



**Ad Standards** Community Panel  
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**AdStandards.com.au**

Ad Standards Limited  
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## Case Report

<b>1. Case Number :</b>	<b>0063-21</b>
<b>2. Advertiser :</b>	<b>Tom Ford Beauty</b>
<b>3. Product :</b>	<b>Clothing</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>24-Mar-2021</b>
<b>6. DETERMINATION :</b>	<b>Upheld - Not Modified or Discontinued</b>
<b>7. IR Recommendation:</b>	<b>Panel to Reconsider</b>
<b>8. Date of reviewed determination:</b>	<b>9-Jun-2021</b>
<b>9. Determination on review:</b>	<b>Upheld - Modified or Discontinued</b>

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

This Instagram advertisement appeared on the @rozalia\_russian Instagram account and features the woman's hand holding up a bottle of the advertiser's product. The caption states "summer in a bottle @tomfordbeauty".

### THE COMPLAINT

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

*Clearly paid / sponsored ads over a period of time without acknowledgement to audience that it is sponsored. No transparency and no regard to law*

### THE ADVERTISER'S ORIGINAL 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 ORIGINAL 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 have sponsorship transparency.

The Panel viewed the advertisement and noted the advertiser did not respond.

***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: "any 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 in the advertisement and the use of the brand name 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 had not provided a response to the case. The Panel therefore was unable to confirm whether the advertiser had arranged for the Instagram post. However, the Panel proceeded on the presumption that the Instagram post was authorised by the advertiser, on the basis that Rozalia Russian is a well-known influencer who would be likely to post such material in a commercial arrangement.

### **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 while some followers of the influencer may be able to recognise that this post is most likely advertising, there was nothing in the wording of the post and no hashtags which clearly demonstrated that this is advertising material.

The Panel considered that tagging the brand on its own was not sufficient to clearly and obviously show that there was an arrangement between the brand and influencer.

## **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 did breach Section 2.7 of the Code, the Panel upheld the complaint.

## **THE ADVERTISER'S RESPONSE TO ORIGINAL DETERMINATION**

The advertiser has not provided a response to the Panel's determination. Ad Standards will continue to work with the advertiser and other industry bodies regarding this issue of non-compliance.

## **INDEPENDENT REVIEW**

### **Ad Standards received the following request for an Independent Review of the determination**

We refer to the Determination, which relates to an Instagram post by Rozalia Russian dated 14 January 2021 showing a bottle of Tom Ford fragrance available at <https://www.instagram.com/p/CKAUuIZATux/> (Instagram Post).

Thank you for your email dated 27 April 2021 in which you indicated that Tom Ford Beauty may provide a submission in relation to the complaint addressed in the Determination.

Prior to the Determination, we understand that Ad Standards attempted to contact Tom Ford International, in relation to a complaint being considered by the Community Panel.



Unfortunately, Tom Ford Beauty - the business responsible for Tom Ford fragrance, does not own or operate the email address— and was not aware of Ad Standards' attempts to contact Tom Ford International. Therefore, Tom Ford Beauty was not able to respond to the complaint prior to the Determination.

If Tom Ford Beauty had been aware of Ad Standards' communications, please be assured we would have responded promptly. We note that Ad Standards has previously considered complaints related to Tom Ford Beauty advertisements (references 0199/15; 0158/15 and 0101/16). In each instance Tom Ford Beauty, and not Tom Ford International, was contacted directly by Ad Standards and responded, comprehensively, in relation to each complaint.

Tom Ford Beauty apologises for any inconvenience caused by the communication challenges in relation to this matter, and appreciates the opportunity to consider and respond to the complaint notification from Ad Standards (dated 12 March 2021) and the Determination (dated 24 March 2021).

We note the Determination was sent to the email address noted above, on 21 April 2021.

For the reasons outlined below, and with the benefit of information not previously available to the Community Panel, Tom Ford Beauty requests that the Community Panel reconsider its decision that the Instagram Post breached section 2.7 of the AANA Code of Ethics (the Code).

