

ASTELLAS PHARMA EUROPE v GENUS

Eczmol journal advertisement

Astellas Pharma Europe complained about a journal advertisement for Eczmol (chlorhexidine gluconate cream) issued by Genus. Eczmol was an antimicrobial emollient which could also be used as a soap substitute in the management of dry and pruritic skin conditions including eczema and dermatitis. Astellas supplied Locoid (hydrocortisone-17-butyrate) a topical corticosteroid available in a number of presentations, including a cream, for the treatment of steroid responsive conditions such as eczema, dermatitis and psoriasis.

Astellas stated that a series of three Locoid advertisements were created in early 2009. Printed materials were distributed to customers in May 2009 and the advertisements were first published in October 2009 (BMJ International, week commencing 5 October). The advertisements were also subsequently published in the New England Journal of Medicine.

Astellas first became aware of the Eczmol advertisement on 17 May 2010; it knew of only one version of the advertisement which as far as it was aware, first appeared in the BMJ on 8 May 2010, one year after the first release of the Locoid advertisements.

Astellas alleged that the overall copy, tagline and general layout of the Eczmol advertisement was similar to that of the Locoid advertisements. In particular:

- the image of a gentle animal with a shadow of a strong animal. This was highly conceptually similar to the three Locoid advertisements which respectively contained images of strong animals formed from images of gentle animals, soft toys or gentle insects. This visually emphasised the message 'gentle/strong' theme of each of the advertisements.
- the tagline 'Gentle yet strong', which was a direct inversion of 'Strong but gentle' used by Astellas. This directly linked into the similar animal imagery used in all of the advertisements.
- the two tonal strong purple background, which reflected the strong aubergine, green and burnt orange two tonal backgrounds in the Locoid advertisements.
- the various elements in the Eczmol advertisement had a very similar overall positioning to the various elements in the Locoid advertisements.

Astellas alleged that as a whole, the Eczmol advertisement could only have been copied from the Locoid advertisements.

Astellas stated that there could be no doubt that the same consumers would be exposed to both the advertisements. Given the strong visual and conceptual similarities between the advertisements and that Eczmol and Locoid were used to treat the same condition, there was a strong likelihood that those consumers would be misled or confused into believing that the products were effectively interchangeable.

There was a risk that the target audience would wrongly associate the products and consequently might treat their patient with the incorrect product. Astellas considered that there were significant public health consequences of such confusion.

The detailed response from Genus is given below.

The Panel noted that the Code stated that promotional material must not imitate the devices, copy, slogans or general layout adopted by other companies in a way that was likely to mislead or confuse.

The Panel noted that in the advertisements for Locoid and the advertisement for Eczmol there was a common theme in that animals were in some way portrayed as their opposites ie in the Eczmol advertisement a real lamb appeared to cast the shadow of an ox, hence the headline 'Gentle yet Strong' and in the Locoid advertisements images of strong animals were composed of multiple pictures of soft animals, hence the claim 'Strong but gentle topical treatment' which appeared beneath the image of the animal. The Eczmol advertisement stated that Eczmol was a cream with antimicrobial power to deal with *Staph aureus* associated with ectopic eczema. Details of its active ingredient and use as an antimicrobial emollient and soap substitute were included in the copy immediately below the brand name which was very clearly given in bold type. The Locoid advertisements had less copy; it was made it clear that the product contained hydrocortisone and it was stated that its safety profile was that of a mild corticosteroid. The Panel considered that although the advertisements shared a common theme, ie the use of animal opposites in relation to the words 'strong' and 'gentle', the execution of the concept was different.

The Panel noted that Locoid and Eczmol might both, on occasion, be used by the same patient. The two products, however, belonged to different therapeutic classes of medicine. In the Panel's view

the advertisements were unlikely to mislead readers such that they might believe that Locoid, a topical steroid, and Eczmol, an antimicrobial emollient, were interchangeable as alleged. Astellas had not produced any evidence to show that health professionals had been misled in this way.

