



Case Report

1	Case Number	0360/17
2	Advertiser	Eco Tan
3	Product	Toiletries
4	Type of Advertisement / media	Internet-Social-Inst
5	Date of Determination	23/08/2017
6	DETERMINATION	Dismissed

ISSUES RAISED

2.7 - Native Advertising Advertising not clearly distinguishable

DESCRIPTION OF THE ADVERTISEMENT

This advertisement appears on the Instagram page of Kat Risteska and features a review of her thoughts of Eco Tan's Coconut Body Milk. Kat has tagged @ecotan and #ecotan, amongst other hashtags. Eco Tan has shared the post on its Instagram page.

THE COMPLAINT

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

Not stating it is an ad! Obviously is as the brand Ecotan also shared on their page. Misleading!! Illegal!! In breach of AANA standards.

THE ADVERTISER'S RESPONSE

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

The complaint issued against Eco Tan Pty Ltd asserts that the instagram post by Kat Risteska is in breach of section 2.7 of the AANA Advertiser Code of Ethics by not "stating it is an ad".

In addition, the complaint asserts that Eco Tan's sharing of the post on our social media was also in breach of section 2.7.

Summary of Response

By way of summary of Eco Tan's position regarding this complaint, we assert that the instagram post in question does not meet the definition of "advertising or marketing communication" under the AANA Code of Ethics, given that Eco Tan Pty Ltd had no control over what Ms Risteska posted, how it was posted or whether it was posted at all.

Further, in the event that the Board consider the post to be "advertising or marketing communication", or our sharing of the post to be "advertising and communication", we assert that the material is clearly distinguishable as such given that the Eco Tan product label is in full view, Ms Risteska tags @ecotan and #ecotan in the post, and followers are directed to our instagram page.

Detailed Response

We address below the following two issues in accordance with the Best Practice Guideline on Clearly Distinguishable Advertising, in addition to citing examples from the Guidelines in support of our position:

- 1. Does the instagram post fall within the definition of advertising and marketing communication under the AANA Code of Ethics?*
- 2. In the event that the post is considered to be "advertising and marketing communication", is the material clearly distinguishable as such to the relevant audience?*

1. Advertising and marketing communication:

Although the material contained in Ms Risteska's instagram post draws the attention of the public in a manner calculated to promote our product, Eco Tan Pty Ltd had no control over what was posted, how it was posted or whether it was posted at all.

Given that Ms Risteska has a strong social media following, Eco Tan Pty Ltd provided her with free product and asked her to provide a genuine review of the product on instagram. She was not paid, except by way of the free samples. There was no obligation for Ms Risteska to write a review, nor was she directed with respect to what to say or how to say it. What she posted was merely her genuine opinion of the product.

Accordingly, the material contained in the instagram post does not fall within the definition of "advertising and marketing communication" under the AANA Code.

This is further demonstrated by the following two examples provided in the Best Practice Guideline on Clearly Distinguishable Advertising, which are the same scenario as the case in question:

Scenario 1: Ripperz provides its running shoes to Cougar, a well-known fitness guru with a strong social media following. The shoes are provided for free along with relevant brand handles and hashtags. Cougar often wears the shoes running and posts images every

morning to his social media account.

Guidance: Where there is no control by Ripperz over any of the images or statements Cougar may make, and there's no understanding that the shoes will feature in his social media, then any resulting communication may not be considered to be advertising or marketing communication.

Scenario 2: 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.

2. Clearly Distinguishable

In the event that the Board considers the instagram post in question to be "advertising and marketing communication", we assert that the material is clearly distinguishable as such to Ms Risteska's followers and to Eco Tan's followers when the repost was done to Eco Tan's instagram page.

As you can see from the instagram post image and text, the product label is in full view, and Ms Risteska tags @ecotan and #ecotan, clearly directing her followers to our page. Therefore, in light of the nature of the content, where it is placed, how followers are directed to the product, the theme, visuals and language used, the use of Eco Tan's brand name and logo, and the audience it addresses, followers would clearly be aware that the post is an advertisement.