To the extent necessary in these unusual circumstances, Tom Ford Beauty also seeks independent review of the Determination on the basis that new and additional relevant evidence is available which could have a significant bearing on the Determination. As outlined above, this information was not previously available to the Community Panel as Tom Ford Beauty was not aware of the complaint and did not have an opportunity to provide a response.

Unfortunately, in view of the communication challenges outlined above, this means there was a substantial flaw in the Determination and process by which the Determination was made, when this evidence is taken into account.

We request that the Determination be reviewed and a recommendation made to the Community Panel to dismiss the original complaint.

1.

Instagram Post

The Instagram Post features a photograph of a hand holding a bottle of Tom Ford Soleil Blanc Eau de Parfum (the Product) and is accompanied by the caption "summer in a bottle @tomfordbeauty".



Tom Ford Beauty did not request or expect Ms Russian to post about the Product and did not review the Instagram Post in advance of its publication. There is no current or past commercial relationship between Tom Ford Beauty and Ms Russian. In fact, Tom Ford Beauty does not engage in paid influencer partnerships or commercial arrangements in which it solicits or controls influencer content.

Instead, the Product was given to Ms Russian as a Christmas gift by Tom Ford Beauty per its custom of providing Christmas gifts as a thank you for being a fan of the brand.

In November 2020, Tom Ford Beauty contacted Ms Russian's management with a Christmas gift offering her an opportunity to select a few products of her choice. Ms Russian selected a lipstick, an eyeshadow palette and two fragrances (including the Product).

The gift was then delivered to Ms Russian with short, handwritten note: "In celebration of the holiday season, and as thank you for your ongoing support this year, please enjoy your personalised selection of Tom Ford Beauty holiday favourites. A very Merry Christmas from Tom Ford Beauty."

Importantly, this communication did not stipulate any conditions on the provision of the gift, made no request to Ms Russian, and did not require Ms Russian to feature any of the products on social media (or otherwise advertise or promote the products). Ms. Russian's later decision to post about the Product was entirely her own. Tom Ford Beauty was not aware of the Instagram Post prior to its posting and did not control or direct its content.

In fact, we note that the Instagram Post featured only one of the products gifted to Ms Russian; none of the others have been featured on Ms Russian's social media, consistent with the fact that she was under no obligation to promote any of the products in the gift.

## **2. Submission in relation to definition of "advertising"**

The Code defines "advertising" as:

*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*

In reaching its Determination, the Community Panel (without the benefit, at that time, of information from Tom Ford Beauty):



- assumed that the Instagram Post was authorised by Tom Ford on the basis that Ms Russian "is a well-known influencer who would be likely to post such material in a commercial arrangement"; and
- considered that the Product's placement and the use of the brand name drew "the attention of the public in a manner designed to promote the brand".

As described above, Tom Ford Beauty had no control whatsoever over the Instagram Post, and therefore, the Instagram Post does not constitute advertising. This submission is supported by the AANA Industry Practice Note on Clearly Distinguishable Advertising (the **Practice Note**). The Practice Note contains a list of scenarios and guidance in relation to the Code. Relevantly, one scenario states "*FabFaces sends a celebrity a set of make-up brushes for free without any stipulation that she must post comments about the products on social media.*" The guidance in relation to this scenario is: "*Where there is no control by FabFaces over any statements the celebrity may make then any resulting communication is unlikely to be considered advertising or marketing communication.*"

This Practice Note scenario is comparable to the scenario involving Tom Ford Beauty and Ms Russian because Tom Ford Beauty did not:

- (a) ask Ms Russian to promote the Product and did not attempt to place Ms Russian under any obligation to do so;
- (b) exercise any control over the Instagram Post (indeed, Tom Ford Beauty was not aware of the content of the Instagram Post until after it was posted).

Therefore, the Instagram Post is unsponsored user generated content and not "advertising" pursuant to the Code.

### **3. Submission concerning whether the material is "clearly distinguishable" as advertising**

The Community Panel focussed upon section 2.7 of the Code, which requires that "*Advertising should be clearly distinguishable as such*" and the Determination found the Instagram Post was contrary to section 2.7.