The Panel noted that although there were some similarities between the advertisements it did not consider that the Eczmol advertisement imitated the Locoid advertisements in a way that was likely to mislead or confuse readers. No breach of the Code was ruled.

Astellas Pharma Europe Ltd complained about a journal advertisement (ref ECZ0110659) for Eczmol (chlorhexidine gluconate cream) issued by Genus Pharmaceuticals Ltd. Eczmol was an antimicrobial emollient which could also be used as a soap substitute in the management of dry and pruritic skin conditions including eczema and dermatitis. Astellas supplied Locoid (hydrocortisone-17-butyrate) a topical corticosteroid available in a number of presentations, including a cream, for the treatment of steroid responsive conditions such as eczema, dermatitis and psoriasis. Inter-company dialogue had failed to resolve the matter.

COMPLAINT

Astellas stated that a series of three Locoid advertisements were created in early 2009. Printed materials were distributed to customers in May 2009. The advertisements appeared on a regular basis in the BMJ International starting with the edition published in the week commencing 5 October. The advertisements also appeared regularly in the New England Journal of Medicine starting with the edition published in the week commencing 19 October. The publication schedule was currently planned to run until 2011.

Astellas considered that the Locoid advertisements were visually and conceptually unique and that there was nothing else like them on the general market, pharmaceutical or otherwise.

Astellas first became aware of the Eczmol advertisement on 17 May 2010; it knew of only one version of the advertisement. As far as Astellas was aware, the Eczmol advertisement first appeared in the BMJ on 17 April 2010, one year after the first release of the Locoid advertisements, and thereafter on a fortnightly publication schedule. Imagery from the advertisement also appeared on the website www.Eczmol.co.uk extracts of which were provided.

Astellas alleged there were many aspects of similarity between the Eczmol advertisement and the Locoid advertisements, including the overall copy, tagline and general layout. In particular:

- the Eczmol advertisement featured the image of a lamb (a gentle animal) with a shadow of

a bull (a strong animal). This was highly conceptually similar to three Locoid advertisements which respectively contained images of the following strong animals, a lion formed from images of kittens (gentle animals), a bear formed from images of teddy bears (soft toys) and a rhinoceros formed from images of butterflies (gentle insects). This visually emphasised the message 'gentle/strong' theme of each of the advertisements, discussed further below.

- the Eczmol advertisement used the tagline 'Gentle yet strong', which was a direct inversion of 'Strong but gentle' used by Astellas in all three Locoid advertisements. This directly linked into the similar animal imagery used in all of the advertisements.
- the Eczmol advertisement had a two tonal strong purple background, which reflected the strong aubergine, green and burnt orange two tonal backgrounds in the Locoid advertisements.
- the various elements in the Eczmol advertisement had a very similar overall positioning to the various elements in the Locoid advertisements including the animal in the top two thirds of the advertisement and the placement of the product descriptor (ie 'Eczmol contains...the skin' and 'Strong but gentle...corticosteroid').

Astellas alleged that as a whole, the Eczmol advertisement could only have been copied from the Locoid advertisements.

Given that Genus knew about the Locoid advertisements (when the Eczmol product manager attended a ceremony at which Astellas received an award for them in January 2010) and that the Eczmol advertisement was first published after that date, Astellas submitted that it was an imitation of the Locoid advertisements that was likely to mislead or confuse.

Both Eczmol, an antiseptic emollient and Locoid, a topical corticosteroid, were used to treat atopic eczema.

In inter-company dialogue Genus had suggested that the Locoid advertisements and the Locoid product were targeted to an international specialist/secondary audience. Genus sought to distinguish the target audience of Eczmol, which was considered to be UK GPs. Astellas had categorically informed Genus on several occasions that this was not the case. It was not possible to distinguish the target audience of the products in this way; Locoid was targeted at physicians of all levels, including those in the UK, particularly GPs. It was conceivable that both Locoid and Eczmol would be used to treat the same condition in one patient. Therefore, Genus' comment that the products were 'used in different contexts' was incorrect.

