



Ad Standards Community Panel
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Case Report

1. Case Number :	0214-22
2. Advertiser :	LSKD Pty Ltd
3. Product :	Clothing
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	14-Sep-2022
6. DETERMINATION :	Upheld – Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram story posted to the @mylittlelolly account features a woman opening a box of clothing and then modelling the outfit. It includes the text, "So proud of @georgiestevenson and her collection with @lskd" *immediately tries it on*"

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:

The complainant's concern raises whether LSKD has breached section 2.7 of the AANA's code of ethics, which provides "Advertising shall be clearly distinguishable as such".

The offending Instagram stories, however, were not advertisements.

LSKD did a collection in collaboration with [designer]. [Designer] then sent products to [the influencer] on her own accord. [The influencer] then posted the products on her Instagram stories on her own accord. LSKD did not supply the products to [the



influencer], and there was no arrangement or other relationship between LSKD and [the influencer]. The offending Instagram stories, therefore, were not advertisements.

For completeness, the offending Instagram stories do not infringe sections 2.1 to 2.6 of the AANA's code of ethics because:

- 1. the Instagram stories do 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. the Instagram stories do not employ sexual appeal;*
- 3. the Instagram stories do not present or portray violence;*
- 4. the Instagram stories do not involve sex, sexuality or nudity;*
- 5. the Instagram stories do not use inappropriate language; and*
- 6. the Instagram stories do not depict material contrary to prevailing community standards on health and safety.*

The complaint should therefore be dismissed.

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 was not distinguishable as advertising.

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

Section 2.7: Advertising 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 focus on the products, and the tagging of the brand 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 the advertiser's response that the material was sent to the influencer by a designer with whom they had collaborated, and not directly by them. The Panel considered that both the designer and the brand had a commercial interest in promoting the product, and that it was within the brand's control to provide product to the third party to promote the product release. The Panel considered that actions taken by the designer to promote the collaboration were within the control of the advertiser.

The Panel noted that in the case of gifts to influencers the context in which this occurs 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, and sometimes provided with free product. 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 relationships with brands.

The Panel noted that the advertiser chose to collaborate with a designer and to provide the designer with product to distribute. The Panel considered that while there was no direct request or stipulation for the influencer to post about the products or to say anything in particular if she did, it is reasonable to assume that the motivation for an advertiser to provide anything for free to an influencer, directly or indirectly, is that they will post about it or otherwise draw the attention of their followers to the brand as the influencer did in this case.

For these reasons, the Panel considered that the Instagram 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 noted that the post caption included the words 'so proud of' which was a suggestion that the influencer had chosen to support the efforts of the designer's



partnership with the brand and was not a disclosure that she had received the product for free. The Panel considered that the material could be mistaken for editorial content and the relationship between the advertiser and influencer was not clear, obvious and upfront as required by the Code.

The Panel considered that the advertisement was not clearly distinguishable to the audience.

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

Ad Standards notes that this was an Instagram story and it was only visible for 24 hours.