Tom Ford Beauty submits that, on the basis that the Instagram Post is not advertising, section 2.7 is not relevant to the Instagram Post and has not been breached.

### **Conclusion**

Tom Ford Beauty is committed to compliance with the Code.

We note that we have addressed those aspects of the Code that the Community Panel considered relevant. Please let us know if Ad Standards or the Community Panel considers any other aspect of the Code to be relevant and we would be happy to make further submissions.



We appreciate that the information set out above regarding the Instagram Post was unfortunately not available to the Community Panel at the time of the Determination, and we hope this information is now helpful in clarifying the position.

Our client is concerned that the Determination does not accurately reflect the application of the Code to the Instagram Post, nor the respective positions of Tom Ford Beauty and Ms Russian.

We request that Ad Standards or the independent reviewer request the Community Panel to reconsider its decision, amend the Determination and dismiss the complaint.

## **INDEPENDENT REVIEWER'S RECOMMENDATION**

### **Independent Review Decision**

I recommend that the Community Panel review its determination in this matter.

### **Complaint**

This was a complaint about a photo appearing on the Instagram account, 'rozalia\_russian', on 14 January 2021. The photo featured a woman holding a product container with a label that read:

TOMFORD SOLEIL BLANC EAU DE PERFUM

The caption on the Instagram page read:

*rozalia\_russian summer in a bottle @tomfordbeauty*

The complaint listed the reason for concern as:

*Clearly paid / sponsored ads over a period of time without acknowledgement to audience that it is sponsored. No transparency and no regard to law.*

### **Community Panel decision**

The Case Report of the Community Panel decision (dated 24 March 2021) named the advertiser as Tom Ford International.

The Panel considered whether the advertisement breached section 2.7 of the AANA Code of Ethics:

*2.7 Advertising shall be clearly distinguishable as such.*

The Panel commented that the advertiser had not provided a response to Ad Standards.

The Panel upheld the complaint, finding that the Instagram post was an 'advertising or marketing communication' that was not 'clearly distinguishable'. The Panel explained those two findings as follows:



- 'Advertising': The AANA Code contains the following definition of 'advertising':
- *... any 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 placement of the branded product in the photo aimed to draw the attention of the public to the product and to promote it.
- In the absence of any response from the advertiser, the Panel proceeded on the presumption that the advertiser had authorised the Instagram post, as Rozalia Russian was a well-known influencer who would be likely to post such material in a commercial arrangement.
- 'Clearly distinguishable': There was nothing in the wording of the Instagram post or hashtag to clearly demonstrate that the post was advertising material, or to show the arrangement between the brand and the influencer.

### **Request for review**

An application for review was submitted by Baker & McKenzie on 12 May 2021 on behalf of Tom Ford Beauty.

I accepted that the application set out a prima facie case for review on two grounds:

- *There was a substantial flaw in the Community Panel's determination:* The Ad Standards notification of the complaint was sent to an email address that is not owned or operated by Tom Ford Beauty. Baker & McKenzie submitted that Tom Ford Beauty would otherwise have responded to the complaint.
- *New and relevant evidence was presented that was not considered by the Community Panel and could have a significant bearing on its determination:* Baker & McKenzie submitted that the Instagram post did not constitute 'advertising' within the meaning of the AANA Code as Tom Ford Beauty had no commercial relationship with Ms Russian and was not aware that she would make an Instagram post about the product.





The complainant and the advertiser were notified that the application for review was accepted. The complainant was invited to make a further submission. No submission was received.

### **Analysis of the application for review**

*Should the Community Panel review its decision on the basis that there was there a substantial flaw in its decision?*

Baker & McKenzie's submission explained that the Ad Standards notification to Tom Ford Beauty that a complaint relating to it had been received was sent to an email address that it is not owned or operated by Tom Ford Beauty (As noted above, the Case Report named the advertiser as Tom Ford International.)

The submission advised that Tom Ford Beauty would have responded to the complaint had a notice been received. Tom Ford Beauty has responded in previous cases when notified by Ad Standards of a complaint relating to it.

