

WHEN IS BONUS CONTENT CONSIDERED PAID CONTENT? WHO IS RESPONSIBLE WHEN INFLUENCERS POST ORGANIC CONTENT THAT IS NOT PAID FOR BY A BRAND?

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In our [recent article](#) from Winnie Lok, we outlined updates to the Australian Association of National Advertisers (AANA) Code of Ethics (the “Code”) and the updated rules applicable to influencers to make sure they disclose appropriately when content is paid for by brands.

In some recent determinations, the Ad Standards Panel (the “Panel”) looks to have been clarifying their position as to what they consider should be disclosed as advertising. These recent determinations need to be considered really closely, as they raise more questions than they answer in our view. In particular, under the Code, for content to be considered advertising it has to promote a product or brand, and the brand has to have some control over it. So, if an influencer posts about a brand but the brand has no idea about it, didn’t ask for it and didn’t pay for it, how can the brand be found to have had any control over that content? We are wading in tricky waters here, as detailed below.

The relevant rules

As background, we are particularly focused on three recent decisions of the Panel that all relate to Section 2.7 of the Code, which outlines that advertising content must be clearly distinguishable using proper disclosures such as hashtags.

The Code’s accompanying Practice Note specifically outlines as follows:

“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”.

To be clear, the Code does not prevent everyday people from posting organic content. However, the three recent rulings appear to blur the lines between organic content and paid content, and especially for influencers. Let’s look at the recent determinations in more detail.

TikTok on the Clock

A recent video posted to TikTok by influencer Leah Johnsen (leahjay_) was the subject of a complaint to Ad Standards (0222-21) and the Panel had to consider if Leah Johnsen did not properly disclose an affiliation with the relevant brand referenced within the post.

In the video in question, Leah Johnsen shows her daily hair removal routine and tells the audience that she wants an at home laser device and, upon looking at the Priceline website, she proceeds to buy a “Go Bare Skin” laser removal device. The rest of the video is a voice over of Leah Johnsen explaining why she loves the device and its features. Importantly, while Leah Johnsen had a paid relationship with the brand, the relationship did not extend to require posts be made to TikTok. A complaint was filed regarding the TikTok post on the basis it was not clearly identifiable as advertising and breached the Code. In her response to the complaint, Johnsen outlined that she was not paid for the video, because *“The tiktok isn’t an ad. I wasn’t paid to promote or share it (the video) on tiktok. I just wanted to create the content. It was for me and the brand wasn’t tagged so I can’t add the ad to it. I can confirm the TIKTOK video was not included in the agreement or paid for”*.

In other words, Johnsen was paid to promote a brand on certain media (in this case, it was Instagram), and she promoted the brand on other media for free. Does that make the “bonus content” she posted on TikTok advertising? According to the Panel it does, but this raises problematic questions in our view.

In the determination the Panel stated that the TikTok post was content that was ‘closely related’ to the commercial relationship between the influencer and the brand and that because the advertiser had *“undertaken the activity of entering into an arrangement with an influencer, and in so doing it is exercising a degree of control”*, that means that it is exercising a degree of control over the bonus content. This is a stretch in our view, but this same logic formed the basis of the Panel’s determination in two other similar cases, involving McDonald’s (0233-21) and Samsung (0207-21).

McDonald’s not Lovin’ It, and Samsung hamstrung

The McDonald’s matter involved a post on Instagram by Andrew Costello (Cosi), a South Australian TV and radio personality, on his @southaussiewithcosi Instagram profile. The post contained an image of Cosi with his wife and two children. The image tagged McDonald’s South Australia with the text *“@maccas_sa have been serving South Australians for 50 years. How cool is that? Tonight we are celebrating their birthday with delivery and my girls are wearing the @peteralexanderofficial limited edition maccas PJ’s”*.

The issue was that McDonald’s did not ask or pay for these posts and had no direct relationship with Cosi. While they had a partnership with the radio station in South Australia that Cosi had a show on, they did not have a partnership with the host or his TV show. McDonald’s had gifted the products to the radio station as a “gesture of goodwill” and to support the station.

There was no commercial arrangement or formal agreement relating to the post and no money changed hands. Again, the issue is one of control – if Cosi genuinely wanted to tell his followers about the brand, and McDonald’s had no idea it was happening, how was McDonald’s in control?

