



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0160-22
2. Advertiser :	James Cosmetics
3. Product :	Other
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	27-Jul-2022
6. DETERMINATION :	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram story was shared to the @misskyreeloves account on 7 July 2022 and featured an image of the influencer demonstrating how to wear the face mask product. Text over the image states, "Fun Fact Did you know there's no wrong way or right way to wear the masks? Big end too tend to puffy bags or big end to tend to crows feet. You're welcome.". The story includes a link to buy the product and the text, "30% off sale".

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

Kyree Harvey has a long term promotional relationship with James Cosmetics and is regularly paid to advertise for them. In this instance, Ms Harvey has not declared the post as an ad or mentioned her paid relationship with James. James is currently running a large influencer campaign promoting their sale.

Did not have any tags or such showing it as a paid promotion - this influencer has worked with this company previously



THE ADVERTISER'S RESPONSE

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

I'm writing in response to Case 0160-22 relating to an Instagram Story by Kyree Harvey including product from James Cosmetics. The post in question, which is attached, was 1 slide appearing for less than 15 seconds on an Instagram Story which lasts for 24 hours only.

It is our belief that the content does not constitute 'advertising or marketing communication'. Firstly, we as the brand had no degree of control over the content, as well as not being aware it was being posted, never requested it be posted, or paid for the content or product. Whilst in previous cases the panel has referenced whether there is a commercial relationship present among other factors, we believe that the panel must make a deeper consideration as to the piece of content and its purpose.

A commercial arrangement does exist between James Cosmetics and Kyree Harvey, however that contract had been fully fulfilled prior to the piece of content that was posted and is being questioned. That content posted as part of the commercial relationship contained the required #Ad on all relevant stories as required by your code of conduct. Which should indicate the clear understanding from the influencer that this content was not advertising in nature, and not intended to provide an advertisement. As mentioned by the complainant, it is well known that James Cosmetics works with Kyree, it was clear that this content was out of the ordinary of the usual advertising Kyree is engaged. So clear, that the complainant has highlighted it.

In contrast to cases such as 0113-22 where the questioned content appeared prior to the paid content, and as such control can be inferred, this content appeared after the contract was fulfilled, meaning the brand had no legal or other rights related to the content. Again, in contrast to case 0118-22 where the content was referencing a gift that was due to be used in paid advertising in the future, as the panel ruled there can be some inferred control given the upcoming promotion. This is not the case here. Not product or payment was provided.

Further, the intent of the content must be considered relevant by the Panel. Here, the content was not posted as a 'bonus' for the brand, or the influencer attempting to provide additional value, Kyree was operating in her standard practice of responding to followers questions in a public way so as to reduce the time required to respond to each person one on one. A similar question which has been posed several hundred times about the correct way to wear the product. This style of QnA is standard practice for Kyree Harvey and has never formed part of any paid partnership with her. As such, it cannot be considered advertising when the purpose was to respond to a legitimate question asked by several different people.



Additionally, it would be a dangerous precedent to create a policy where an influencer who engages in the usual course of their organic content but talks about or has in their possession any product they have ever been gifted or ever worked with, whether that be last week, last year, or years ago, must declare it as an advertisement. The panel must consider that if it is the usual course for an influencer to respond to their audience, and provide value, which is their primary role on the platform, that there is a distinction between advertising and brand related commentary with their audience. This is especially true when there is no relevant time being considered when a partnership has ended, which is unique as far as cases the Panel has considered. Again, we would point towards the intent of the post. If the intent was to provide commercial value to a brand or business, it is advertising in nature, however the Panel must concede that if the primary purpose was not to advertise or provide a material value, although value may be created, it is not on its face advertising in the context of the Code. Especially where there is no exchange of money, or product related to that content.

Again, we would point to the Code as having no specific definition of control and as such be lost as to where control can be found when no payment, product, direction can be found. Especially in the context of deliverables already being concluded prior to the content in question.

Whilst we strongly disagree that this is advertising material, and the material is fully compliant with all Australian Consumer Laws, if the Panel disagrees based on their own Code, we submit that the content is clearly distinguishable.

The complainant has highlighted that Kyree Harvey is well known to work with James Cosmetics, and as such has met the standard applied by the Panel in Case 0118-22 making the content distinguishable. Based on the Panels findings in that case, the clear tagging, mention of the website and display of the product should clearly distinguish the content for the audience, and as proven by the complainant can and was distinguished. Further, and unlike that case, there was no attempt to hide the commercial nature of the prior partnership with hashtags such as #notspon but rather a willingness to answer a legitimate question from a follower regarding a prior partnership which had no bearing on the content.

My sincere thanks for the opportunity to respond, and hope that the Panel considers a more unique approach to assessing content such as this where the purpose and intent behind the content is clearly related to the regular and ongoing relationship the influencer has with their audience and their platform.

THE DETERMINATION

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



The Panel noted the complainant's concern that the advertisement is misleading as it does not disclose the stories as 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 noted the advertiser's response that a commercial relationship did exist between the influencer, Ms Harvey, and the brand, however the requirements for that agreement had been fulfilled and the agreement had ended. The Panel further noted the advertiser's statement that this post in this case was outside the arrangement and the advertiser was unaware of it.

The Panel considered that the post did draw attention of the public to the product through the depiction of the product, description of use, tagging of the brand and link to a sale. The Panel noted that the link in particular is a call to action to viewers and goes above and beyond simply providing requested information to her followers by promoting the product and where to purchase.

The Panel acknowledged that the advertiser did not have creative control over the video, however there was an affiliate relationship between the content creator and the advertiser and that this would constitute a reasonable degree of control.

The Panel determined that the Instagram story was an advertisement.

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 the focus on the product and product packaging, tagging of the brand, and link to the sale by the advertiser all combined in a way which meant that the commercial nature of the post was clear. The Panel considered that the relationship between the advertiser and influencer was apparent.

Section 2.7 Conclusion

The Panel considered that the advertisement was clearly distinguishable as such.

Conclusion

Finding that the advertisement did not breach any other section of the Code the Panel dismissed the complaint.