The Ad Standards complaint handling procedures anticipate that an advertiser will be given a reasonable opportunity to respond to a complaint relating to it, consistently with the principles of procedural fairness.

It appears that has not happened in this case because of administrative error or oversight. There is no reason to doubt Baker & McKenzie's submission that Tom Ford Beauty did not receive notification of the complaint and would have responded had it done so.

I therefore recommend that the Community Panel review its decision in light of the evidence now presented in the Baker & McKenzie submission.

*Should the Community Panel reverse its decision on the basis of new and relevant evidence that was not earlier considered by the Panel?*

The Baker & McKenzie submission provides the following information that was not available to the Community Panel:

- Tom Ford Beauty had provided the product as a Christmas gift to Ms Russian, but did not request or require or expect her to advertise the product or feature it on social media
- Tom Ford Beauty was not aware that Ms Russian would make an Instagram post about the product and did not review the post in advance of publication
- There is no current or past commercial relationship between Tom Ford Beauty and Ms Russian
- Tom Ford Beauty does not engage in paid influencer partnerships or commercial arrangements to solicit or control influencer content.



It should be accepted that that information was not available to the Community Panel. The Case Report notes that, in the absence of any submission, the Panel had proceeded *'on the presumption that the Instagram post was authorised by the advertiser'*.

The issue then arising, in light of that new information, is whether it was reasonably open to the Community Panel to reach a decision different to the one that it did reach.

On the information provided, it is unlikely that Tom Ford Beauty was displeased that Ms Russian drew attention in an Instagram post to an expensive product that it provided free of charge to her. The Baker & McKenzie submission explains that the product was given to Ms Russian as a Christmas gift to thank her for her support during the year. She was earlier advised (through her management) that gifts may be given and that she could choose from a number of items.

It is clear that Tom Ford Beauty knew that Ms Russian was a well-known influencer who had supported its brand. While it may be correct to submit that Ms Russian's decision to post about the product *'was entirely her own'*, a reasonable assumption is that Tom Ford Beauty anticipated the possibility that Ms Russian would publicise one of the products given to her and in that way provide a potential commercial benefit to Tom Ford Beauty.

However, the AANA Code of Ethics applies a more restricted test for *'advertising'*. An important element of the test is that an advertisement is *'undertaken by, or on behalf of an advertiser or marketer [and] over which the advertiser or marketer has a reasonable degree of control'*.

Issues that can arise in applying that definition to *'influencer'* marketing and *'user generated content'* are discussed in AANA Practice Notes. The Practice Note on *'Clearly Distinguishable Advertising'* explains that the relationship between an advertiser and an influencer must be clear, obvious and upfront where the influencer *'accepts payment of money or free products or services from a brand in exchange for them to promote that brand's products or services'* (p 13).

The discussion of user generated content in that Practice Note explains that the Code *'does not apply to UGC on pages and sites which are not within an advertiser's reasonable control even if brands or products are featured'* (p 14). On the other hand, the advertiser is taken to have reasonable control of the UGC when it becomes aware of it, including through a complaint lodged with Ad Standards.

The Baker & McKenzie submission draws attention to a hypothetical example that is given in the AANA Industry Practice Note on *'Clearly Distinguishable Advertising'*. The Scenario and the AANA Guidance is as follows:



*Scenario:* FabFaces sends a celebrity a set of make-up brushes for free without any stipulation that she must post comments about the products on social media.

*Guidance:* Where there is no control by FabFaces over any statements the celebrity may make then any resulting communication is unlikely to be considered advertising or marketing communication.

In my view, it is open to the Community Panel to decide, in light of the AANA guidance and the information provided in the Baker & McKenzie submission, that Tom Ford Beauty did not have reasonable control over the action taken by Ms Russian in featuring a Tom Ford Beauty product in an Instagram posting. Absent that control, the arrangement between Tom Ford Beauty and Ms Russian may not fall within the definition of 'advertising' in the AANA Code of Ethics.

