

Google Inc v Australian Competition and Consumer Commission [2013]

HCA 1: Misleading and Deceptive Representations

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Digital technologies have created new problems for the law. In recent years a number of cases have been brought against Google concerning its 'AdWords' program. This program enables advertisers to have their advertisements placed alongside what is deemed 'relevant content' on either the Google search engine or on its partner websites. Advertisements are matched to keywords chosen by the advertiser. When an internet user types in a search term that contains a keyword or visits a Google-partnered page featuring the keyword, the advertisement will appear on that page. These advertisements may take the form of 'sponsored links. A question which has arisen in these cases is whether search results which include undisclosed sponsored links constitutes conduct which is misleading or deceptive, or whether Google is merely a conduit to the information on its site. The High Court of Australia examined this question in the Google Inc v Australian Competition and Consumer Commission.

FACTS

Google Inc ('Google') provides the ability for advertisers to have their advertisements placed alongside what is deemed 'relevant content' on either the Google search engine or on its partner websites. This is achieved through a program, owned by Google, called 'AdWords'.¹ Advertisements are matched to keywords chosen by the advertiser. When an internet user types in a search term that contains a keyword or visits a Google-partnered page featuring the keyword, the advertisement will appear on that page.² These advertisements may take the form of 'sponsored links'. In order for an advertiser to have their advertisement appear, rather than that of another who has chosen the same keywords, advertisers bid for placements. This provides Google with its source of revenue.³ A combination of how high the advertiser's bid is and what Google considers to be the quality of

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1 Google, *Advertising on Google AdWords: An Overview* <https://support.google.com/adwords/answer/1704410?hl=en&ref_topic=3121763>.

2 Google, *Advertising on Google AdWords: An Overview* <https://support.google.com/adwords/answer/2497976?hl=en&ref_topic=3121763>.

3 Google, *Facts about Google and Competition* <<https://www.google.com/competition/howgoogleleadswork.html>>.

the advertiser's advertisement, website and keywords is used to determine which advertisements appear and their order.⁴

Between 2005 and 2006, STA Travel, Carsales, Ausdog Dog Training Australia and the Trading Post Australia had sponsored links generated on Google search pages.⁵ Each of these companies had headlines on their sponsored links that featured the names of other companies. STA Travel had sponsored links featuring the headlines of 'Harvey Travel' and 'Harvey World Travel'.⁶ Carsales had a sponsored link that was generated with the headline 'Honda.com.au'.⁷ Ausdog Dog Training Australia had a sponsored link that was generated with the headline 'Alpha Dog Training', the name of a different dog training company.⁸ The Trading Post had a sponsored link that was generated with the headline 'Just 4x4s Magazine'.⁹ All of these sponsored links appeared when a search was made for the companies named in those headlines. Except for Carsales, the names of the companies that appeared were the direct competitors of the link owners.

The Australian Competition and Consumer Commission ('the ACCC') brought an action against Google on the basis that these search results 'conveyed misleading and deceptive representations, and that, by publishing or displaying those search results, Google engaged in conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth)'.¹⁰ Section 52(1) of the *Trade Practices Act* provided that 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.'¹¹

PRIOR HISTORY

The ACCC sought declarations and injunctive relief against Google and Trading Post Australia in the Federal Court of Australia.¹² The primary judge, Nicholas J, found that the advertisements falsely represented a commercial association between the advertiser and the businesses that had been searched for. Further, Nicholas J found that the advertisements falsely represented to the searcher that by following the link, they would be taken to the website of the business for which they had searched.¹³ Despite this, Nicholas J dismissed the ACCC's application

4 Above n 2.

5 *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1.

6 Ibid [36].

7 Ibid [40].

8 Ibid [44].

9 Ibid [49].

10 Ibid [1].

11 Trade Practices Act 1974 (TPA) has been renamed the Competition and Consumer Act 2010 (Cth) (the CCA). The Australian Consumer Law (or ACL) forms Schedule 2 to the CCA. Section 52 of the TPA is now section 18 of the ACL.

12 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd and Google Inc* [2011] FCA 1086.

13 *Google Inc v ACCC* [2013] HCA 1 [2].

against Google. The judge found that Google had not engaged in misleading and deceptive representations themselves. This was, Nicholas J explained, because the relevant class of persons

will not necessarily have a detailed familiarity with the Google search engine but they should be taken to have at least some elementary understanding of how it works. It is not possible to use a search engine in any meaningful way without knowing something about how it operates.¹⁴

The ACCC appealed to the Full Court of the Federal Court. The Court, consisting of Keane CJ, Jacobson and Lander JJ, found that ‘[t]he reaction of the ordinary and reasonable member of the class is not solely determinative of the issue.’¹⁵ Rather than Google merely being a conduit for the advertisers, the Court determined that ‘what is displayed in response to the user’s search query is not the equivalent of Google saying here is a statement by an advertiser which is passed on for what it is worth.’¹⁶ The Court held that because it was Google’s technology that created what was displayed, as the search engine generates a response to a user’s request, Google in fact ‘created the message which it presents’.¹⁷ The Court pointed to the following quote from *Gardam v George Wills & Co Lt*.

