

# ADVERTISING AGENCY EMPLOYEE v BAYER

## Advertisements on media website

An advertising agency employee alleged a breach of the Code in that advertisements for Sativex (delta-9-tetrahydrocannabinol and cannabidiol) in the treatment of spasticity associated with multiple sclerosis had been posted on a creative media website which was not password protected; anyone could access the website.

The detailed response from Bayer is given below.

The Panel noted that as a result of an advertising agency submitting the Sativex campaign for an award, and being shortlisted, the advertisements at issue had appeared on the creative media website. The website was a US-based, professional website; it was not directed at the general public. In that regard, the Panel noted that the complainant worked in an advertising agency. Data showed that 83% of those visiting the website were media professionals working in marketing (12%), design (19%) or advertising (52%).

The Panel noted that the advertisements for Sativex, a prescription only medicine, had been placed on the US website, albeit indirectly, by the advertising agency engaged by Bayer; the advertisements referred to the UK cost of the medicine and thus, indirectly, to the use of Sativex in the UK. 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 Panel considered it would be prudent if the potential for such submissions was addressed in the contract between the pharmaceutical company and its agency at the outset. The website in this case was directed specifically at creative media professionals and although anyone could access it, it was not aimed at the general public. The Panel noted the website's readership demographics and considered that in the particular circumstances of this case, Sativex had not been promoted to the public. No breach of the Code was ruled. High standards had been maintained. 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 advertisements for Sativex (delta-9-tetrahydrocannabinol and cannabidiol) in the treatment of spasticity associated with multiple sclerosis.

## 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 Bayer, the Authority asked it to respond in relation to Clauses 2, 9.1 and 22.1 of the Code.

## RESPONSE

Bayer submitted that reproductions of advertisements for prescription only medicines (POMs) were widespread in the pharmaceutical advertising media; they appeared in printed materials, related online sites and related professional accounts on social media without any restrictions on access by the public. Bayer did not know of any previous Code breaches which related to the display of POM advertising within such professional media. Bayer noted that in Case AUTH/2576/2/13 the Panel made clear its position that creative agencies and individuals might reasonably be expected to show examples of their work in an appropriate professional context.

In the complaint now at issue the complainant appeared to have downloaded Sativex advertisements from the US-based media website.

Three Sativex advertisements for health professionals appeared on the website because the Sativex UK campaign won an international award. Bayer submitted that there was no precedent for the Code being used to prevent creative healthcare advertising agencies, much of whose business was generated by advertising POMs, from entering such work for awards, nor from showing examples of their work in legitimate professional media, whether in the UK or, as in this case, elsewhere.

Bayer stated that the advertising agency which worked on Sativex in the UK, had undertaken a comprehensive internal investigation into this complaint and reported in full to Bayer. Bayer was satisfied that the agency's actions had complied with the Code and that it had made every effort to ensure all its personnel were fully trained on the Code.

Bayer noted that the agency had entered the most recent UK Sativex campaign to a long-established, US-based, international awards competition for advertising, design, interactive and communications. The agency was emailed on 11 November 2013 that the Sativex entries had been shortlisted. The email stated that there would not be an awards ceremony

this year but that all winning work would appear on a creative media website and two other reputable US-based professional creative media sites. It was announced on these sites on 19 November that Sativex had won a healthcare award, the agency became aware of the award on 20 November, the day that this complaint was submitted.

The creative media website was a global advertising archive and community run by a US media company, whose mission statement positioned it as 'the leading provider of jobs, news, education, events, and research for the media industry. Our mission is to help media professionals succeed and grow in their careers as we provide them with opportunities to acquire new positions, knowledge, skills, and connections'. The audience for the site was composed almost exclusively of creative media professionals, >90% of users identified themselves as such. Bayer noted that the complainant worked for an advertising agency and thus also fell within this professional category.

The creative media website made it clear that it was intended as a resource for creative professionals, encouraging critical comment on a wide range of advertisements, with an emphasis on sharing best advertising practice and recognising high creative standards.

Bayer submitted that the creative media website at issue and its linked Twitter feed were therefore well-established US creative professional sites, owned by a bona fide US media company, with a global audience of media professionals. These sites were not directed at the UK general public. They sought only to present and discuss the creative merits of the advertisement itself, not the merits of any product being advertised. There was clearly no intention to encourage any patient to request a prescription of Sativex from a UK doctor and, given the content and US base of the website, it seemed highly improbable that any UK patient would seek it out.

Bayer submitted that it considered that the site fell outwith the Code and that the advertising agency's submission of the Sativex campaign for the healthcare awards was consistent with reasonable business interests as endorsed by the Panel in Case AUTH/2576/2/13, in showing examples of its work in an appropriate professional context. There was no advertisement of Sativex directed towards the UK public and thus there was no breach of Clause 22.1.

Bayer noted that all of the agency's employees involved in creating work for pharmaceutical companies had to have a good understanding of the Code and other relevant advertising codes and standards. The agency trained all relevant new employees on the Code as part of their induction and held regular refresher and update training. Details were provided.

Further the current contract between Bayer and its agency for the purposes of Sativex marketing, stated, *inter alia*, that the agency should abide by the Code

and ensure that all advertising placed by the agency was legal, decent, honest and truthful.

Thus Bayer and its agency placed the highest value on adherence to the Code and this was reflected in the contractual arrangements between them. Additionally, Bayer could demonstrate that all personnel involved in both companies had been fully trained on the requirements of the Code. The company thus denied any breach of Clauses 2 or 9.1 of the Code.

Taking all the above into consideration, Bayer submitted that it had not breached the Code. The complaint did not fall within the scope of the Code and Bayer and its agency had maintained the highest professional and Code-compliance standards at all times.

## PANEL RULING

The Panel noted that as a result of the advertising agency submitting the Sativex campaign for an award, and being shortlisted, the advertisements at issue had appeared on the creative media website. The website was a US-based, professional website for the creative media; it was not directed at the general public. In that regard, the Panel noted that the complainant worked in an advertising agency. Data from the creative media website showed that 83% of those visiting its website were media professionals working in marketing (12%), design (19%) or advertising (52%). Eight percent were software developers and IT and 'others' accounted for the remaining 9%.

The Panel disagreed with Bayer's submission that the matter was not within the scope of the Code. 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 advertisements for Sativex, a prescription only medicine, had been placed on the US website, albeit indirectly, by the advertising agency engaged by Bayer; the advertisements referred to the UK cost of the medicine and thus, indirectly, to the use of Sativex in the UK. 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 Panel considered it would be prudent if the potential for such submissions was addressed in the contract between the pharmaceutical company and its agency at the outset. 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. The Panel noted the website's readership demographics and considered that in the particular circumstances of this case, Sativex 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**         **9 January 2014**

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