

Competition and IP Alert

Google is not liable for misleading and deceptive content in the sponsored links in its search results

WHAT YOU NEED TO KNOW

- The High Court has found that Google, in displaying sponsored links which themselves contained misleading representations, was not engaging in misleading or deceptive conduct.

WHAT YOU NEED TO DO

- The decision is clearly of great importance to Google and provides valuable guidance for other businesses which make available third party information, especially in online environments.
- ISPs, social media, and vertical search sites should all determine the extent to which they wish to be responsible for third party information and make that clear to users.

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The decision is clearly of great importance to Google and provides valuable guidance for other businesses which make available third party information, especially in online environments.

Although the various High Court judges analysed the issues in a variety of ways, the general proposition that emerges is that a person who accurately repeats what another person has said and does not adopt or endorse the statement does not engage in misleading conduct, even if the repeated statement is misleading.

The prohibition on misleading and deceptive conduct, formerly in section 52 of the *Trade Practices Act 1974* and now in section 18 of the Australian Consumer Law, has been part of Australian law for almost 40 years but, as the judgments in this case illustrate, its interpretation and application are not settled and there is a spectrum of approaches.

The case concerned a number of advertisements displayed by Google's AdWords program. Relevantly, the AdWords program enables advertisers to create,

change and monitor the performance of advertisements (sponsored links) which appear in conjunction with the organic results of a user's search conducted by the Google search engine. An advertiser specifies one or more keywords which will trigger the appearance of the sponsored link when those keywords are entered as search terms by a user of the Google search engine. The advertiser bids for the key words in an online auction.

A sponsored link has three elements:

- a headline which incorporates a link to a web page;
- the address of the web page to which the headline links; and
- some advertising text.

In some cases the advertiser may specify that the headline to the sponsored link will consist of the search terms entered by a user which correspond to the keywords selected by the advertiser. This ability is referred to as key word insertion.

Specifically, the case concerned four groups of advertisements referred to as the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisements and the Trading Post advertisement. Each of the advertisements was found

to contain representations that there was, contrary to the fact, a relationship between the advertiser and another business (for example a relationship between STA and Harvey World Travel) and that information regarding that other business could be found at the website of the advertiser when, in fact, such information could not be found.

The ACCC alleged that Google, by publishing and displaying the search results which included the sponsored links, had also engaged in misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act*.

The Trial Judge found that Google had not engaged in misleading or deceptive conduct. This was reversed on appeal to the Full Federal Court which unanimously held that Google had, itself, engaged in misleading and deceptive conduct. The High Court then unanimously reversed the Full Court's decision.

Primary judgment

A number of the Trial Judge's findings were crucial to the outcome in the High Court. They included:

- the relevant class of consumers who might be affected by the conduct will consist of people who have access to a computer connected to the internet and they will have some basic knowledge and understanding of computers, the web and search engines, including Google;
- ordinary and reasonable members of this class would understand that sponsored links are advertisements and different from organic search results;
- ordinary and reasonable members of the class would not have understood Google to have endorsed or to have been responsible in any meaningful way for the content of the advertisements but rather the advertisements were messages from the advertisers which Google was passing on for what they were worth; and
- although Google did not expressly disclaim making the misrepresentation, the way the advertisements were presented excluded that possibility.

In short, the Trial Judge concluded, in respect of each advertisement, that Google did not make the misleading representations in the sponsored links, the advertisers made those representations.

Full Federal Court decision

The Full Court considered that Google's role went beyond that of a mere conduit:

- Google created the message which it presents;
- that the Google search engine calls up and displays the response to the user's enquiry; and
- it is Google's technology which creates that which is displayed; and
- Google did not merely repeat or pass on the statement by the advertiser.

The Full Court concluded that, in displaying the sponsored links which contained the misrepresentations, Google had made the misrepresentations and that, accordingly it had engaged in misleading and deceptive conduct.

High Court decisions

The majority (Chief Justice French and Justices Crennan and Kiefel) approached the issues in this case on the basis that Google was an intermediary or conduit and that the case law developed in relation to the liability of intermediaries for transmitting misleading information was settled and directly applicable.

