



Eli Lilly recovers confidential documents but loses secrets to the Web

By Staff writers, TechWeb | 16 February 2007 10:29 AEST | General News

A US federal judge in Brooklyn ruled on Wednesday that confidential internal documents dealing with the anti-psychotic drug Zyprexa must be returned to Eli Lilly & Company and enjoined the doctor and lawyer responsible for leaking them to the media from distributing them further.

"This was a win for Lilly, especially because the information was designated as confidential, pursuant to the protective order," says John P. Iwanicki, a lawyer with Banner & Witcoff, Ltd. in Boston.

But it's also a win for the Internet. Eastern District Court Judge Jack B. Weinstein's ruling rejected Eli Lilly's request to ban Web sites from publishing the documents based on the difficulty of enforcing such an order.

"To extend the reach of the injunction further [beyond those responsible for the leak] might involve the court in attempting to control a constantly expanding universe of those who might have, or will have, access by reason of the original breach," the ruling states. "That such an amplified injunction could be enforced effectively is doubtful. Even if enforcement were possible, on policy grounds the risk of unlimited inhibitions on free speech should be avoided when practicable."

It's a surprising recognition of the limits of judicial power online.

"This ruling makes it clear that Eli Lilly cannot invoke any court orders in its futile efforts to censor these documents off the Internet," said EFF staff attorney Fred von Lohmann in a statement.

The documents were initially provided by Eli Lilly in the course of litigation against the company by some thirty-thousand plaintiffs over the past two and a half years who claim that inadequate warnings about Zyprexa led to obesity and diabetes.

The court ordered the documents sealed based on the consent of the parties involved, to hasten settlements. The documents allegedly show that Eli Lilly withheld information from doctors about Zyprexa's potential side effects.

Eli Lilly has paid out over US\$1.2 billion to settle claims from those who took the drug.

As described in the ruling, Dr. David Egilman, an expert for the plaintiffs, James B. Gottstein, a lawyer based in Alaska, and Alex Berenson, a reporter for the *New York Times*, conspired to obtain access to the protected documents under pretense.

Upon obtaining the documents, Gottstein made them available electronically in an effort to, as he testified, "get them out [in a] way that would make it impossible to get them back." The released documents provided source material for several *New York Times* articles by Berenson about Zyprexa and have since appeared on various Web sites.

While the judge declined to forbid websites from presenting the leaked information, he may not be so lenient when it comes to sanctioning the individuals responsible. Iwanicki observes that while you can't make public information secret again, "Lilly will probably be pushing for some kind of adverse inference or penalty as a result of violation of the protective order. The court needs to take action to prevent this from happening in the future."




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