

ADVERTISING AGENCY EMPLOYEE v LILLY

Advertisements on media website

An advertising agency employee alleged a breach of the Code in that an advertisement about maintenance treatment in advanced lung cancer had been posted on a creative media website which was not password protected; anyone in any country could access it. The Eli Lilly & Company logo was in the bottom right hand corner of the advertisement.

The detailed response from Lilly is given below.

The Panel noted that the advertisement at issue featured a photograph of an older woman who appeared to be helping a young girl to knit. Next to the lady's seat was a parking meter. Below the photograph was the question 'Why put a time limit on advanced lung cancer treatment?' Subsequent text explained that although traditionally, patients with advanced non-small cell lung cancer (NSCLC) were limited to a fixed number of first-line treatment cycles, new evidence showed that maintenance therapy controlled tumour growth and allowed people to maintain quality of life for longer. Readers were referred to a website which linked directly to the Lilly oncology website. From the homepage of that website, health professionals were directed to a page from where they were invited to download a slidekit on maintenance therapy in advanced NSCLC. The slidekit included the UK prescribing information for Alimta (pemetrexed) which was licensed, *inter alia*, for use in advanced NSCLC. In the Panel's view, the slidekit promoted Alimta. The homepage of the website directed patients to a page about Lilly oncology which provided corporate information about the company and also information about relevant patient websites.

The Panel noted Lilly's submission that, without its agreement and contrary to the terms of its contract, the advertising agency had submitted the advertisement for an award. The advertisement was subsequently selected as a finalist and thus appeared on the creative media website. The Panel noted Lilly's submission that the creative media website was an online advertising archive and community based in the US and intended for a specialised audience of media professionals.

The Panel noted that the advertisement had been placed on the US website, albeit indirectly, by the advertising agency engaged by Lilly; the advertisement referred health professionals to a website from which they could download a promotional slidekit for Alimta which included the UK prescribing information for the medicine. The Panel thus considered that the matter came within the scope of the Code.

The Panel acknowledged that creative agencies would want to enter their work for awards and that as a result, examples of such work might appear,

inter alia, on open access websites. The website in this case was directed specifically at the creative media and although anyone could access it, it was not aimed at the general public. In addition the website linked to the advertisement at issue provided information for health professionals and for the public; the two sections were clearly separated and the intended audiences identified. The Panel noted the creative media website's readership demographics and considered that in the particular circumstances of this case, Alimta had not been promoted to the public. No breach of the Code was ruled. High standards had been maintained and no breach of the Code was ruled including no breach of Clause 2.

An advertising agency employee provided a screenshot from a creative media website which featured an advertisement about maintenance treatment in advanced lung cancer. The advertisement featured the photograph of an older lady sitting in a chair apparently helping a child to knit. The Eli Lilly & Company logo was in the bottom right hand corner.

COMPLAINT

The complainant alleged a breach of the Code in that the website was not password protected and anyone in any country could access it.

When writing to Lilly, the Authority asked it to respond in relation to Clauses 2, 9.1 and 22.1 of the Code.

RESPONSE

Lilly submitted that the advertisement was developed as part of the company's campaign on maintenance therapy in non-small cell lung cancer (NSCLC). The campaign was intended to increase health professionals' awareness of the concept of maintenance treatment in NSCLC, which was an emerging treatment option when the advertisement was developed. It was a therapeutic approach by which one of the chemotherapy medicines given first-line or a new medicine was continued until progression of the disease. Randomized controlled trials had demonstrated that maintenance treatment could delay the progress of lung cancer and was now recommended in several treatment guidelines in oncology. Maintenance was intended to help patients with the symptoms of cancer, and, hopefully improve survival time.

The campaign was developed by Lilly for use between January 2013 and the end of January 2014. It had been distributed through a variety of communication channels.

The focus of the campaign and of the advertisement was not a medicine, but the concept of maintenance therapy for NSCLC as highlighted above. A number of approved treatment options in the maintenance setting were available for NSCLC from different manufacturers and no Lilly product was mentioned on the advertisement. It thus could not be claimed that Lilly had advertised any Lilly medicine to the public either directly or by implication. Lilly firmly believe that there was no prescription only medicine advertising visible to the public as alleged by the complainant or at all. Lilly denied a breach of Clause 22.1.

Lilly also denied that the display of the advertisement on the creative media website was in breach of Clause 9.1. The imagery used on the advertisement was of absolute good taste and appropriate for the target audience and also to be used in the public domain. Further, as highlighted above no prescription only medicine was promoted. Therefore, the use of a child could not imply that a treatment was licensed for children (no treatment was advertised). Lilly submitted that the advertisement was certified in compliance with Clause 14.

Lilly did not consider that it had breached Clauses 22.1 or 9.1 and as a consequence, it did not consider that the publication of the advertisement on the creative media website was such as to be likely to bring discredit upon, or reduce confidence in, the pharmaceutical industry.