Their approach, the adoption/endorsement approach, was summarised as follows:

*".. **the question** whether a corporation which publishes, communicates or passes on the misleading representation of another has itself engaged in misleading or deceptive conduct **will depend on whether** it would appear to ordinary and reasonable members of the relevant class of consumers that **the corporation has adopted or endorsed that representation**". [emphasis added]*

In applying this approach the majority noted the following:

- Google has no control over a user's choice of search terms or an advertiser's choice of keywords;
- even with the facility of keyword insertion the advertiser is the author of the sponsored link;
- each relevant aspect of a sponsored link is determined by the advertiser;
- Google does not create, in any authorial sense, the sponsored links that it publishes or displays;

- on its face each sponsored link indicates that its source is not Google but an advertiser;
- ordinary and reasonable users of the Google search engine would have understood that the sponsored links were created by advertisers and would have also understood that representations made by the sponsored links were those of the advertisers and were not adopted or endorsed by Google.

These facts led the majority to conclude that Google did not itself engage in misleading or deceptive conduct or endorse or adopt the misleading representations it displayed on behalf of advertisers.

Justice Hayne also concluded that Google did not engage in misleading or deceptive conduct. His conclusion was based on the Trial Judge's finding that the user of the Google search engine would not understand Google to be making any misleading or deceptive representations. Accordingly, the ACCC's case, which depended on the proposition that Google had made the representations conveyed by the advertisements, must fail.

Justice Hayne however seriously departed from the majority in relation to the adoption/endorsement approach. In his view, the correct approach to analysing the position of conduits of information is not to ask whether particular representations were misleading or deceptive and, if so, whether they had been expressly, or by implication, endorsed or adopted by the conduit. Justice Hayne's approach is to focus on the conduct of the conduit. This approach leads him to the conclusion that, in the absence of other considerations, the publisher of a misleading advertisement has itself engaged in misleading and deceptive conduct. Justice Hayne states:

"when a print or electronic media corporation publishes a paid advertisement, the reader or viewer of the advertisement will very often recognise readily that what is seen or heard was devised and paid for by the advertiser. The reader or viewer will usually be given no reason not to take the advertisement at its face value. If the advertisement is misleading or deceptive, the reader or viewer will likely be misled or deceived. The conduct of publishing the advertisement has made it available for the reader or viewer. If no more is shown, there seems much to be said for the view that publishing the advertisement is conduct of the kind prohibited by section 52."

There is no doubt that the ACCC would prefer that this approach to analysing the liability of intermediaries for

misleading representations was the settled law in Australia.

Justice Hayne is fortified in this view by his analysis of the role of the so-called "publisher's defence" in section 85(3) of the Act. That section creates a defence to a contravention of section 52 if the defendant establishes that:

- their business is the publication of advertisements;
- the advertisement was received for publication in the ordinary course of business; and
- the publisher did not know and had no reason to suspect that the publication of the advertisement would amount to a contravention of section 52.

Justice Hayne contends that section 85(3) proceeds on the assumption that a publisher who publishes a misleading advertisement has engaged in misleading or deceptive conduct. To require that the publisher only contravenes section 52 when it has endorsed or adopted the content of the advertisement would, in the view of Justice Hayne "...strip section 85(3) of its content...because, whatever meaning is given to those expressions, they necessarily direct attention to questions different from the issues about knowledge of and reason to suspect a contravention that are posed by section 85(3)".

Justice Heydon largely adopted the majority's endorsement/adoption approach and also concluded that Google had not engaged in misleading and deceptive conduct.

In the course of his analysis, Justice Heydon took aim, at least implicitly, at the approach adopted by Justice Hayne, including his analysis of the role of section 85(3). Justice Heydon stated:

"There is an available argument, though it is a very extreme one, that unless the defence under s 85(3) is made out, any publication by one person of a misleading message created by another contravenes the misleading and deceptive conduct provisions...One weakness in the argument is that while it might have force in relation to the relatively narrow field with which s 85(3) deals – the publication of advertisements by persons whose business is to publish or arrange for the publication of advertisements – the problems that very wide absolute liability for misleading and

deceptive conduct create can arise in fields outside advertising".

After a close analysis of the Full Court's reasoning, Justice Heydon concludes pithily that the reasoning underpinning earlier cases:

"...rests on the fundamental idea that if a person repeats what someone else has said accurately, and does not adjust it, there is nothing misleading in that person's conduct".

The end point of Justice Heydon's analysis was that:

"The ACCC did not attack the proposition that if Google had expressly indicated that it was not making any representation inherent in the advertisements it would not have been liable under section 52. If that is so, then an exclusion by ... a necessary implication must have the same result".

Justice Heydon's analysis is clear and of considerable assistance in assessing the application of the prohibition on misleading and deceptive conduct to a wide range of circumstances involving the dissemination of information by an intermediary.

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