Again, the Panel determined that by sponsoring the radio station which employed Cosi, McDonalds had a requisite degree of control over content that was posted. This is another step removed from the Leah Johnsen case above, because in the Cosi case there wasn’t even a direct commercial relationship between the influencer and the brand.

The Samsung case was similar to the Johnsen case, in that the relevant content was a post by influencer Nadia Fairfax where she posted about two new Samsung phones, including the Samsung “Z Flip” and the Samsung “Galaxy Z Fold 2”. A complaint was made about the post and, in response, Samsung submitted that it did not have any reasonable degree of control over the post and thus it was not Samsung advertising.

Samsung agreed that there was a relationship between Ms Fairfax and Samsung and a quick search online indicates there are still images on Samsung Australia's Instagram page featuring the influencer promoting Samsung products. Samsung argued, however, that in this instance the brand was not involved in the post whatsoever and that it was effectively bonus content published by Ms Fairfax.

Again, the Panel extended their view of "control" to extend to anything an influencer does for a brand that it has a relationship with.

What does this all mean?

There is a lot to unpack in the above determinations. It is clear that clause 2.7 of the Code is important and ensuring that influencer marketing is not the "Wild Wild West" of the advertising world is also vital, especially given the growth of the space in recent times and its effectiveness in reaching audiences.

The questions raised by these recent determinations however are significant. Firstly, if a brand has no idea about a piece of content being published, how can they possibly be in "control" of it? Secondly, when an influencer is engaged they are generally engaged to produce specific work, to a specific brief, in relation to a specific product or brand, for a specific fee, to be published in specific media. Just because a brand has a commercial relationship with an influencer in relation to certain conduct does not mean that the brand has a relationship with that influencer in relation to all other conduct that the influencer may engage in. After all, there is an important distinction between a brand ambassador relationship and a social media influencer agreement – again, depending on the exact nature of the arrangement in each case – in that a brand ambassador is generally tied to a brand for a set period, and is the "face" of the brand. With social media influencers this is partly correct, but social media influencers are more akin to media vendors than brand ambassadors, in that their role is to speak directly to their followers and connect those followers with the advertisers.

In addition, if a brand is said to "control" everything an influencer does on all media just because it paid the influencer to post something on one specific media, what are the limits of this concept of "control"? Is it time-limited? So, if an influencer has a relationship with McDonald's in March 2021 to post three Instagram stories about some new vegetarian options, and then in 2022 the influencer visits their local McDonald's with their family and posts about how much they like the new coffee or how much they love the new shaker fries, is that advertising? Does McDonald's control that content because of the prior commercial relationship?

The next question is this: If organic or "bonus" content needs to be identified as advertising, our view is that it will need to be stated within the contract between the brand and the influencer. Problematically, if the organic content is within the contract, it is no longer "organic" or "bonus" and we begin to have a "chicken or the egg" situation. The brand will have to pay for material it did not want and did not budget for, and the influencer now has an inordinate level of control of the relationship.

Of course, no two influencer agreements are exactly the same and the expectation to provide disclosures on posts made by (as an example) an influencer who is more of a brand ambassador, and has a long term relationship with a brand lasting numerous years, will differ from those who have been paid to publish a small amount of content over a short time.

The upshot of these recent determinations is that Ad Standards apparently takes an expansive view of a brand's control over influencer behaviour, and influencers need to take

a strict view of anything they post about a brand, especially where they may have a commercial connection (or have had one previously) with that brand. Wherever there is or was any form of commercial relationship between a brand and an influencer, Ad Standards (rightly or wrongly) views any content posted by the influencer to be controlled by the brand. Stating the obvious to the Panel – i.e. “We had no idea about this material, how can it be our advertising?” - has not worked to date.

While influencers are their “own brands”, they are also people who have lives and post material relating to their lives. Brands and their agencies need to be mindful in constructing contracts with these influencers to ensure that the influencers know that any material relating to the brand client is likely to be viewed as that brand’s advertising, and treat their disclosures accordingly, even if the posts are outside the scope of the contract.

As the social media space grows and more determinations are made, it will be interesting to see if Ad Standards’ determinations continue on the current trend or if they will lean towards a solution that is more practicable.

Contact us

If you would like further information on advertising regulations, the AANA Code, Ad Standards or influencer contracts, please contact one of our experts.

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