non-program material during C and P periods between 19 October and 18 November 2010. It is also the ACMA's finding that HSV breached CTS 35 by broadcasting the non-program material immediately after a C period on 7 November 2010.

The ACMA considered the Seven Network's reference to the Commercial Television Industry Code of Practice and found it not relevant to the interpretation of CTS 35(1).

Licence condition at clause 7(1)(b) of Schedule 2 to the BSA

Each commercial television broadcasting licence is subject to the condition that the licensee will comply with program standards applicable to the licence under Part 9 of the BSA (clause 7(1)(b) of Schedule 2 of the BSA). The CTS 2009 are program standards of the kind there referred to. A failure to comply with the CTS 2009 amounts to a breach of the licence condition at clause 7(1)(b) of Schedule 2 of the BSA.

As the ACMA has found breaches of the CTS 2009, the ACMA also finds that all five licensees have in respect of each such breach also breached a condition of their commercial television broadcasting licence by broadcasting the material.

Attachment A – Relevant provisions of the BSA and CTS 2009

Clause 7(1)(b) of Schedule 2 to the BSA provides:

7 Conditions of commercial television broadcasting licences

- (1) Each commercial television broadcasting licence is subject to the following conditions:
 - ...
 - (b) the licensee will comply with program standards applicable to the licence under Part 9 of this Act;
 - ...

The CTS 2009:

CTS 26 Advertisements

- (1) ...
- (2) No advertisements may be broadcast during P periods.
- (3) ...

CTS 28 Separation of advertisements and sponsorship announcements

During C periods, advertisements and sponsorship announcements must be clearly distinguishable as such to a child viewer. This requirement is in addition to the requirements of the Commercial Television Industry Code of Practice.

CTS 35 Promotions and endorsements by popular characters

- (1) No material broadcast during a C period or P period, or in the break immediately before or after a C period or P period, may contain an endorsement, recommendation or promotion of a commercial product or service by:
 - (a) a principal personality or character from a C program or P program; or
 - (b) a popular program character or popular movie character; or
 - (c) a popular cartoon, animated or computer generated character; or
 - (d) a popular personality; or
 - (e) a licensed character; or
 - (f) a proprietary character.

Note 1 Popular personality includes well known sporting and music personalities.

Note 2 **Licensed character** and **proprietary character** are defined in CTS 5 and include characters from fiction, television, movies, etc.

- (2) CTS 35 (1) does not apply to an advertisement:
- (a) if:
- (i) the advertisement depicts a commercial product or service in the form the product or service is usually offered for sale; and
 - (ii) no endorsement, recommendation or promotion of the commercial product or service is provided by way of voice-over, animation or any other means by a character or personality mentioned in CTS 35 (1); or
- (b) if:
- (i) the advertisement contains an endorsement, recommendation or promotion of a commercial toy or game; and
 - (ii) the endorsement, recommendation or promotion is made by a character mentioned in CTS 35 (1); and
 - (iii) the character is represented in the toy or game.
- (3) An advertisement during a C period may use a character or personality mentioned in CTS 35 (1) to endorse, recommend or promote a non-commercial product or service if the advertisement:
- (a) contains only generic statements about nutrition, safety, education or like matters; and
 - (b) is suitable to be contained in a children's program described in CTS 6.