

Case Report

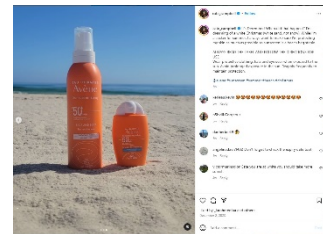
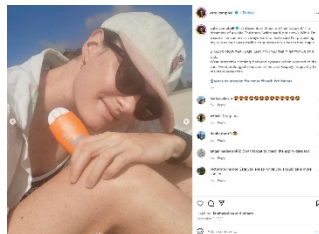
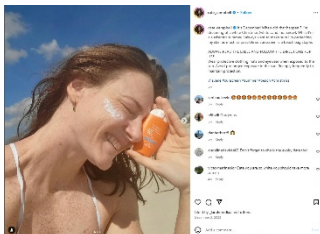
1. Case Number :	0004-24
2. Advertiser :	PIERRE FABRE GROUP
3. Product :	Health Products
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Decision:	7-Feb-2024
6. Decision:	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This instagram post by @cate_campbell features a woman posing in 2 photos with orange Avene bottles of 50+ sunscreen. The third photo in the post is of the sunscreen in the sand with a beach/ocean backdrop.



THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

Cate is an ambassador for the brand Avene (skincare sunscreen etc). She has posted what appears to be an ad marketing the sunscreen as a “beach bag staple” on 2nd Dec 2023, yet has not disclosed on the post this is an ad. Presumably she is being paid as an ambassador or receives these products for free yet #gifted or #ad is not disclosed on the post.

THE ADVERTISER'S RESPONSE

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

We refer to correspondence from Ad Standards dated 8 January 2024 in respect to a complaint about a social media post made on 2 December 2023 by Cate Campbell where Cate Campbell posted 3 images featuring our sunscreen product and tagging the brand (Instagram Post).

A copy of the Instagram Post is included in our response.

The Complainant has stated the following reasons for concern:

"Cate is an ambassador for the brand Avene (skincare sunscreen etc). She has posted what appears to be an ad marketing the sunscreen as a "beach bag staple" on 2nd Dec 2023, yet has not disclosed on the post that this is an ad".

The basis of the complaint is that the Instagram post raises an issue under Section 2.7 of the AANA Code of Ethics (the Code), namely that the Instagram Post is not clearly distinguishable as advertising.

As we have been asked to address all parts of Section 2 of the Code, we respond as follows:

(2.1 – Discrimination or vilification) –the Instagram Post does not contain material that discriminates against or vilifies any section of the community.

(2.2 – Exploitative and Degrading) –the Instagram Post does not contain material that employs sexual appeal which is exploitative or degrading to any individual or group.

(2.3 – Violence) –the Instagram Post does not contain material that is violent toward any individual or group.

(2.4 – Sex, Sexuality and Nudity) –the Instagram Post does not contain material that is sexual in nature.

(2.5 – Language) –the Instagram Post does not contain inappropriate, strong or obscene language.

(2.6 – Health and Safety) –the Instagram Post does not contain any unsafe or unhygienic behaviour or other material which is contrary to prevailing community standards on health and safety.

(2.7 – Distinguishable as Advertising) – As commented above, the basis of the complaint is that the Instagram Post raises an issue under section 2.7 of the Code.

The Code defines an “Advertising or Marketing Communication” as 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 product.

We do not dispute that the material is an advertising or marketing communication. The Instagram Post was generated by a third party, who is an ambassador of the product shown in the Instagram Post. Her ambassadorship with the brand is made clear at the top of her Instagram Page. In fact, the complainant is aware that Cate Campbell is an ambassador of the brand as that fact is specifically mentioned in the complaint.

It is a term of our engagement with Cate Campbell that social media content is approved and content is declared as a paid partnership or #ad. These words were inadvertently omitted from the Instagram Post.

Nevertheless, the issue is whether the post itself is distinguishable as advertising. The complainant raised a concern that the ad marketing the sunscreen appears to be an ad but has not disclosed on the post that it is in fact an ad. The complainant further states that it is presumed ‘she is being paid as an ambassador or receives these products for free yet #gifted or #ad is not disclosed on the post’.

Pages 13 and 14 of the AANA Code of Ethics Practice Note dated February 2021 (AANA Practice Note) provides a detailed explanation of the requirement to clearly distinguish advertising materials.

In particular, page 13 states that:

“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 up front to the audience and expressed in a way that is easily understood. (Examples provided include the inclusion of #Ad, Advert, Advertising, branded content, paid partnership, paid promotion).

However, where advertisers have made commercial arrangements for the branded products to feature as a product placement, and no other claim is made about the products, no label or disclosure may be required. Even though consumers may not realise the advertisers have made a commercial arrangement for their products to appear, the use of the branded products may be sufficient to distinguish the material as an advertisement or marketing communication. Further disclosure of product placement may not be necessary because there is a prevailing community view that audience do not need to be notified of this sort of product placement.”

The Instagram Post features three photos with the branded product placed prominently in each photo.

- *The first image features the product close to Cate Campbell's face with sunscreen across her cheek.*
- *The second image features a close up of Cate Campbell and the product.*
- *The last image in the Instagram Post features the products alone placed on sand.*

In each image, the products are the principal focus. The Instagram Post also includes the mandatory warning statement required to be included in advertisements promoting sunscreens and the brand is tagged.

We submit that a typical Instagram user or typical follower of Cate Campbell would understand that the prominent placement of the product is of a type that would be associated with advertising as opposed to organic Instagram content. A review of Cate Campbell's organic content published on Instagram account immediately shows that it is predominately focussed on herself (rather than a brand or product as per the Instagram Post).

Further section 2.7 of the Code 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."

We respectfully submit that the nature of the Instagram Post, together with the placement and focus of the products in the images, the tagging of the brand, Cate Campbell's known ambassadorship as well as the nature of the Instagram Post compared to her other organic content all combine in a way which clearly distinguishes the Instagram Post to a typical Instagram user or follower that the Instagram Post is commercial in nature without the need for any further disclosure or distinguishing element such as the inclusion of the word #ad.

Notwithstanding, Pierre Fabre appreciates the concern and immediately upon receiving the complaint, arranged for the Instagram Post to be edited to include the words "#ad" so that it is abundantly clear that the Instagram Post is an advertisement.

For the reasons outlined above, Pierre Fabre respectfully requests that the Panel dismiss the complaint that the Instagram Post is not clearly distinguishable as advertising.

THE DECISION

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 noted the advertiser's response that there was an agreement in place with the influencer for this content to be produced and considered that this 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 the advertiser's response that it was a term of their arrangement with the influencer that all social media content is declared as a paid partnership or #ad, but that these words were inadvertently omitted from the Instagram Post.

The Panel noted the advertiser's response that upon receiving the complaint, they have arranged for the post to be edited to include the words "#ad" so that it is abundantly clear that the Instagram Post is an advertisement.

The Panel noted that the product was the focus in all three images, with the third showing only the product. The Panel noted that the brand was tagged in the caption.

The Panel considered that the way that the influencer held the product in the first two images looked staged and gave the impression that the content was promotional rather than organic. The Panel considered that the text in the post read like an ad as it included a disclaimer about reading the label and following the product directions, as well as further comments on sun safety.

The Panel considered that the combination of elements, including the brand tag, sun safe information, and focus on the product, 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.