



Ad Standards Community Panel
PO Box 5110, Braddon ACT 2612
P (02) 6173 1500 | F (02) 6262 9833

AdStandards.com.au

Ad Standards Limited
ACN 084 452 666

Case Report

1. Case Number :	0197-22
2. Advertiser :	ASICS Oceania
3. Product :	Clothing
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	14-Sep-2022
6. DETERMINATION :	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This series of Instagram stories on the @monique_bodycraft account from 5 August 2022 features a video of an Asics bag and box with the Influencer's name on it. On the bottom right of the video is "Good morning @asicsaustralia 6:37Am Queen Victoria Building". A video of a person's ankle and shoe in front of Sydney harbour is then seen with the words "The new @asicsaustralia ASICS GEL-KAYANO 29 officially launches in Australia today!" in the bottom right hand corner. This is followed by a video filmed by someone running with a group and the words "I took them for a run this morning with @runningheroesaunz @asicsaustralia" in the bottom right hand corner. This is followed by a still image of the influencer mid-jump in front of Sydney harbour and the text, "The FF BLAST Plus foam technology in the new ASICS GEL-KAYANO 29 creates a softer landing and a more energised toe-off than ever before in a GEL-KAYANO, for a lighter (K29 is 10h lighter in weight than the K28), bouncier run! @runningheroesaunz x @asicsaustralia It's a big yes from me! Love them!"

THE COMPLAINT

The complainant was concerned that the story did not comply with the Distinguishable Advertising provision of the AANA Code of Ethics.

THE ADVERTISER'S RESPONSE



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

ASICS Oceania Pty Ltd (AOP) is a wholly owned subsidiary of ASICS Corporation, a sporting shoes, sporting apparel and sporting equipment business based in Japan. AOP operates ASICS's businesses in the Australia, New Zealand and Pacific Islands regions. AOP operates the ASICS Australia Instagram account @asicsaustralia.

AOP understands that a complaint has been made to Ad Standards that an Instagram stories post mentioning ASICS Australia made on [influencer account] by [the influencer] (a running and fitness influencer and advertiser for fitness and wellness brands) is not clearly distinguishable as advertising.

AOP takes its compliance obligations seriously and, in particular, it is aware of its obligation under section 2.7 of the AANA Code of Ethics that "Advertising shall be clearly distinguishable as such". AOP has now investigated this matter in detail and AOP strongly rejects that:

*the Instagram Post is not clearly distinguishable as advertising; and/or
AOP has breached section 2.7 of the AANA Code of Ethics,
for the reasons set out in detail below.*

Background

On 5 August 2022, [the influencer] posted on her Instagram account at [influencer account], as an Instagram "Story", an advertisement for ASICS's new ASICS GEL-KAYANO 29 running shoes (Shoes) (Instagram Post), which Shoes were launched by AOP that day. [The influencer] is a popular Instagram running and fitness influencer and advertiser for fitness and wellness brands with approximately 24,100 "followers" on Instagram.

As a popular Instagram running and fitness influencer and advertiser with a considerable number of "followers" and as a member the Running Heroes community (described below), AOP (via its partner, Running Heroes) invited [the influencer], along with other running influencers and Running Heroes community members, to be one of the first people to test out the new Shoes by participating in a 5 to 6 kilometre ASICS group run event. Running Heroes owns and operates a mobile phone app for runners through which runners can participate in an online running community and take part in weekly running challenges to win prizes and access exclusive discounts on fitness related products. AOP has a services agreement with Running Heroes pursuant to which Running Heroes provides AOP with both digital marketing content (e.g. running events with the Running Heroes community and influencers) and digital advertising on Running Heroes's app and website (e.g. premium positioning of ASICS products on the Running Heroes app and website).

[The influencer] does not have a formal sponsorship or brand ambassador agreement or arrangement with either AOP, ASICS or Running Heroes. [The influencer] was not paid money by any of AOP, ASICS or Running Heroes to participate in the running event. However, [the influencer] was provided by AOP with the new Shoes and an ASICS top and shorts free-of-charge to wear during the run and to keep after the run. [the influencer] was not required by either AOP, ASICS or Running Heroes to post about the run, AOP, ASICS, ASICS Australia, Running Heroes, or the Shoes or running apparel. However, [the influencer] was encouraged to do so because the invitation to the group run participants (Invitation) stated: "There will be a photographer and



videographer present for this event, however, we'd love for you all to take your own pictures and share across your socials tagging @asicsaustralia & @runningheroesaunz". The Invitation also provided some marketing content regarding the Shoes to the run participants, namely: "The FF BLAST Plus foam technology in the new ASICS GEL-KAYANO 29 creates a softer landing and a more energised toe-off than ever before in a GEL-KAYANO, for a lighter (K29 is 10g lighter in weight than the K28), bouncier run" (Marketing Content).