I therefore recommend that the Community Panel review its decision that Tom Ford Beauty was in breach of Section 2.7 of the AANA Code of Ethics on account of Ms Russian's Instagram post.

I note that it may also be open to Ad Standards and the Community Panel to resolve that this Instagram post, if repeated, may be classified as advertising on the basis that it is user generated advertising content that has been brought to an advertiser's attention.

## **THE DETERMINATION ON REVIEW**

The case was brought before the Community Panel for a second time in accordance with the Independent Reviewer's recommendation.

The Ad Standards Community Panel (Panel) noted the request for review of its decision and the findings of the Independent Reviewer.

In particular the Panel noted that the Independent Reviewer considered that there were substantial flaws in Panel's determination. Specifically the Reviewer noted that:

- Due to an administrative error Ad Standards communicated with an incorrect email address and the advertiser therefore was not able to respond to the complaint.
- The advertiser had provided additional information which may have a significant bearing on the decision.

Taking into account the Independent Reviewer's recommendations and comments, and the further information provided by the advertiser, the Panel noted that it needed to reconsider the case under Section 2.7 of the AANA Code of Ethics.

**Section 2.7: Advertising or Marketing Communication shall be clearly distinguishable as such.**



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 in the advertisement and the use of the brand name did amount to material which would draw the attention of the public in a manner designed to promote the brand.

The Panel considered whether the advertiser had a reasonable degree of control over the post.

The Panel noted the advertiser’s submission that they did not have control over the post as there was no request to or obligation imposed on Ms Russian to post about the free product, and that they were not made aware of the post until after it had been published.

The Panel noted the Independent Reviewer’s recommendation that the Panel reconsider whether the advertiser had reasonable control over the advertisement considering the advertiser’s submission.

A minority of the Panel considered that the advertiser did not have a reasonable degree of control over the advertisement as there was no formal agreement in place between the advertiser and the influencer about her posting the material. Further, a minority of the Panel considered that the advertiser did not request that the influencer post the product and did not have direct control over what was posted. The minority of the Panel considered that the influencer was in control of what was posted, not the advertiser.

The Panel noted that the Code does not define ‘reasonable degree of control’. The Panel noted that there is no indication of timeframes around which the advertiser can be seen to have control. The Panel noted that in the case of gifts to influencers the context in which the product is given 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 Ms Russian a gift knowing she was an influencer. The Panel considered that while there was no direct request or stipulation for Ms Russian to post about the gift, it is reasonable to assume that the motivation for an advertiser to provide free product to an influencer with whom they have a positive relationship is that they will post about the product or otherwise draw the attention of their followers to the brand as Ms Russian did in this case. The Panel considered that the advertiser has undertaken the activity of giving a gift to an influencer, and in choosing to send the gift they are exercising a degree of control, and the post did draw the attention to the product.

Taking into account all of the material now available to it, 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:

"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 post and no hashtags which clearly demonstrated the relationship between Ms Russian and the brand.

The Panel considered that tagging the brand on its own was not sufficient to satisfy the Code's requirements and that the post was not clearly distinguishable as advertising.

### **2.7 conclusion**

On review, the Panel determined that the advertisement was not clearly distinguishable as such and did breach Section 2.7 of the Code.



## **Conclusion**

Finding that the advertisement did breach Section 2.7 of the Code, the Panel upheld the complaint.

## **THE ADVERTISER'S RESPONSE TO UPHELD DETERMINATION**

Tom Ford Beauty thanks the Community Panel for considering its submissions and reconsidering its determination.

Tom Ford Beauty respects the Community Panel's process and decision; however, it respectfully disagrees that the Instagram post, which is the subject of the complaint, falls within the definition of Advertising in the AANA Code of Ethics. Tom Ford Beauty did not pay for the post and believes it did not have a "reasonable degree of control", or any control, over it given that it also did not request or direct the post. Tom Ford Beauty can therefore only request that the post be amended or removed and, respectful of the Panel's determination, Tom Ford Beauty has made these requests.

Ad Standards has confirmed that the advertisement has been removed.