



CASE REPORT

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| 1. Complaint reference number | 187/03 |
| 2. Advertiser | Nissan Motor Aust. Pty Ltd (Nissan 350Z) |
| 3. Product | Vehicles |
| 4. Type of advertisement | Cinema |
| 5. Nature of complaint | FCAI - Other |
| 6. Date of determination | Tuesday, 10 June 2003 |
| 7. DETERMINATION | Upheld – discontinued or modified |

DESCRIPTION OF THE ADVERTISEMENT

Described by the advertiser as a movie trailer, the material reviewed by the Board opens on an early morning skyline scene of Prague. The following text appears on screen:

“In the following film, each take was shot in one continuous sequence in real time over 5.7 miles, using a total of 14 cameras. No special photography was used to enhance the actual speed of “The Run”.”

With an accompanying soundtrack of voices, this changes to preparations of a Nissan 350Z for what transpires as a high-speed drive through the city on a date shown by superimposed caption as September 29, 2002 ahead of another caption reading: “The Run.” At the indicated time of 6.50am, there is a spoken 3-2-1 countdown, after which various camera angles show the car travelling at speeds up to a radar-device indicated 123 miles per hour over different roads including cobblestone surfaces, pedestrian crossings, tramlines and traffic lights, and negotiating tight bends, a short tunnel, one-way and two-way streets. The vehicle is portrayed skidding around one corner, and at the end of the action sequence as passing between an articulated bus and a tram crossing its path from opposing directions. This is followed by a blank screen, with only the sound of the car continuing, as captions read: “No special effects photography was used to enhance the actual speed of what you have just seen,” followed by: “The drivers were professionals. The route was closed. Do not attempt to perform any of the driving depicted in this film. Observe all laws and speed limits. Always wear seat belts. Please drive safely,” and finally: “People and vehicles shown were on a controlled set during the making of this film. Drivers were wearing 5-point racing harnesses. Rear-spring air bags were used to offset camera weight. The vehicle Dynamic Control and all air bags in the Z® were disconnected. For your safety, never disconnect the air bag system.”

THE COMPLAINT

Comments which the complainant/s made included the following:

“The advertisement showed a car being driven around the streets of Prague like a formula one car. You see the speedometer go from 0 mph to 123 mph and rising. The car screams along the cobbled streets with bystanders, past cafes and narrowly missing trams and buses. The ad is incredibly irresponsible as the maximum speed limit in Australia is 110km.... This ad is only encouraging people to buy the car and race it along the streets of the city, as the ad shows the car doing this.”

“... it portrays a high speed motor ride through a city centre, just missing public transport, with pedestrians in close proximity, and other vehicles on the road. The “mandatory” disclaimer advising that it took place on closed roads, driven by professional drivers, and “do not attempt to do this” is laughable when you consider that the target audience of young revheads already carry out dangerous stunts on our highways, and need little encouragement to outdo each other in stupid driving behaviour.”

THE DETERMINATION

The issue to be considered by the Advertising Standards Board (“Board”) was whether the material before it was in breach of the Federal Chamber of Automotive Industries’ Advertising for Motor Vehicles Voluntary Code of Practice (the “FCAI Code”).

To come within the FCAI Code, the material being considered must be an “advertisement”. The FCAI Code defines an “advertisement” as follows:

“...matter which is published or broadcast in all of Australia, or in a substantial section of Australia, for payment or other valuable consideration and which draws the attention of the public, or a segment of it, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct”.

The Board decided that the material in question was published or broadcast in all of Australia or in a substantial section of Australia for payment or valuable consideration given that it was being broadcast in cinemas around Australia.

The Board determined that the material draws the attention of the public or a segment of it to a “product” being a Nissan 350Z “in a manner calculated to promote.... that product”. The Board accepted Nissan’s submission that the material related to a DVD being sold by Nissan in Australia for \$19.95 but held that the material served two purposes in that it was an advertisement for the Nissan 350Z and an advertisement for the DVD known as “The Run”.

Having concluded that the material was an “advertisement” as defined by the FCAI Code, the Board then needed to determine whether that advertisement was for a “motor vehicle”. “Motor vehicle” is defined in the FCAI Code as meaning:

“passenger vehicle; motorcycle; light commercial vehicle and off-road vehicle”.

The Board determined that the Nissan 350Z was a “passenger vehicle”.

The Board determined that the material before it was an “advertisement for a motor vehicle” and therefore that the FCAI Code applied.

The Board then analysed specific clauses of the FCAI Code and their application to the advertisement. The Board identified that clauses 2(a), (b) and (c) were relevant in the circumstances.

In relation to clause 2(b) of the FCAI Code, the Board held that the depiction did take place on a “road” as defined by the FCAI Code. The definition provides as follows:

“Road: means an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles”

The Board then found that driving at a speed of 123 miles per hour on roads would clearly breach Australian speed limit laws. Accordingly, the advertisement was, prima facie, held to be in breach of clause 2(b) of the FCAI Code.

As far as road safety as dealt with in clauses 2(a) and 2(c) of the FCAI Code is concerned, the Board held the driving sequences and the speed depicted would breach applicable legislation in Australia and therefore that prima facie, the advertisement breached clauses 2(a) and (c) of the FCAI Code.

In verifying its prima facie conclusions, the Board referred to the Explanatory Notes to the FCAI Code. The Board referred in particular to the FCAI’s statement in the Explanatory Notes that:

“The FCAI supports a responsible approach to advertising for motor vehicles. While acknowledging the legitimate use of motor sport, fantasy, humour and self-evident exaggeration in creative ways, the FCAI asks advertisers to be mindful of the importance of road safety and to ensure that advertising for motor vehicles does not contradict or undermine efforts to achieve improved road safety outcomes in Australia.”

The Board held that given this intent in the FCAI Code, the advertisement breached both the spirit and the letter of the FCAI Code.

Finally, the Board considered whether “legitimate use” had been made of “motor sport, fantasy, humour and self-evident exaggeration in creative ways” so that the advertisement would not be in breach of the FCAI Code. The Board considered that there was little if any depiction of fantasy or self-evident exaggeration in the sequence portrayed. Instead the filming technique was such that the driving sequence appeared to be very clear and realistic. Put another way, what one actually sees in the driving sequence appears to be a totally realistic cinematic reproduction of what actually occurred. The Board contrasted and distinguished this from other motor vehicle advertisements it had previously considered where driving sequences were unrealistic or fanciful or where the impression of speed was simulated by the use of special effects. To put the matter beyond doubt the Board noted that the concluding captions in the advertisement, particularly phrases like “No special effects photography was used to enhance the actual speed of what you have just seen” excluded consideration of the advertisement as featuring self-evident exaggeration and that there was nothing in the theme, text or visuals of the advertisement to suggest that motor sport, fantasy or humour were being used.

On the above basis, the Board confirmed its prima facie view and held that the material before it constituted an advertisement for a motor vehicle in breach of clauses 2(a), 2(b) and 2(c) of the FCAI Code. The Board upheld the complaint.

In response, Nissan advised that it did not consider that it had breached the Code, but nevertheless would remove the trailer from screening in its current form. The advertiser further advised that it “remains committed to adhering to its community obligations in relation to all aspects of its business”.