



Ad Standards Community Panel
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AdStandards.com.au

Ad Standards Limited
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Case Report

1. Case Number :	0205-22
2. Advertiser :	Hanes Brands Inc
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

These Instagram stories posted to the @misskyreeloves Instagram account feature two separate images.

The first story is an image of a woman posing in front of a mirror. Superimposed over the image is the text "I hunted High and low for some shorter and comfy crew socks. These are the ones I have and loveeeee them!". A link with the words "socks on sale" is included.

The second story is an image of two baby body suits with the text, "Layered with these body suits under. Super stretchy and comfy. I use the ergo pouch PJ sleep suit guide, based on Denny's room temp". A link with the words "Body Suits" is included.

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:

We refer to the Ad Standards letters dated 31 August 2022 in relation to complaint reference no 0205-22 (Complaint). Hanes Innerwear Australia Pty Ltd (Bonds), a wholly



owned subsidiary of Hanes Brands Inc., owns the Bonds brand in Australia and New Zealand.

While the Complaint identifies item 2.7 of the Advertiser Code of Ethics (Code), we have reviewed the advertisements in question (the Advertisements) against all the provisions of Section 2 of the Code. We have carefully considered the Code and submit that Bonds has not breached any part of section 2 of the Code for the reasons set out below.

Bonds is not able to provide full details of the Advertisements as they are not something that we either created or approved prior to publication. They were only drawn to our attention as a result of the Complaint and due to their nature as posts in a third party's Instagram Story, are no longer live or retrievable by Bonds.

Images of the Advertisements that we have been provided are shown below and we can only assume that their content is correctly depicted in those images. Each is a post made by "[the influencer]". In the first post, the caption states "I hunted high and low for some shorter crew socks. These are the ones I have and loveeeee them!" followed by a link labelled Socks on Sale.

The second image shows the address of that link, being rstyle.me/cz-n/gseihpccwnx. In the second post, there is an image of two baby singlet suits, a link labelled Body Suits, and the wording "Layered with these body suits under. Super stretchy and comfy. I use the ergo pouch PJ sleep suit guide based on Denny's room temp." The link goes to rstyle.me/cz-n/gseiayccwnx.

The content of these posts was created by [the influencer]. The links used in the posts are created/shared by an international affiliate marketing company Reward Style. Content creators such as [the influencer] can join Reward Style's platform, select brands and links to products that they think are of interest to their followers, and post those links on their online channels with content that they create. If a follower clicks on the link, they will be taken to the relevant product.

The link will track their activity and register if they make a purchase as a result of following the link. A commission is then paid by Reward Style to the content creator based on the value of the product sale.

Bonds has no contract with the content creators, no visibility or control over the Content Creators that use the Reward Style platform or the links to Bonds' products, no control or visibility over the content they create and receives no notification that any such link has been used or content created.

This contrasts with other affiliate marketing programs where Bonds creates the links and content (including imagery and copy) and that content is then used by influencers on their pages. In such content, Bonds has control over the copy and includes tags such as #bondsad or #ad within that copy to clearly delineate the content as advertising material.



In relation to the Advertisements covered by the Complaint, Bonds contracts with a marketing company, Rakutan. Rakutan separately contracts with affiliate marketing platforms, such as Reward Style, and acts as a “commercial agent” to bring Bonds and Reward Style together. Bonds is not privy to the contract between Rakuten and Reward Style, nor the contract that Reward Style has with its Content Creators, such as [the influencer].

Bonds accepts Reward Style in to its program, but otherwise has no relationship with Reward Style. Where a sale is made by Bonds to someone who followed a link, Bonds pays a commission to Rakuten. Rakuten makes a payment to Reward Style and Reward Style makes a payment to the Content Creator/Publisher/Influencer. As such, Bonds is intending for Content Creators to use links to its products in their online content, but has no control or visibility over who they are and what they create.