In response to a request for further information, Lilly stated that the campaign was developed by an advertising agency engaged only to create the contents of the campaign, ie to develop the advertisements which formed part of it. It was not contracted by Lilly in order to place the advertisement on any media channels.

Lilly further noted that the terms and conditions of its contract with the agency included a confidentiality clause which required the agency to retain confidential information in strict confidence and not use it for its own benefit without Lilly's prior written agreement. Furthermore, the terms and conditions stated that 'Each party shall ensure that it and its activities under this Contract shall at all times comply with all applicable laws, regulations and industry codes [...]'.
Lilly submitted that it did not pay the advertising agency to publish the advertisement or other materials on the creative media website or on any other media channels, or otherwise authorise it to do so. The advertising agency caused the advertisement to be published on the creative media website on its own initiative.

The advertisement was submitted by the advertising agency, in the absence of any inputs or permission from Lilly and in breach of the above mentioned confidentiality obligation, for a healthcare award, an internet-based competition for creative works in the healthcare arena. The agency had advised Lilly that the winning works of the 2013 award were meant

to be published on a creative media website and another media website, from Monday, 18 November; and the advertisement was a finalist, not a winner, of the awards, and consequently it should not have been published on any of the above websites. However, the webmaster of the creative media website uploaded all of the 2013 healthcare awards finalist works onto the website on the same day in which the complaint was filed. This included the advertisement in question.

Lilly stated that it was unaware of all of the above.

The creative media website was an online advertising archive and community located in the US and owned by a media company. The creative media website was intended for a specialised audience of media professionals.

With regard to certification of the advertisement, as a conservative approach, Lilly considered that the advertisement needed certification. Although it did not promote any Lilly medicine, the advertisement was intended to raise health professionals' awareness of maintenance treatment in NSCLC. However, there was a statement on the certification which clarified this ie 'This concept is designed to promote the rational for the use of maintenance therapy in the treatment of advanced NSCLC. This material will not be used to promote ALIMTA [...] (Alimta was a Lilly medicine for treatment of NSCLC). Lilly considered that this statement clarified the non-promotional nature of the item.

PANEL RULING

The Panel noted that the advertisement at issue featured a photograph of a seated older woman who appeared to be helping a young girl to knit. Next to the lady's seat was a parking meter. Below the photograph was the question 'Why put a time limit on advanced lung cancer treatment?' Subsequent text explained that although traditionally, patients with advanced NSCLC were limited to a fixed number of first-line treatment cycles, new evidence showed that maintenance therapy controlled tumour growth and allowed people to maintain quality of life for longer. Readers were referred to a website which linked directly to the Lilly oncology website. From the homepage of that website, health professionals were directed to a page about maintenance therapy for advanced lung cancer and invited to download an educational slidekit on maintenance therapy in advanced NSCLC. The slidekit included the UK prescribing information for Alimta (pemetrexed) which was licensed, *inter alia*, for use in advanced NSCLC. In that regard, the Panel disagreed with Lilly's submission that the campaign did not focus on a medicine. In the Panel's view, the slidekit promoted Alimta. The homepage of the website directed patients to a page about Lilly oncology which provided corporate information about the company and also information about relevant patient websites.

The Panel noted Lilly's submission that, without the company's agreement and contrary to the terms of its contract, the advertising agency had submitted

the advertisement for an award. The advertisement was subsequently selected as a finalist and thus appeared on the creative media website. The Panel noted Lilly's submission that the creative media website was an online advertising archive and community based in the US and intended for a specialised audience of media professionals.

The Panel noted that Clause 24.2 stated that information or promotional material about a prescription only medicine which was placed on the internet outside the UK would be regarded as coming within the scope of the Code if it was placed there by a UK company or an affiliate of a UK company or at the instigation or with the authority of such a company and it made specific reference to the availability or use of the medicine in the UK. In that regard, the Panel noted that the advertisement had been placed on the US website, albeit indirectly, by the advertising agency engaged by Lilly; the advertisement referred health professionals to a website from which they could download a promotional slidekit for Alimta. The slidekit included the UK prescribing information for the medicine. The Panel thus considered that the conditions set out in Clause 24.2 had been met and so the Code applied.

The Panel acknowledged that creative agencies would want to enter their work for awards and that as a result, examples of such work might appear, *inter alia*, on open access websites. The website in this case was directed specifically at the creative media and although anyone could access it, it was not aimed at the general public. In addition the website linked to the advertisement at issue provided information for health professionals and for the public; the two sections were clearly separated and the intended audiences identified. The Panel noted the creative media website's readership demographics and considered that in the particular circumstances of this case, Alimta had not been promoted to the public. No breach of Clause 22.1 was ruled. High standards had been maintained. No breach of Clause 9.1 was ruled.

The Panel noted its rulings above and consequently ruled no breach of Clause 2.

Complaint received **20 November 2013**

Case completed **24 January 2014**