

SELLING ON SOCIAL

HOW DOES ADVERTISING AND SOCIAL MEDIA CURRENTLY COEXIST?



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A scantily clad, blonde ex-Bachelor contestant lies sprawled on a day bed, seductively tousling her locks and averting her gaze from the lens of the camera. A bottle of Nads hair removal cream sits conspicuously on the day bed beside her, seemingly placed in the centre of the image for full impact. “My little secret for silky smooth legs,” the caption of the Instagram photo reads “@nads_hair_removal #The NadsImpact”. You could be forgiven for confusing the social media photo with a professional advertising campaign; the image is perfectly airbrushed and the reality TV star looks as alluring as any cover model would. The post prompts confusion: is this Olena the person promoting Nads hair removal cream? Or Olena the *savvy brand influencer, businesswoman or commercially shrewd model*? The problem is that this post appears among an array of personal photographs posted by the starlet, blurring the lines between product endorsement and reality.

Social media has become a platform of choice for brands, businesses and beautiful citizens alike to promote products, places and other people. Businesses can pay to have sponsored posts appear in Instagram or Facebook newsfeeds, but more often than not companies target individuals with significant “followings” to spruik products that are compatible with the “lifestyle” these individuals espouse. According to the social-media analytics firm Captiv8, in 2015 brands were spending over \$100million per month on social influencer advertising on Instagram alone, underscoring the prevalence of this form of online advertising.¹

This type of advertising can be inherently confusing for an undiscerning consumer mindlessly scrolling the Instagram feed; images posted by friends and celebrities seamlessly blur into one another and the distinction between the commercial and the personal is eroded. For a marketer, this is the benefit of advertising on social media; product placement and endorsements by influential posters seem more authentic and appealing to followers who relate to their particular personal brand.

Within Australia, there are no specific consumer laws or regulations that govern advertising and product endorsement on social media and many social influencers don’t disclose that their posts are sponsored. This means that a post like the above is not subject to any actual regulations that would require the poster to disclose a commercial relationship or sponsorship agreement with Nads. The primary issue resulting from the lack of regulation of advertising on social media is the ambiguity that is generated for the consumer. This problem is articulated by Peggy Kern, Senior Lecturer at the Centre for Positive Psychology, Melbourne Graduate School of Education, who highlights the hypocrisy that underscores the absence of a legal regime to govern social media advertising; “traditional media outlets are legally required to differentiate between editorial and advertisements or advertorials, and with social platforms becoming just as popular as print and digital media (if not more), particularly with the with the younger population, more clarity is desperately needed around paid endorsements.”²

¹ Captiv8, The State of Influencer Marketing (2015) <<https://captiv8.io/2015-Influencer-Report>>.

² Leigh Campbell, Current Laws and Moral Responsibility Around Social Media Product Endorsements (15 July 2016) The Huffington Post <http://www.huffingtonpost.com.au/2015/11/16/social-media-endorsements_n_8578328.html>.

Presently, “social influencers” can self-regulate their posts by adding #sponsored or a similar variation to explicitly disclose that a post has been paid for. However, this practice is not legally required and tends only to be utilised by accounts with a particularly large following, more likely to draw the attention of the ACCC for potential misleading or deceptive conduct. For example, online media company “Urban List Sydney” (which has 110K followers on Instagram), self regulates by using the hashtag #sponsoredlove for posts that have been paid for by cafes, restaurants or food vendors. Due to the size of its following, Urban List Sydney has an incentive to limit its liability and protect against any accusation of misleading conduct.

By contrast, ex-Bachelor contestant-come-social media figure, Anna Heinrich has 264K followers, but readily promotes an array of products without any sponsorship disclosure. These examples highlight the discrepancies that exist within the sphere of social media advertising and endorsements. Even when hashtags are used to disclose sponsorship they can often do so in an ambiguous way. Some celebrities utilise #sp, #spon or #ad (abbreviated versions of sponsored post, sponsored and advertisement, respectively) however these can be insufficient and obfuscate meaning. Sharyn Smith, CEO of Social Soup, a social media marketing agency, described the shortcomings of this approach by stating that “the average consumer would miss these short abbreviated labels... what we are looking at is the collision between advertising and authenticity as brands try to leverage the genuineness of influencers.”³

WHAT ARE THE CURRENT AUSTRALIAN REGULATIONS OF SOCIAL MEDIA ADVERTISING?

The ACCC publishes an online “Guide on Social Media” that explains the prohibition of false or misleading claims in advertising, as per ss 18 and 29 of the Australian Consumer Law (ACL).⁴ For those utilising social media accounts, a prohibition on misleading or deceptive conduct extends to posts or comments made by third parties, placing an obligation on companies and brand representatives to monitor the content that’s generated by their posts. This obligation was confirmed by the Court in *ACCC v Allergy Pathway Pty Ltd and Anor*.⁵

Due to the unique nature of social media, ss 18 and 29 of the ACL are unlikely to provide an effective remedy against misleading and deceptive conduct occurring on social media – including by reason of paid posts which are not identified as such. Unlike a protracted, months-long traditional media campaign for a product on television or in print media that can be halted or forcibly

altered to rectify a breach of the ACL, social media advertising is ubiquitous, transient and can be targeted to specific and small markets. Consequently, a reactive penalty may be an inadequate measure to prevent misleading or deceptive conduct before it impacts upon an audience.