Addressing the Complaint in relation to clause 2.7 of the Code, clause 2.7 requires “Advertising shall be clearly distinguishable as such.”

“Advertising” is defined in the Code as:

(a). 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,*

(b). but does not include:

- labels or packaging for products*
- corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy*
- in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel, station or network.*

In relation to the Advertisements in issue in this Complaint, we do not believe that they meet the definition of “Advertising” of Bonds. The first requirement in paragraph (a) of the definition of Advertising is not met, as the posts are not ones “• over which [Bonds] has a reasonable degree of control.” For that reason, we submit that Bonds has not breached clause 2.7 of the Code.

Should the Advertisements have contained content and links created by Bonds (as described in the alternate affiliate marketing programs described above), then Bonds should be regarded as having that level of control, but that element of the definition is not met in this case. Equally, the Advertisements in issue in this Complaint may well qualify as “Advertising” of the Content Creator, [the influencer] as they controlled the content, or perhaps Reward Style as they are named in the link and have the controlling contract with the Content Creator. We have been informed by Ad Standards that in other posts, this creator uses tags such as #ad or #sponsored.



It may have been an oversight on their behalf to have missed including a similar tag in these posts.

This case highlights to us a practical need for us to ensure that our affiliate marketing partners are both aware of Australian Advertising Standards, and take steps to impose those standards on their content creators. We are investigating how this can be achieved to try and ensure that our brand is not used by others in a manner contrary to standards. It may also highlight the need for separate consideration in the Code of who is an “Advertiser” when affiliate marketing is in play.

Turning now to address each of the other parts of Section 2 of the Code, the relevant provisions are as follows:

2.1 Advertising shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief.

2.2 Advertising shall not employ sexual appeal: (a) where images of Minors, or people who appear to be Minors, are used; or (b) in a manner which is exploitative or degrading of any individual or group of people.

2.3 Advertising shall not present or portray violence unless it is justifiable in the context of the product or service advertised.

2.4 Advertising shall treat sex, sexuality and nudity with sensitivity to the relevant audience.

2.5 Advertising shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.

2.6 Advertising shall not depict material contrary to Prevailing Community Standards on health and safety

Again, we do not consider the Advertisements to be “Advertising” when Bonds is listed as the advertiser based on the definition of that term in the Code. This means that none of these sections has been breached by Bonds. Putting that to one side, if the Advertisements are considered “Advertising” of [the influencer] or Reward Style, we suggest that they do not breach any of these requirements based on their visual and copy content.

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 post did draw attention of the public to the products through the depiction of the product and link to purchase the products. The Panel noted that the link in particular is a call to action to viewers and goes beyond simply providing requested information to followers by promoting the product and where to purchase.

The Panel noted the advertiser's response that a commercial relationship did not exist between the advertiser and influencer, and that the affiliate links were provided through a third-party company which is in turn engaged by a marketing company engaged by the advertiser. The Panel noted that in order for the third-party affiliate company to be able to provide links and commissions to influencers, the advertiser would have needed to authorise its marketing company to undertake an agreement with the affiliate company.

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 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 relationships with brands.

The Panel noted that the motivation for brands to sign up with third-party affiliate companies (or have their agents do so) is to have their products promoted by influencers. The Panel considered the fact that this arrangement was undertaken by a marketing company did demonstrate that the arrangement was made for the purposes of promoting the brand. As such, the Panel considered that for the purposes of the Code the advertiser did have a reasonable degree of control over the material posted by influencers using the affiliate links.



The Panel determined that the Instagram stories were 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 noted that the first story included a reference to the product and a link to where the product was on sale. The Panel noted that the link was larger than the other text in the story. The Panel considered that the use of a large link to a sale item was a clear indication that the material was advertising.

The Panel noted that the second story included a photo of the product which looked as though it could have been from a catalogue. The Panel noted that this story also had a large link to purchase the product. Overall, the Panel considered the combination of the stylised image and the large link to purchase the product did make the material sufficiently 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.