Section 2.7 of the AANA Code of Ethics

Section 2.7 of the AANA Code of Ethics requires that "Advertising shall be clearly distinguishable as such". AOP considers that the Instagram Post is "advertising" for the purposes of the AANA Code of Ethics, including for the following reasons:

The Instagram Post is calculated to promote the Shoes and, specifically, the launch of these Shoes which occurred on the date of the Instagram Post (i.e. 5 August 2022).

AOP (via Running Heroes) sought out [the influencer], as a known running and fitness influencer, and provided her with free product (namely, the Shoes and running apparel) and services (namely, participation in the 5 to 6 km group run) with a view to obtain promotion for the Shoes and/or ASICS from [the influencer] on her Instagram account.

AOP had a reasonable degree of control over the content of [the influencer]'s Instagram Post by providing her with the free running apparel and Shoes to wear and "test out" during the group run and by providing [the influencer] (via Running Heroes) with the Marketing Content described above. This is despite the fact that neither AOP nor Running Heroes had creative control over the Instagram Post, or a written contract or formal brief in place with [the influencer]. AOP is aware that, in recent Ad Standards cases, providing known influencers (such as [the influencer]) with free products or services (such as the Shoes and running apparel in [the influencer]'s case) has been shown to be enough to constitute a reasonable degree of control over the influencer's content. Accordingly, AOP considers that it had a reasonable degree of control over the content of [the influencer]'s Instagram Post.

Instagram Post is clearly distinguishable as advertising

As noted above, AOP understands that the complaint made to Ad Standards is that the Instagram Post is not clearly distinguishable as advertising. AOP strongly rejects that the Instagram Post is not clearly distinguishable as advertising, including for the reasons below.

First, and consistent with clause 2.2 (regarding Advertising oversight and complaints process) of the Australian Influencer Marketing Code of Practice by the Australian Influencer Marketing Council (AiMCO Code of Practice), AOP respectfully submits that the Ad Standards Community Panel (Panel) must consider the Instagram Post "as a whole" in determining if the advertising is clearly distinguishable as advertising, including considering the images, videos, captions, tags and audio of the Instagram Post. Section 2.2 of the AiMCO Code of Practice states: "All reviews consider the case from a consumer's standpoint and will review the post as a whole to determine if the advertising is clearly distinguishable, from image, headline, caption and hashtags, or video or audio files".

Secondly, and consistent with section 2.7 of the AANA Code of Ethics, AOP submits that the Panel should consider the Instagram post from the perspective of a typical



Instagram user and, in particular, a typical “follower” or the regular audience (Followers) of [the influencer]’s Instagram account. Section 2.7 of the AANA Code of Ethics states: “When advertisements are targeted to a specific audience, the relevant perspective is that of a typical member of the targeted group”. AOP submits that the Instagram post is targeted to Instagram users and, principally, to Followers of [the influencer] (including because Instagram stories automatically expire after 24 hours and cannot be browsed or viewed at a later date (as you can for Instagram posts) by persons generally “browsing” Instagram).

Thirdly, the context and content of the Instagram Post “as a whole” (as per clause 2.2 of the AiMCO Code of Practice noted in the first point above), including its images, videos, captions, tags and audio, make it clearly distinguishable as advertising. Regarding the context of the Instagram Post, [the influencer] is a popular running and fitness Instagram influencer and advertiser for fitness and wellness brands. Those “following” or viewing [the influencer]’s Instagram posts and stories would readily see that she has approximately 24,100 Instagram followers (suggesting to the Instagram user that it is a commercial Instagram account) and, importantly, that [the influencer] conducts a significant amount of advertising, particularly for fitness and wellness products, on her Instagram account. Recent examples of such advertising include (but are not limited to):

Sponsorship with Hello Fresh (per Instagram story dated 22 August 2022);

Paid partnership with Bose for a portable bluetooth speaker (per Instagram post dated 17 August 2022);

Sponsorship with Yootropics multivitamin (per Instagram post dated 31 May 2022).

Paid partnership with The Right Fit (per Instagram post dated 12 May 2022);

Paid partnership with The Iconic Sport (per Instagram post dated 6 April 2022); and

Paid partnership with Kayosports (per Instagram post dated 27 March 2022).

In addition, [the influencer] and her Instagram page have the “look and feel” of a typical Instagram advertiser (e.g. considerable advertising, and aspirational fitness, lifestyle and travel imagery).

Further, regarding the context of the Instagram Post, Instagram is well-known by Instagram users to be a significant advertising channel today and Instagram users know that a considerable amount of Instagram content is advertising, particularly by influencers (such as [the influencer]) with a large number of followers who monetise or commercialise their Instagram accounts by conducting advertisements and promotions for brands on them. Instagram users today are also accustomed to popular Instagram influencers (such as [the influencer]) receiving payment or free products from brands in exchange for the influencer reviewing or promoting a brand’s product on their Instagram accounts.