The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation.¹⁸

The Court argued that because Google was involved in creating the message, they were involved in making the representation. As such, the Full Court found that Google had contravened s 52 of the *Trade Practices Act* and allowed the ACCC’s appeal. As a result, Google appealed to the High Court of Australia.

JUDGMENT

French CJ, Crennan, Kiefel, Hayne and Heydon JJ, sitting on the High Court, unanimously ordered that the appeal be upheld with costs, setting aside the orders made by the Full Court of the Federal Court of Australia and the orders made by the Federal Court, and in their place, dismiss the appeal to the Full Court of the Federal Court of Australia with costs. French CJ, Crennan and Kiefel JJ submitted a joint judgment, while Hayne and Heydon JJ both submitted separate judgments.

¹⁴ *ACCC v Trading Post* [2011] FCA 1086 [122]

¹⁵ *Australian Competition and Consumer Commission v Google Inc* [2012] FCA 503 [89].

¹⁶ *Ibid* [95].

¹⁷ *Ibid*.

¹⁸ *Gardam v George Wills & Co Lt* [1988] FCA 194 [110].

French CJ, Crennan and Kiefel JJ

French CJ, Crennan and Kiefel JJ found that in the case law pertaining to intermediates or agents who publish, communicate or pass on the misleading or deceptive representations of another, the test for whether that intermediate or agent has themselves engage in misleading or deceptive conduct is ‘whether it would appear to ordinary and reasonable members of the relevant class that the corporation has adopted or endorsed that representation.’¹⁹

Their joint judgment was that the primary judge’s claim that ‘ordinary and reasonable users would have understood the sponsored links to be statements made by advertisers which Google had not endorsed’ was correct.²⁰ Further, they found that in relation to advertising of this nature, Google is only a means of communication between advertisers and consumers, acting in the same way as ‘newspaper publishers (whether in print or online) or broadcasters (whether radio, television or online), who publish, display or broadcast the advertisements of others.’²¹ Though a search engine is different due to the fact that it provides information based on a user’s request, this does not then make the search engine ‘the maker, author, creator or originator of the information in a sponsored link.’²²

Hayne J

In his judgment, Hayne J argued that the ACCC failed to make out their case ‘that Google made the representations conveyed by the advertisements.’²³ Thus, it was not necessary to determine whether Google endorsed or accepted the messages of the advertisements, being required by neither statute or case law. Google simply could not be understood as engaging ‘in conduct that is misleading or deceptive’²⁴ because no user would understand Google to be making the representations which the trial judge found to be misleading or deceptive.²⁵

Heydon J

Heydon J found that the Full Court of the Federal Court had made an error of law and an error of fact in their reasoning.²⁶ Heydon J asks whether it is ‘the case that traders in Google’s position will necessarily have contravened s 52(1) of the TPA if they do anything more than “repeat or pass on” material?’²⁷ The view that they do is an error of law. When quoting from *Gardam v George Wills & Co Ltd*,

19 Ibid [15].

20 Ibid [70].

21 Ibid [69].

22 Ibid.

23 Ibid [82].

24 *Trade Practices Act 1974* (Cth) s 52 (1).

25 *Google Inc v ACCC* [2013] HCA 1 [82].

26 *Google Inc v ACCC* [2013] HCA 1 [147].

27 Ibid [148].

Hayne J notes that the Full Court did not include the sentence

When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation.²⁸

Heydon J stated that no ordinary and reasonable members of the relevant class would have regarded Google as adopting the advertisements, referring to the test in *Butcher v Lachlan Elder Realty Pty Ltd* for assessing an agent's conduct: 'what a reasonable person in the position of the purchasers, taking into account what they knew, would make of the agent's behaviour.'²⁹

The error of fact the Full Court had made, according to Heydon J was in relation to the Court's position that Google created the message that it presents in the form of the sponsored links. While Google may have 'created the picture which the user saw on the screen' and 'put in place the technology which enabled the advertisements to be displayed', it 'did not create "the message" sent by means of that technology.'³⁰

COMMENTARY

Following *Butcher v Lachlan Elder Realty Pty Ltd*³¹ it was made very clear by the High Court in each of the judgments that every case regarding s 52 of the *Trade Practices Act* was 'concerned with the application of a statutory text, expressed in general terms, to particular facts'. That said, what this case does establish is that although search engines like Google provides advertising in a very different way, as the advertisements are generated responses based on what the user has requested, it should be seen in its role as a conduit between advertisers and consumers as acting in the same way as newspaper publishers (whether in print or online) or broadcasters.

