

CASE AUTH/3382/9/20

COMPLAINANT v CHUGAI

Granocyte Showreel YouTube video

A complainant, who described him/herself as a concerned UK health professional, alleged that a YouTube video (dated 2014, uploaded 2015) promoted Chugai Pharma UK Limited's product, Granocyte (lenograstim). Granocyte was indicated for the reduction of the duration of neutropenia in certain patients and the mobilisation of peripheral blood progenitor cells.

The complainant queried why Chugai had placed the video on YouTube and left it promoting to the public for the last five years. The complainant doubted that the video had been recertified every two years and alleged that the prescribing information was missing.

The detailed response from Chugai is given below.

The Panel noted Chugai's submission that the YouTube video in question featured a draft version of its October 2014 sales aid and that, seemingly without its knowledge, the video was created by a former (named) Chugai agency to showcase its work to potential new clients. The agency uploaded the video in September 2015 after the relationship between it and Chugai had ended. The Panel noted that claims for the Granocyte were visible and Chugai's submission that it had not found any evidence that it had granted permission to use the content for showreel purposes.

The Panel noted Chugai's submission that the text associated with the video on the agency's website which described the concept of the campaign and which the Panel noted appeared to be within a tab entitled 'Work', provided evidence that the target audience was not the public. The Panel noted, however, from correspondence from the agency, that a webpage link was created for the video content but, to the best of the agency's knowledge, it was never made live and the video was not part of its main website or linked to it.

The Panel understood that creative agencies would want to be able to show examples of their work. The Panel considered that there was a difference between putting examples of pharmaceutical promotional material on an advertising agency's website, in a section clearly labelled in that regard and putting the same on open access YouTube which was not limited to professional use. In that regard, the Panel noted Chugai's submission that YouTube had several settings for video storage including private settings so that videos could be hosted but only shared with named individuals via a private link.

The agency stated that the video was uploaded to YouTube as the means to show it but the video itself was always an unlisted link, which meant that it could not be found via standard search, subscriber feeds, user video tabs etc. The agency had intended for the video to be available only to named viewers for showreel purposes.

The Panel noted Chugai's submission that the agency did not know that the unlisted video was visible on YouTube until it began its own investigation. It appeared not to have been available from the agency's YouTube channel, but was unexpectedly 'indexed' by Google and could be found by searching Google for 'Granocyte' and then clicking on the 'videos' link. Chugai also noted that it could not find the video in YouTube alone by searching for the name of the agency, Granocyte or Chugai. It appeared to be available by using the specific link provided by the complainant. The Panel noted Chugai's submission that the agency had now removed the video as well as the page content and all Google links to it.

The Panel noted Chugai's submission that there was no deliberate intent by the agency or Chugai to make the video available to the general public.

The Panel noted that the complainant had not submitted his/her search strategy. The Panel considered that on the evidence before it, the balance of probabilities was that the video was not intended for general access as implied. It appeared that the complainant had accessed the video on an unlisted YouTube page which, unexpectedly and apparently unknown to Chugai or the agency, appeared to have been indexed by Google and had thus become searchable.

The Panel was concerned that it appeared that the agency had used pages of the draft Granocyte detail aid in the video at issue without Chugai's knowledge. The agency appeared to use the video to showcase its work to individuals by sharing a specific URL for it to be viewed on YouTube. In the Panel's view, based on the evidence before it, the video was a showreel for a creative agency and was not being used as promotional material or material covered by the Code; the requirement to recertify the material if still in use was thus not relevant. No breach of the Code was ruled.

Although the Panel was concerned that material that did not appear to meet the requirements of the Code could be accessed by selecting the video links following a Google search, it seemed reasonable to consider the video as material intended for targeted individuals to showcase the agency's work rather than being available widely to view on YouTube. That it had become more widely available was due to indexing by Google. The Panel thus decided that, in these circumstances, the lack of prescribing information did not amount to a breach of the Code as alleged. No breach was ruled.

Although it was unfortunate that it could be accessed via a Google search, despite only being intended for limited availability, the Panel decided that the video did not amount to Chugai promoting a prescription-only medicine to the public. No breach was ruled.

The Panel was concerned that indexing by Google, over which neither Chugai nor its agency had any control, meant that the video could be found via a Google search but, nonetheless, given its comments and rulings above, it considered that in the specific circumstances of this case the video was an agency showreel and, in that regard, Chugai had not failed to maintain high standards. No breach was ruled.

A complainant, who described him/herself as a concerned UK health professional, complained about a YouTube video about Granocyte (lenograstim). Granocyte was marketed by Chugai Pharma UK Limited and indicated for the reduction of the duration of neutropenia in certain patients and the mobilisation of peripheral blood progenitor cells.

COMPLAINT

The complainant provided a link to, and a screenshot of, a YouTube video; he/she considered that the material had been created for the UK company and that it appeared to promote Granocyte. The video, which dated from 2014, appeared to have been uploaded in 2015.