Regarding the specific content of the Instagram Post (which demonstrates that it is advertising):

The Instagram Post commences with video images of an ASICS paper shopping bag prominently marked with an oversized and well-known ASICS logo and an ASICS shoe box prominently marked with an oversized ASICS logo. Each of the ASICS shopping bag and the ASICS shoe box are prominently marked with white stickers with [the influencer]’s name on them, namely “[the influencer]”. This conveys to a typical Instagram user or typical Follower of [the influencer] that [the influencer] has received



the Shoes as part of an advertising or promotional arrangement between [the influencer] (a popular Instagram running and fitness influencer and advertiser) and ASICS, and that [the influencer] has not purchased the Shoes as an ordinary consumer (for completeness, because when ordinary consumers purchase running shoes, those shoes or their packaging materials are not usually subsequently labelled with the consumer's name as the packaging materials were in [the influencer]'s case). [the influencer] captioned the opening image of the Instagram Post with the words "Good morning @asicsaustralia" and she has tagged the ASICS brand "@asicsaustralia". She also tagged her location and the time as 6:37AM at the Queen Victoria Building (QVB), which is a famous historical shopping centre in Sydney's CBD. From this caption and the tags, a typical Instagram user or typical Follower of [the influencer] would understand that [the influencer] is at an event organised by ASICS (at the ASICS retail store in the QVB shopping centre) outside of ordinary shopping hours, and that [the influencer] was not shopping at the ASICS QVB store as an ordinary consumer at 6:37am in the morning, which is clearly outside of normal shopping hours and outside of the time when both the QVB shopping centre and the ASICS store would ordinarily be open (for completeness, the ASICS QVB store ordinarily opens at 9:00am).

The next images in the Instagram Post are close-up video images of the Shoes with the iconic Sydney Harbour Bridge in the background and [the influencer] has captioned the images with the words "The new @asicsaustralia ASICS GEL-KAYANO 29 officially launches in Australia today!". A typical Instagram user or typical Follower of [the influencer] would understand this close-up imagery of the shoe (with the Sydney Harbour Bridge in the background) and the caption wording to be an advertisement because the imagery and wording is of the type that would commonly be used in a launch advertisement for a new product, rather than in organic Instagram content. Further, from this caption, the typical Instagram user or typical Follower of [the influencer] is now aware that the Shoes are launching in Australia that day and, therefore, that [the influencer] could not have purchased the Shoes as an ordinary consumer (since stores would not yet have opened at 6:37AM and the Shoes were therefore not yet available to ordinary consumers) and that [the influencer] (as a popular Instagram running and fitness influencer and advertiser) has instead obtained the Shoes before they became available to the general public as part of an advertising or promotional arrangement with ASICS.

The next images in the Instagram Post are video images of [the influencer] going on a run to "test run" the new Shoes along with the Running Heroes running group. Each of the other members of the running group are also clearly wearing the new ASICS GEL-KAYANO 29 running shoes and are all also wearing matching ASICS branded running shorts and tops. Moreover, numerous of the runners are wearing identical ASICS outfits, which makes the group look like they're wearing an ASICS running "uniform", which makes it even clearer to a typical Instagram user or typical Follower of [the influencer] that [the influencer] is participating in an organised ASICS promotional event. [the influencer] has captioned the images with the wording "I took them for a run this morning with @runningheroesaunz" and, immediately below this wording, [the influencer] has tagged the brand "@asicsaustralia". A typical Instagram user or typical Follower of [the influencer] would understand from this imagery (e.g. due to each member of the running group wearing the ASICS Shoes and ASICS apparel "uniform"), brand tags and caption wording, that [the influencer] was participating in



a promotional group run event organised by ASICS and Running Heroes to “test run” the new Shoes (which [the influencer] and the other running group members had been provided by ASICS before they became available to the general public) on their product launch day.

The next image in the Instagram Post is a photo of [the influencer] enthusiastically jumping in the air wearing the Shoes (and ASICS shorts and a purple ASICS top, which are the same as those worn by several of the other running group members, that perfectly matches the purple Shoes) in front of the Sydney Harbour Bridge and [the influencer] has captioned the image with the wording “The FF BLAST Plus foam technology in the new ASICS GEL-KAYANO 29 creates a softer landing and a more energised toe-off than ever before in a GEL-KAYANO, for a lighter (K29 is 10g lighter in weight than the K28), bouncier run!”, which wording is identical to the Marketing Content. [the influencer] accompanies the caption with the brand tags @runningheroesaunz and @asicsaustralia along with the words “It’s a big YES from me! Love them!”. A typical Instagram user or typical Follower of [the influencer] would understand this image, captions and brand tags to mean that [the influencer] has a commercial or promotional arrangement with ASICS to “test run” the Shoes and provide her views on the Shoes on Instagram as part of the promotional launch of the Shoes that occurred that day. A typical Instagram user or typical Follower of [the influencer] would also expect that [the influencer] would keep the Shoes and running apparel after she had worn them on the run as one would not ordinarily expect [the influencer] to return the Shoes and running apparel to ASICS after she had worn them exercising on a group run outside (including because running shoes and apparel are not the type of product that one would expect to be returned to a brand owner after use c.f. a luxury car “test drive” by an Instagram influencer).

