

Advertising through Influencers

It is often fairly obvious that an advertorial in a newspaper or magazine is a piece of advertising, even without the 'advertising feature' label which is usually included.

It is perhaps less obvious to the average person whether communications posted by social influencers and vloggers on their own channels are pieces of advertising, rather than content which reflects the opinion of the influencer. The Advertising Standards Authority (ASA) considers content in an editorial space (such as a newspaper, or on an influencer's social media channel) to be advertising content if it is paid for by a brand and if the brand exercises some degree of editorial control over the content.

Payment would include free products and/or reciprocal arrangements, as well as money.

Whether a brand exercises a degree of editorial control over an influencer's content will depend on the facts in each case. However, the ASA has made clear that any of the following rights or restrictions could amount to a sufficient degree of control:

- control over the general messaging of the content, even if the specific wording is left to the influencer;
- a right for the brand to review and/or amend messaging;
- restrictions on the influencer from writing or posting about competitor brands;
- a stipulation that the brand would be the sole owner of copyright and other intellectual property rights in materials created during the promotion.

By way of an example, if a watch manufacturer gives a blogger a free watch on the condition that the blogger writes positively about the watch and the brand, it is likely that the ASA would consider that to be advertising content, despite the fact that the payment was non-monetary and that the actual wording of the content (if not the positive tone) is left to the blogger.

BUSINESS CONTACTS

Michael Lister
Partner
michael.lister@harbottle.com

Andy Millmore
Partner
andy.millmore@harbottle.com

Will Priestley
Associate
will.priestley@harbottle.com

Identifying marketing communications

If content posted by influencers falls within the definition of advertising content as set out above, it must be obviously identifiable as such to people who see it (CAP Code Rule 2.1).

Sometimes this is clear, for example in circumstances where a vlog or social post appears on a brand's own social media channels. However, where it is not clear from the context that something is an ad, an appropriate label should be used so it is clear.

What should the label say?

ASA guidance suggests labels such as '#ad' or 'advertisement feature' should be used.

Several recent ASA adjudications have considered labels which refer to content being sponsored, such as 'sp', '#spon' and 'sponsored post.' The ASA has clarified that it considers sponsored content to be content which has been paid for by a brand but over which the brand does not exercise editorial control. As such, labelling a piece of advertising content as sponsored content is likely to mislead people by suggesting that the brand involved had no editorial control over it and that the content is therefore primarily independent. Labels such as '#spon' should therefore be avoided in this context.

Similarly, labels such as 'brought to you by', 'in partnership with' and 'thanks to our friends at...' are ambiguous as to whether the content is advertising or is sponsored material, and so should be avoided.

Where should the label appear?

The label should be placed somewhere that people viewing the content will be able to see it before they choose to read, watch, or listen to that content. On social posts, for example the label could be included in the main body of the post copy.

The ASA has previously ruled that putting branded copy at the beginning of a video on a vlogger's YouTube channel is not sufficient, because, by pressing play, the viewer has already chosen to engage with the content. That the content is advertising needs to be made clear to the viewer before they make that decision.

The ASA has also held that text in the 'description' box in YouTube is not sufficient for these purposes, since it is not immediately visible when viewing a video on a tablet, app or mobile browser, and does not appear in video listings.

The onus to make branded content obviously identifiable as advertising is on the influencer just as much as it is on the brand. Brands should therefore make the influencer's obligations clear to them when agreeing the terms of a promotion.