The complainant stated that he/she had no idea why Chugai had placed the video on YouTube in the first place, let alone left it promoting to the public for the last five years. The complainant doubted that it had been recertified every two years (on balance, it would be better that Chugai had poor quality control over its materials rather than it being intentional). The complainant alleged that the video also appeared to be missing prescribing information.

When writing to Chugai, the Authority asked it to consider the requirements of Clauses 4.1, 9.1, 14.5 and 26.1 of the Code.

RESPONSE

Chugai explained that Granocyte was a legacy product that received only limited promotion between 2016 and 2018 and no promotion since early 2018 – although a scientific service was still provided in support of the product.

Chugai stated that the video was not created by or for the company. It was a showreel created by a former (named) Chugai medical communications agency in 2015 to demonstrate its capabilities to potential new clients. The video included screenshots of a draft version of a UK Granocyte sales aid; claims for the product were visible. That the video featured a draft version of the sales aid was indicated by the inappropriate positioning of the generic name; the certified sales aid had the generic name correctly positioned next to the Granocyte brand logo. A copy of the certified sales aid (ref CPUKGRA0003a(2)) was provided.

The video lasted for 24 seconds and was set to music with no voice-over; it showed two pages of the draft sales aid. There was no real end to the video; it simply stopped and the music faded out in the background. There was no beginning or introduction etc, as might be the case in a promotional video. The brevity and style of the video was very strongly indicative of a 'demo' that was not intended for distribution to, or to be viewed by, health professionals (or the public).

Chugai explained that all of the agency's work was related to the health environment and therefore its customers were specialist companies within the pharmaceutical/healthcare sector. The agency was part of a larger network, but to the best of Chugai's knowledge, the wider elements of the network did not have a health focus. The agency had told Chugai that the video was not intended for either the public or for health professionals; the only target audience comprised those who might wish to commission services from the agency. Chugai provided a copy of a letter from the agency which explained that point.

Chugai stated that it had not worked with the agency since 2015; the last invoice it could identify for Granocyte was the completion of the sales aid in November 2014; it was likely that the video was created after that and the screenshots provided by the complainant indicated that it was uploaded to YouTube in September 2015, after Chugai ceased its relationship with the agency. In that regard, it might not be reasonable to hold Chugai accountable for anything that happened after Chugai terminated the relationship. Chugai noted that its records did not go back far enough such that it still had a record of the contract it had had with the agency.

Chugai stated that its investigations had failed to identify any evidence that the company knew about the video. Chugai had not reviewed the video and as it had not certified it either it could not be in breach for not recertifying it, therefore Chugai denied a breach of Clause 14.5.

Chugai stated that its investigation had failed to identify any evidence that it had granted permission to use the content for showreel purposes. However, Chugai noted that Case AUTH/2912/12/16, indicated that such agency showreels might be acceptable on websites and on secure links on YouTube.

However, Chugai was not aware that the video was on YouTube and in that regard noted that YouTube had several settings for video storage. Where most consumers were aware of the publicly accessible elements of the site with its millions of videos, it was less widely known that YouTube allowed private settings so that videos could be hosted but only shared with named individuals via a private link (as in Case AUTH/2912/12/16). The agency had confirmed that it had intended for the video to be available only to named viewers for showreel purposes and that it was not intended for the wider public. This was evidenced by the text that was associated with the video on the agency's website, which described the concept of the campaign that further evidenced that the target audience was not the public.

Chugai stated that the agency had identified the video (using the link provided by the complainant) and that it had now been removed. The agency was also not aware of the video being visible on YouTube until it began its own investigation. It appeared not to have been available from the agency's YouTube channel, but was unexpectedly 'indexed' by Google and thus was visible by searching Google for 'Granocyte' and then clicking on the 'videos' link. Chugai also noted that it could not find the video in YouTube alone by using search terms such as the name of the agency, Granocyte or Chugai. It appeared to only be available via the specific link provided by the complainant. Chugai it was satisfied that there was no deliberate intent by the agency or Chugai to make the video available to the public.

In that regard, Chugai submitted that the circumstances were similar to those in Case AUTH/2918/12/16 in which no breach of the Code was ruled even though the contents of a company server and draft health professional websites were unintentionally and inappropriately made visible to the wider general public. Given those circumstances, Chugai denied a breach of Clause 26.1.

As the video was not intended as promotional material for health professionals and was never used for such, and as Chugai had no knowledge of any health professionals ever having been exposed to the video, prescribing information was not necessary and so Chugai denied a breach of Clause 4.1.

Given that Chugai was not involved in the creation or use of the video, that its target audience comprised potential clients for Chugai's former agency, that it was almost impossible to find

without the link provided, and that Chugai denied all other breaches of the Code, Chugai accordingly denied a breach of Clause 9.1 as it did not believe its standards dropped below the appropriately high level to which it aspired.