Identification of concerning conduct is also an issue. The ACCC relies on individual “whistle blowers” to specifically report conduct which they suspect is misleading or deceptive. Individual brand influencers who receive one-off payments for product endorsements on a Facebook or Instagram post may be too innocuous and are likely to be too numerous to come to the attention of the ACCC. Moreover, the nature of social media is such that loyal “followers” often feel a connection to the individuals whom they follow and are potentially more likely to be interested in interacting with a post of an influencer that they admire, than querying whether or not a post is sponsored. The onus should not be on individuals to report potentially misleading or deceptive conduct on social media, rather the law should regulate this space by placing a positive obligation on brands and their representatives to disclose sponsorship and commercial incentives attached to posts from the outset.

The most high profile example of the ACCC criticising a company for its use of advertising on social media occurred in December 2014 when Australia Post used social media influencers to promote its services in the lead up to Christmas.⁶ In that instance proceedings were not initiated.

Outside of the ACCC, media regulation in Australia occurs through the Australian Communications and Media Authority (ACMA) and the Advertising Standards Bureau (ASB). The ACMA regulates television and radio advertising and the ASB provides various industry codes of practice to help regulate the industry.

The relevant ASB guideline for social media platforms is *AANA Best Practice Guideline: Responsible Marketing Communications in the Digital Space*.⁷ This guideline provides recommendations to encourage best practice for advertising or marketing material appearing on digital platforms. The AANA recommends strategies to manage consumer interactions and moderate user-generated comments in the digital space. Additionally, the AANA provides guidance for advertisers when marketing using advergames, apps, blogs, vlogs, tweets and reviews, and explains how to promote transparency, data protection and privacy and appropriate commercial electronic messaging. Ultimately however, the guideline is only a blueprint for best practice and does not impose any obligations on marketers and individual social influencers. Codifying the guideline would be an appropriate step in facilitating more effective regulation of digital platforms.

³ Bennett, above n 1.

⁴ Competition and Consumer Act 2010 (Cth) sch 2, s18-20

⁵ (No 2) [2011] FCA 74

⁶ Nic Christensen, Australia Post caught out over use of paid Instagrammer endorsements (24 December 2014) Mumbrella <<https://mumbrella.com.au/australia-post-caught-use-paid-instagrammer-endorsements-269324>>.

⁷ Best Practice Guideline – Responsible Marketing Communications in the Digital Space (September 2015) Advertising Standards Bureau <https://www.iabastralia.com.au/uploads/uploads/2016-01/1452214800_409ec2c8d44785fef8fee644c14ba8fc.pdf>.

HOW CAN THE LAW ADAPT?

The unique nature of social media advertising necessitates specific legal solutions. It is clear that regulation of advertising on social media platforms is required to protect consumers and ensure that those marketing on social media are held to the same standards as those on traditional platforms. Australia could consider applying a form of the current US model, where the Federal Trade Commission (FTC) has established an Endorsement Guide that applies to social media endorsements; and the not-for-profit group Truth in Advertising acts as a watchdog for those failing to comply with the FTC guidelines.

The Endorsement Guide provides guidelines to help marketers and “social influencers” ensure that their promotions on social media are truthful and not misleading. For example, the Guide mandates that endorsers should not discuss their experience with a product if they have not used it. Importantly, the Guide actively requires disclosure of factors, such as payment, that could affect a person’s assessment of the endorsement. The FTC enforces these truth in advertising laws and has the potential to file actions in the Federal District Court to prevent further misleading or deceptive conduct.

Additionally, the Truth in Advertising body monitors non-compliance with FTC guidelines. Although they do not have the ability to pursue charges, they are empowered to alert the FTC of contraventions. Kim Kardashian, one of the most influential celebrities on Instagram with a cool 94.2 million followers, came under fire in 2015 for promoting a morning sickness pill without disclosing her post’s sponsorship. This post, and approximately 100 similar others, caught the attention of The Truth in Advertising body who warned Kardashian that failure to remove the posts would result in an FTC investigation.⁸ Since then, Kim Kardashian and her equally famous sisters have adjusted their posts and hashtags to reflect their status as advertisements.

Like the US, Australia could benefit from having a codified legislative instrument to provide clear guidelines and corresponding penalties for brands and “social influencers” alike. Doing so would bring some much needed legal clarity to a murky, largely unregulated, yet increasingly important part of the media industry.

8 Kardashian/Jenner Database (23 August 2016) Truth In Advertising <<https://www.truthinadvertising.org/kardashianjenner-database/>>



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