Given that the Locoid advertisements and the Eczmol advertisement were both targeted towards the same audience (practitioners at all levels, including GPs) and had the same market (the UK) there could be no doubt that the same consumers would be exposed to the advertisements. Given the strong visual and conceptual similarities between the advertisements and that the products were used to treat the same condition, there was a strong likelihood that those consumers would be misled or confused into believing that the products were effectively interchangeable.

Astellas considered that the arguments advanced by Genus, which sought to distinguish the advertisements, were semantic at best; GPs reviewing the advertisements would not stop to analyse the conceptual differences between 'strong but gentle' and 'gentle but strong'. They would also not break down the subtle differences in the 'characteristics' of the animals posited by Genus. Rather, in the context of the conceptually and visually similar advertisements that related to products that were used to treat the same condition, there was a risk that the target audience would wrongly associate the products and consequently might treat their patient with the incorrect product. Astellas considered that there were significant public health consequences of such confusion.

For the reasons above, Astellas alleged that the Eczmol advertisement was an imitation of the copy, taglines, and general layout of the Locoid advertisement in a way that was likely to mislead or confuse in breach of Clause 9.4 of the Code.

RESPONSE

Genus stated that an advertising agency [not the one employed by Astellas] was asked to develop an original advertising concept for Eczmol in September 2009. The Brand Concept Diagram was completed by 29 September and the 'Baary' (name of the lamb in the advertisement) concept was initially presented to Genus on 12 October. Revised concepts were then emailed to Genus on 21 October ie the day before the Locoid advertisement was first published in the UK in the New England Journal of Medicine. Genus and its agency thus had not imitated the devices, copy, slogan or general layout adopted by Astellas in a way that was likely to mislead or confuse.

For reasons not applicable to this case there was a subsequent delay in the launch of Eczmol and hence a delay in the advertisement being published.

The Eczmol Baary concept was a very clear conceptual image that simply depicted a 'real life' lamb that had the shadow of an ox. This image was specifically designed to represent the simplicity of the product and was very basic in design. It also represented the history of the product development from real life experience. This was conceptually very different from the complex design of the Locoid advertisements. The Locoid advertisement

used many small, soft furry animals to make up one large fierce, wild animal.

The animals (or toys) used in the Locoid advertisements could not be confused with 'real life' animals and therefore it seemed extraordinary that they could be considered a source of confusion between products or indeed any form of imitation.

The Eczmol advertisement simply stated 'Gentle yet Strong', the Locoid advertisement stated 'Strong but gentle topical treatment'. These statements were not directly related and therefore 'imitation' was not applicable. If the basis of the argument was around the two words then the entire industry must be held to account with statements such as 'fast and effective' or 'dual action'. These words were entirely suitable and reasonable as descriptors of unique selling points of both products and neither company should reasonably be able to claim a monopoly on their use. The fact that they were not even used in the same order, and the rhythm, tone and strapline lengths were so different added to the vexatious nature of this complaint.

The Eczmol advertisement incorporated two colour tones which were unblended and used to infer a horizon. If the horizon did not exist then the lamb could not appear to be standing on the ground therefore the shadow concept would not work. The Locoid advertisements had blended and shaded tones that were also far more vivid in nature. Again Genus contended that the two were effectively different.

There were two places of similar positioning between the advertisements and these were standard in most pharmaceutical advertisements which were in portrait orientation. The prescribing information was at the bottom and the logo was at the bottom right. The actual concept pieces of the advertisements differed as the placement of the animals and the tag lines were in very different positions. Again Genus found it difficult to see how this could be considered imitation.

Genus submitted that the initial concepts of the design and formats were completed before the publication of the Locoid advertisement and in reality the concepts were very different from one another.