PANEL RULING

The Panel noted Chugai's submission that the short YouTube video identified by the complainant featured a draft version of its sales aid which was eventually approved for use in October 2014. The video used the same images but did not include the non-proprietary name below the brand name as in the approved version of the sales aid. The Panel noted Chugai's submission that the YouTube video was not created by or for Chugai, or seemingly with its knowledge; it was created by a former Chugai agency to showcase its work and demonstrate its capabilities to potential new clients. The Panel noted that the agency uploaded the video in September 2015, after the relationship between it and Chugai had ended. The Panel noted that claims for the Granocyte were visible in the video and Chugai's submission that its investigation had failed to identify any evidence that it had granted permission to use the content for showreel purposes. The Panel noted that it was a well-established principle that companies were responsible for third parties working on their behalf even if they acted outside of the company's instructions. The Panel noted that Chugai did not have copies of the contract with the agency as its records did not go back as far as 2015.

The Panel noted Chugai's submission that the text associated with the video on the agency website which described the concept of the campaign and which, from the material provided by Chugai, the Panel noted appeared to be within a tab entitled 'Work', further evidenced that the target audience was not the public. The Panel noted, however, that correspondence from the agency stated that a webpage link was created for the video content but, to the best of its knowledge, the link was never made live and that the video was not part of its main website or linked to it.

The Panel understood that creative agencies would want to be able to show examples of their work. The Panel considered that there was a difference between putting examples of pharmaceutical promotional material on an advertising agency's website, in a section clearly labelled in that regard and putting the same on open access YouTube which was not limited to professional use. In that regard, the Panel noted Chugai's submission that YouTube had several settings for video storage including private settings so that videos could be hosted but only shared with named individuals via a private link.

The agency stated that the video was uploaded to YouTube as the means to show it but the video itself was always an unlisted link, which meant that it could not be found via standard search, subscriber feeds, user video tabs etc. The Panel noted Chugai's submission that the agency had confirmed that it had intended for the video to be available only to named viewers for showreel purposes.

The Panel noted Chugai's submission that the agency was also not aware of the unlisted video being visible on YouTube until it began its own investigation. It appeared not to have been available from the agency's YouTube channel, but was unexpectedly 'indexed' by Google and was thus visible by searching in Google using the term 'Granocyte' and then clicking on the 'videos' link in Google. Chugai also noted that it could not find the video in YouTube alone by using search terms such as the name of the agency, Granocyte or Chugai. It appeared to only be available by using the specific link provided by the complainant. The Panel noted Chugai's

submission that the agency had identified the video (using the link provided by the complainant) and it had now been removed as well as the page content and all Google links to it.

The Panel noted Chugai's submission that there was no deliberate intent by the agency or Chugai to make the video available to the public.

The Panel noted that the complainant had not submitted his/her search strategy. The Panel considered that on the evidence before it, the balance of probabilities was that the video was not intended for general access as implied. It appeared that the complainant had accessed the video which was intended for named viewers only on an unlisted YouTube page which, unexpectedly and apparently unknown to Chugai or the agency, appeared to have been indexed by Google and had thus become searchable.

The Panel was concerned that it appeared that the agency had used pages of the draft Granocyte detail aid which included product claims in the video at issue without Chugai's knowledge. The Panel noted that the agency appeared to use the video to showcase its work to individuals by sharing a specific URL for it be viewed on YouTube. In the Panel's view, based on the evidence before it, the video was a showreel for a creative agency and was not being used as promotional material or material covered by Clause 14.3 and thus, in the Panel's view, the requirement to recertify the material if still in use was not relevant. The Panel therefore ruled no breach of Clause 14.5.

Although the Panel was concerned that material that did not appear to meet the requirements of the Code could be accessed by selecting the video links following a Google search, it seemed reasonable in this case to consider it as material intended for targeted individuals to showcase the agency's work rather than being available widely to view on YouTube. That it had become more widely available was due to indexing by Google. The Panel thus decided that, in the particular circumstances of this case, the lack of prescribing information on the agency's showreel YouTube video at issue did not amount to a breach of the Code as alleged. No breach of Clause 4.1 was ruled.

Although it was unfortunate that despite only intending to be available from the agency to individuals given a specific URL the video could be accessed via a Google search, the Panel decided that the video, which could not be accessed from the agency's YouTube channel or via a general search on YouTube or without the specific URL, did not amount to Chugai promoting a prescription-only medicine to the public. No breach of Clause 26.1 was ruled.

The Panel was concerned that indexing by Google, over which neither Chugai nor its agency had any control, meant that the video could be found via a Google search but, nonetheless, given its comments and rulings above, it considered that in the specific circumstances of this case the video was a showreel for a creative agency and, in that regard, Chugai had not failed to maintain high standards. No breach of Clause 9.1 was ruled.

Complaint received **10 September 2020**

Case completed **29 March 2021**