



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0161-21
2. Advertiser :	Niks and Keeks
3. Product :	Clothing
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	23-Jun-2021
6. DETERMINATION :	Upheld – Not Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram Post dated 06/02/2021 on the @the_bored_toddler account features three images. The caption on the post states:

"It's all fun and games until lockdown ends and you have to put a bra back on [squinting face with tongue emoji]. In all seriousness though, we did great Western Australia [okay emoji]. There was one case, we went into a 5 day lockdown and kicked it in the butt [arms raised emoji]. I feel so lucky to live where I live and I really feel for those who have been in lockdown for months, I can't begin to imagine how it must be impacting your lives [tears emoji]. Please know my inbox is always open and I love a chat so shoot me a message anytime [smiling emoji]. I'm loving wearing this new @niksandkeeks baby doll dress, its the perfect dress to chuck on and make it look like you've actually put some effort in [squinting face with tongue emoji]. Check it out and use "NEW10" for a little discount [face blowing a kiss emoji]."

The three images show a woman posing in a white and blue dress.

THE COMPLAINT

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

Influencers are required to disclose sponsored content. This post clearly appears to be an advertisement. She has put #ad but it's buried in the comments and you have to search to find it.



THE ADVERTISER'S RESPONSE

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

Advertiser did not provide a response.

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 #ad.

The Panel viewed the advertisement and noted the advertiser had not provided a 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 clear placement of the product, the brand name tagged in the comments, the further information provided about the product and the discount code did amount to material which would draw the attention of the public in a manner designed to promote the brand.



The Panel noted the advertiser had not provided a response to the complaint. The Panel noted that the influencer originally included the #ad in a group of hashtags as part of a comment on the post (no longer readily accessed) and that this is a clear indication of a commercial relationship.

The Panel noted that the precise nature of the relationship between the advertiser and the influencer was not known, however it appeared likely the advertiser was aware of her position as an influencer. The Panel noted that it appeared that the advertiser chose to send the influencer a gift or that there was a commercial relationship in place for the influencer to post about the product. The Panel considered that the advertiser has undertaken the activity of giving a gift to an influencer or entering into an arrangement with an influencer, and in choosing to do so 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 caption itself and no hashtags which clearly demonstrated the relationship between the influencer and the brand and the circumstances surrounding the posting of the product.

The Panel noted that the original caption included the discount code NEW10 and considered that this is an indication that there was some kind of arrangement in place between the influencer and the advertiser. However, the Panel considered that discount codes can often be automatically sent by a brand when a product is purchased, for the purchaser to share with friends, and that the use of a discount code on its own is not enough for the post to be clearly distinguishable as advertising.

The Panel noted that the influencer had posted a comment on the post which included the hashtag #ad. The Panel considered while this may mean that the post was initially identifiable as advertising material, after several other comments had been made on the post this comment was no longer immediately visible to those



viewing the advertisement. The Panel noted the post has a lot of comments and the original comment was no longer sufficient to distinguish the post as advertising.

The Panel considered that tagging the brand and use of a discount Code was not sufficient to satisfy the Code's requirements and that the wording of the post was not clearly distinguishable as advertising.

2.7 conclusion

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

Conclusion

Finding that the advertisement breached 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.