Genus did not believe that there was any basis in the complaint that the Eczmol advertisement was likely to mislead or confuse the intended audience, or indeed anyone viewing these advertisements. The advertisements themselves were conceptually different and visually the colour schemes were not similar; health professionals were unlikely to confuse them.

Genus further argued that the main active ingredients within the two products had been prescribed in the UK for many years. Hydrocortisone was known to be a steroid by UK physicians and Locoid was positioned as a potent

steroid with the safety profile of a mild corticosteroid. The indication for Locoid was 'conditions responsive to topical steroids'. Locoid would therefore be prescribed and promoted against all of these conditions. In MIMS (July 2010) Locoid was correctly placed in the inflammatory skin conditions section. Chlorhexidine was known to be an antimicrobial or antiseptic. Eczmol, due to its 8% emollient base was indicated for dry and pruritic skin conditions and was within the eczema, pruritic, dry skin conditions section of MIMS. Eczmol was specifically promoted to combat *Staph aureus* in eczema.

Genus submitted that there was no reasonable likelihood of confusion between these two products as they were specifically promoted to improve differing conditions and underlying factors. Furthermore the trade names of the products were so different as to make confusion even more unlikely. As the audience was qualified health professionals the likelihood of any confusion decreased yet further and therefore Genus could not agree with the suggestion that there were any consequences for public health.

In addition to the above and despite ongoing promotion of Eczmol to UK health professional audiences, Genus had yet to hear any mention of Locoid from its customers. Therefore this alleged perceived risk did not appear to be seen in real life.

Genus made no comment regarding its belief that Locoid in this promotional exercise was directed to non-UK audiences as it appreciated that UK physicians might on occasions be exposed to non-UK advertisements, but it firmly believed that the above arguments were a robust rebuttal of the accusation.

For all the rationales included above, Genus was surprised by the ongoing nature of this complaint because the two advertisements were developed independently, the concepts were different in design, they were not visually similar and the products were for different indications.

Genus therefore denied a breach of Clause 9.4.

PANEL RULING

The Panel noted that Clause 9.4 stated that promotional material must not imitate the devices,

copy, slogans or general layout adopted by other companies in a way that was likely to mislead or confuse.

The Panel noted that in the advertisements for Locoid and the advertisement for Eczmol there was a common theme in that animals were in some way portrayed as their opposites ie in the Eczmol advertisement a real lamb appeared to cast the shadow of an ox, hence the headline 'Gentle yet Strong' and in the Locoid advertisements images of strong animals were composed of multiple pictures of soft animals, hence the claim 'Strong but gentle topical treatment' which appeared beneath the image of the animal. The Eczmol advertisement stated that Eczmol was a cream with antimicrobial power to deal with *Staph aureus* associated with ectopic eczema. Details of its active ingredient and use as an antimicrobial emollient and soap substitute were included in the copy immediately below the brand name which was very clearly given in bold type. The Locoid advertisements had less copy than the Eczmol advertisements. The Locoid advertisements made it clear that the product contained hydrocortisone and referred to its safety profile as that of a mild corticosteroid. The Panel considered that although the advertisements shared a common theme, ie the use of animal opposites in relation to the words 'strong' and 'gentle', the execution of the concept was different.

The Panel noted that Locoid and Eczmol might both, on occasion, be used by the same patient. The two products, however, belonged to different therapeutic classes of medicine. In the Panel's view the advertisements were unlikely to mislead readers such that they might believe that Locoid, a topical steroid, and Eczmol, an antimicrobial emollient, were interchangeable as alleged. Astellas had not produced any evidence to show that health professionals had been misled in this way.

The Panel noted that although there were some similarities between the advertisements it did not consider that the Eczmol advertisement imitated the Locoid advertisements in a way that was likely to mislead or confuse readers. No breach of Clause 9.4 was ruled.

Complaint received	2 July 2010
Case completed	9 August 2010
