



Ad Standards Community Panel
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AdStandards.com.au

Ad Standards Limited
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Case Report

1. Case Number :	0144-21
2. Advertiser :	ORTC Clothing
3. Product :	Clothing
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	16-Jun-2021
6. DETERMINATION :	Upheld – Not Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram advertisement features a post with two images posted by @myfriendelias. The caption for the images reads "The mind is a far better warrior than the sword".

Both images feature Elias Black shirtless wearing shorts. In the first image he is squatting and in the second image he is standing.

THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

This post goes against advertising standards and does not include any visible indicators saying the post is a paid partnership, advertisement or sponsorship

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

This post displays no mention of our label, ad, sponsorship, paid or commercial partnership with ortc Clothing Co. Please share more information as to why this post would have received a complaint.



THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).

The Panel noted the complainant's concern that the Instagram post does not include any visible indicators that the post is an advertisement.

The Panel viewed the advertisement and noted the advertiser's response.

Section 2.7: Advertising or Marketing Communication shall be clearly distinguishable as such.

Is the material advertising?

The Panel noted that it must consider two matters:

- Does the material constitute an 'advertising or marketing communication', and if so
- Is the advertising material clearly distinguishable as such?

Does the material constitute an 'advertising or marketing communication'?

The Panel noted the definition of advertising in the Code. Advertising means: "any advertising, marketing communication or material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct".

The Panel considered that the advertiser had not been tagged in the photo or the comments. The Panel noted that the brand name was clearly visible on the shorts worn by Mr Black in the post. The Panel noted that Mr Black was shirtless in the post and the main item of clothing visible was the shorts with the brand logo. The Panel considered that the image appeared as though he was modelling the shorts, and in combination with the clearly visible brand name this would draw the attention of the public in a manner calculated to promote the brand and product.

As to whether the advertiser or marketer has a reasonable degree of control, the Panel noted the advertiser's response did not provide any information relating to the circumstances of the post. The Panel noted that in case 0143-21 the Panel had considered another post by Mr Black where there was a commercial relationship between Mr Black and the same advertiser. The Panel noted it was not known whether this photo shoot had been a part of that arrangement, or whether the advertiser had provided the shorts to Mr Black for free.



The Panel noted that the Code does not define ‘reasonable degree of control’. The Panel noted that there is no indication of timeframes around which the advertiser can be seen to exert control. The Panel noted that in the case of gifts to influencers the context in which the product is given cannot be ignored. The Panel noted that influencers operate as an advertising medium utilised by businesses to promote their brands and products. The Panel noted that many influencers have agents and that businesses exist which put brands and influencers in touch with each other. The Panel noted that influencers are sometimes paid, sometimes provided with free product and sometimes post about products in the context of longer-term relationships without immediate incentive. The Panel noted that influencers’ posts may also be created in circumstances in which there is no relationship context. The Panel considered that the Code’s requirements should be interpreted with its purpose in mind, that is to ensure that consumers are informed, and that influencers should be transparent about their relationship with a brand, whatever form it takes.

The Panel noted that the advertiser is aware of Mr Black’s position as an influencer. The Panel noted that there is an existing commercial relationship between Mr Black and the advertiser and that while the exact circumstances surrounding this post are not known, it is likely that Mr Black received the product for free, at a discount, or as part of a separate arrangement. The Panel considered that it is reasonable to assume that the motivation for an advertiser to provide product to an influencer with whom they have a positive relationship is that they will post about the product or otherwise draw the attention of their followers to the brand as Mr Black did in this case. The Panel considered that the advertiser has undertaken the activity of providing product to an influencer, and in choosing to provide the product they are exercising a degree of control, and the post did draw the attention to the product.

For these reasons, the Panel considered that the post did meet the definition of advertising in the Code.

Is the material clearly distinguishable as such?

The Panel noted the Practice Note for the Code states:

“Influencer and affiliate marketing often appears alongside organic/genuine user generated content and is often less obvious to the audience. Where an influencer or affiliate accepts payment of money or free products or services from a brand in exchange for them to promote that brand’s products or services, the relationship must be clear, obvious and upfront to the audience and expressed in a way that is easily understood (e.g. #ad, Advert, Advertising, Branded Content, Paid Partnership, Paid Promotion). Less clear labels such as #sp, Spon, gifted, Affiliate, Collab, thanks to... or merely mentioning the brand name may not be sufficient to clearly distinguish the post as advertising.”

The Panel considered that there was nothing in the wording of the post and no hashtags which clearly demonstrated the existing relationship between Mr Black and the brand and the circumstances surrounding the posting of the product.



The Panel considered the wording of the post was not clearly distinguishable as advertising.

2.7 conclusion

In the Panel's view the advertisement is not clearly distinguishable as such and did breach Section 2.7 of the Code.

Conclusion

Finding that the advertisement did breach Section 2.7 of the Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

The advertiser has not provided a response to the Panel's determination. Ad Standards will continue to work with the relevant authorities regarding this issue of non-compliance.