The soundtrack to the Instagram Post is an upbeat and uplifting song, consistent with ASICS’s brand image and its current “Live Uplifted” marketing tagline and marketing campaign. The soundtrack has the uplifting “sound and feel” of an advertisement. The majority of the images in the Instagram Post feature and “hero” the Shoes and not [the influencer] herself (c.f. [the influencer]’s organic Instagram content). Due to the Shoes being the principal focus of the Instagram Post, a typical Instagram user or typical Follower of [the influencer] would understand that the Instagram Post is an advertisement for the Shoes and ASICS, rather than being an organic post by [the influencer] to showcase or promote herself and her lifestyle.

Finally, AOP submits that, including for the above reasons, the Instagram Post is clearly distinguishable to a typical Instagram user or typical Follower of [the influencer] from the organic content posted to [the influencer]’s Instagram account for which no enticement has been provided by a third party. AOP submits that a typical Instagram user who views the Instagram Post (and not just [the influencer]’s regular audience or “followers”) would be able to quickly and clearly determine that they are viewing sponsored or advertising content as opposed to organic content. A review of [the influencer]’s organic content on her Instagram account immediately shows that it usually focuses on [the influencer] herself and her lifestyle (rather than a brand or product as per the Instagram Post, which focuses on ASICS and the Shoes); images of [the influencer] that show [the influencer] as the principal subject of the post (rather than images of a branded product as per the Instagram Post, which principally shows images of the Shoes as the main subject of the post); and does not contain captions,



tags of brands' Instagram accounts, or hashtags connected to brands or products (c.f. the numerous captions regarding ASICS and the Shoes, and the continual use of the @asicsaustralia brand tag on each and every image in the Instagram Post). Accordingly, and consistent with section 2.7 of the AANA Code of Conduct and section 2.3 (regarding AiMCO best practice recommendations) of the AiMCO Code of Practice, because the Instagram Post is clearly distinguishable from the organic content posted by [the influencer] (as outlined above), AOP submits that no further specific disclosure or specific advertising labels (e.g. #spon or #ad) should be required. Section 2.7 of the AANA Code of Conduct notes that: "There is no absolute requirement that advertising or marketing communication must have a label however it must be clear to the audience. If it is clear to the audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed." Section 2.7 of the AANA Code of Conduct also states: "Advertisers have flexibility as to how to ensure that material is distinguishable as advertising or marketing communication. Advertisers may use logos or brand names combined with other visual or audio cues where appropriate, such as background shading, outlines, borders, graphics, video or audio messages depending on the medium. AOP submits that, including due to [the influencer]'s extensive uses of the ASICS logo; her use of the ASICS brand tag @asicsaustralia on each and every image in the Instagram Post; her extensive use of images of the Shoes (and ASICS apparel) so that they are clearly the principal subject of the Instagram Post; her inclusion of the Marketing Content (which distinctly sounds like marketing and advertising content as opposed to organic content); and her captions regarding the Shoes and ASICS in the Instagram Post, it is clear to a typical Instagram user or typical Follower of [the influencer] that the Instagram Post is commercial in nature (particularly when contrasted with [the influencer]'s organic Instagram content, as described above) and, therefore, that no further disclosure or distinguishing element is required.

Outcome sought by AOP

AOP appreciates your and the Panel's consideration of this matter and the matters raised in this letter. For the reasons outlined above, AOP respectfully requests that the Panel dismisses the complaint that the Instagram Post is not clearly distinguishable as advertising, as required by section 2.7 of the AANA Code of Ethics.

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 material is not distinguishable as advertising.

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 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 tagging of the brand, and promotion of the shoes did amount to material which would draw the attention of the public in a manner designed to promote the brand.

With regards to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser’s response acknowledging that this was advertising material.

The Panel considered that the Instagram stories 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 noted that the first story included a box and bag with the Asics branding, as well as text tagging the brand. The Panel noted that all of the text in the subsequent stories used the brand tag and provided information on the shoe.

The Panel considered that the information provided about the shoe was factual and read like marketing material. The Panel considered that the combination of elements, including the brand tag, information on the shoe, and focus on the shoes, meant that the material was clearly distinguishable as advertising.



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.