This is further demonstrated by the following examples provided in the Best Practice Guideline on Clearly Distinguishable Advertising:

Scenario 1: The FabFaces make-up brand creates a #brighteyes campaign to highlight their new range of eye makeup, engaging a group of well-known social media influencers to appear in videos talking about moments that make their eyes bright. These videos are then shared by the brand using the hashtag.

Guidance: Where the content is then distributed by the brand via its own social media presence, it is likely to be clearly distinguishable to the relevant audience as a marketing communication.

Scenario 2: FabFaces arranges with the influencers to post the #brighteyes content on social media and use the hashtag.

Guidance: That content is likely to be considered a marketing communication and must be clearly distinguishable as such to the relevant audience, for example a tweet could include a tag @FabFaces or if there are a series of connected tweets in a short space of time, the final tweet could include a brand tag e.g. #FabFaces, #ad or similar wording.

Other Comments

Please note that we have currently removed the repost of Ms Risteska's post from our social media. We would, however, like to be able to use the image in the future as we do not believe this would be in breach of the Code for the reasons outlined above.

We have also been advised by Ms Risteska's agent that she has been the victim of extensive harassment on social media due to her relationship with her high profile actor boyfriend. On this basis, we believe the complaint may be vexatious and wish to highlight this to the Board in case similar complaints are made in relation to Ms Risteska.

Conclusion

We await the Board's decision regarding this complaint. As outlined above, we believe we are not in breach of the AANA Code of Ethics given that the Instagram post does not meet the definition of "advertising and marketing material", and if it did, the post is clearly distinguishable as such.

THE DETERMINATION

The Advertising Standards Board ("Board") considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the "Code").

The Board noted the complainant's concerns that the advertisement is not clearly identified as advertising material and is therefore misleading.

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

The Board considered whether the advertisement complied with Section 2.7 of the Code which requires that "Advertising or Marketing Communications shall be clearly distinguishable as such to the relevant audience."

The Board noted that this new provision came into effect on 1 March 2017. The Board noted the advice provided in the Practice Note to Section 2.7: "If it is clear to the relevant 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."

The Board noted that this Instagram advertisement appears on the page of the page of Kat Risteska, an actress/dancer/singer, and features a review of her thoughts on Eco Tan's Coconut Body Milk alongside an image of herself holding the product.

The Board noted the complainant's concern that the advertisement is not clearly identified as an advertisement.

The Board noted the advertiser's response that they sent Kat free samples of their product and asked her to write a review, but that they had no control over what Kat posted, or if she posted at all.

The Board noted that while the advertiser may not have control over what Kat posts about their product, in the Board's view sending a person free samples of a product amounts to a business transaction and therefore can be considered a form of payment, and whilst the advertiser cannot control what is actually written in the review it does have an element of control as it has requested a review and has reposted the material on its own social media account.

Finding that the Instagram post under complaint does meet the criteria of advertising and marketing communications the Board then considered whether it is clearly distinguishable as advertising material to the relevant audience.

The Board noted the wording of the advertisement and considered that it reads as though from a press release rather than an individual's actual thoughts on the product promoted. The Board noted the hashtag used in the advertisement, #ecotan, and considered that the advertisement is clearly promoting a tanning product as well as directing people to the advertiser's own social media presence. Overall the Board considered that the relevant audience of followers of Kat Risteska and other users of Instagram would be aware that this is a sponsored post for Eco Tan and is therefore clearly distinguishable as advertising material.

The Board considered that this Instagram advertisement is clearly distinguishable as advertising material to the relevant social media audience and determined that the advertisement did not breach Section 2.7 of the Code.

Finding that the advertisement did not breach the Code on other grounds, the Board dismissed the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

THE DETERMINATION ON REVIEW

ADVERTISER'S RESPONSE TO IR DETERMINATION

