



Ad Standards Community Panel  
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## Case Report

1. Case Number :	0215-22
2. Advertiser :	La Mer
3. Product :	Beauty Salon
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 @rachel.rowlings account features an image of a bottle of 'the concentrate' and the text "Thank you @lamer FAMILY [heart emoji]".

### 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 your email on 31 August 2022 in relation to a complaint received regarding [the influencer] and a post in relation to a LA MER product.*

*You have asked if there is any arrangement in place with [the influencer] for the production of social media content. We confirm LA MER has no arrangements in place with [the influencer] in relation to the production of social media content, and there is no paid partnership, sponsorship or promotional arrangement between [the influencer] and LA MER.*



*[The influencer] was sent a gifted LA MER product without any request, obligation or requirement to post any content. LA MER is committed to transparency in relation to influencer conduct, including compliance with the AANA Code of Ethics and Ad Standards' guidance.*

*In this context, the product gifted to [the influencer] was accompanied by a written note with an express disclosure reminder that states: "Thank you for your love of La Mer! We remind you to disclose in each post that you've received this complimentary gift to ensure full transparency to your followers. #GiftedbyLaMer".*

*The disclosure and hashtag recommended by LA MER was not used by [the influencer]. While LA MER has no control of the content of Instagram posts by third parties such as [the influencer], it has nevertheless reminded her of the importance of clear disclosure of any branded gifts in the context of the AANA Code of Ethics and Ad Standards' guidance.*

*We note that the post in question was an Instagram Story, which disappeared 24 hours after being posted and is no longer accessible. In these circumstances, including where LA MER takes all appropriate steps within its power to ensure that influencer posts featuring gifted LA MER products make clear and adequate disclosure, LA MER requests that this matter be closed.*

*LA MER welcomes any further guidance from Ad Standards and is committed to educating influencers on the importance of disclosure, transparency and compliance with the AANA Code of Ethics.*

*If this matter is considered by an Ad Standards Community Panel LA MER will provide any further details which may be necessary and helpful.*

## **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 story 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 photos of the product 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 product.

With regards to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser’s response that they had sent the product as a gift to the influencer with an instruction card stating, “We remind you to disclose in each post that you've received this complimentary gift to ensure full transparency to your followers. #GiftedbyLaMer” and the influencer had chosen not to use the hashtag.

The Panel noted that in the case of gifts or invitations 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 send product to the influencer, knowing that she has a large social media presence and is likely to post about the gift. The Panel considered that while there was no direct request or stipulation for the influencer to post about the product 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 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.

The Panel noted the advertiser had done the right thing in including instructions in the package with a suggested hashtag to use when posting about the gift, and these instructions had not been followed..

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 superimposed text on the post stated, “THANK YOU @lamer FAMILY”. The Panel noted that the text was very small and the brand tag was not capitalised like the other text. The Panel considered that stating ‘thank you’ was not the same as declaring that the product had been gifted, and that people viewing the advertisement may still assume that the influencer had purchased the product herself.

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**

La Mer takes these matters seriously and believes in the importance and integrity of proper advertising disclosures. La Mer respects the Community Panel’s determination and appreciates the Community Panel's assessment that La Mer “had done the right thing” with respect to providing timely and proper disclosure information for influencer gifting.