S 85 (3) – Publisher's Defence

As each of the judgments found that the ACCC had failed to make the case that Google had contravened s 52 of the *Trade Practices Act*, it was not necessary for the justices to determine whether the 'publisher's defence' found in s 85(3) of the Act applied. Despite this, the justices did examine the section and, in particular, its relationship to s 52. S 85 (3) reads as follows:

In a proceeding under this Part in relation to a contravention of a provision of Part V committed by the publication of an advertisement,

28 *Gardam* [1988] FCA 194 [110].

29 (2004) 218 CLR 592 [50]

30 *Google Inc v ACCC* [2013] HCA 1 [149].

31 [2004] HCA 60 [80].

it is a defence if the defendant establishes that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of that Part.³²

Hayne J used this section to explain why he considers the discussions of endorsement and adoption in the majority judgment and that of Heydon J to be misguided. According to Hayne J, if s 52 is read as being ‘contravened by the publisher of a third party’s advertisement *only* when the publisher has endorsed or adopted the content of the advertisement’, this would have the result of stripping s 85(3) of its content.³³ Hayne J argued that s 85(3) is asking us to examine questions relating to knowledge and reason (whether the publisher ‘did not *know* and had no *reason* to suspect’), and having us consider whether the publisher has endorsed or adopted the content distracts us from these questions by posing an entirely different set.³⁴

Heydon J disagreed with this interpretation of the relationship with ss 52 and 85(3). Rather, s 85(3) should be understood, he argued, as ‘operat[ing] as a backstop in cases where the defendant did make the misleading statement, but the fairly rigorous criteria for immunity stated in s 85(3) are made out.’³⁵ Under this interpretation, the defendant will have been found to have contravened s 52, having engaged in conduct that is misleading or deceptive, and endorsed or adopted that content. It is only after both of these have been established will s 85(3) be brought out as a potential defence, to protect those who despite having contravened s 52 in such a way, did not know and had no reason to suspect that its publication would amount to a contravention of a provision of the Act.

Under Heydon J’s interpretation of s 52 and s 85(3), there would most likely be fewer cases that would consider the publisher’s defence, as it is harder to satisfy the requirements of contravening s 52. Heydon J is right to say that the criteria for immunity to be found in s 85(3) are ‘fairly rigorous’. That section alone is not a sufficiently broad defence to capture all of the targets that the ‘endorsement or adoption’ test protects.

International Cases

Issues relating to Google’s ‘AdWorks’ have created litigation internationally as well. The case of *Google France SARL v. Louis Vuitton Malletier SA*³⁶ arose under a similar factual situation as that seen in *Google Inc v ACCC*. When users

32 *Trade Practices Act 1974* (Cth) s 85 (3).

33 *Google Inc v ACCC* [2013] HCA 1 [123].

34 *Ibid.*

35 *Ibid* [162].

36 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010)

had entered searches using trademarks of Louis Vuitton, AdWorks had generated sponsored links and advertisements that either falsely purported to be links to Louis Vuitton or that used Louis Vuitton's trademarks next to the terms 'replicas' and 'copies'.³⁷ Though a French regional court found that Google had infringed on Louis Vuitton's trademarks, on appeal to the European Court of Justice it was determined that Google had not infringed because it had not used the trademarks 'in its own commercial communication'.³⁸

The case of *Interflora Inc. and Interflora British Unit v Marks and Spencer Plc and Flowers Direct Online Limited*³⁹ in the United Kingdom was another that dealt with AdWorks and registered trademarks. This case is distinct from that of *Google France* or *Google Inc v ACCC*, as it was not Google itself being litigated against, but rather the advertiser. What is interesting about this case, however, is the discussion in it relating to general consumer awareness of the difference between natural search results and paid advertising. The High Court of Australia's decision in *Google Inc v ACCC* was quite dependent on the idea that ordinary users knew the difference between what Google endorsed and what was sponsored advertising. The UK Court in the *Interflora Inc* case, however, determined that 'even now a significant proportion of internet users in the UK do not appreciate the distinction' between natural search results and paid advertising.⁴⁰ It seems unlikely that Australian internet users are anymore computer-literate than those in the United Kingdom, despite the courts having come to the opposite conclusions regarding the capabilities of their populations.

CONCLUSION

As a result of the ACCC having centred their argument on the claim that Google was the maker or creator of the sponsored links and therefore liable under s 52 of the *Trade Practices Act* for having done more than merely pass on the links, there was no determination by the Court as to whether Google could have been liable in other regards. As mentioned in the joint judgment of French CJ, Crennan and Kiefel JJ, the ACCC did not seek to rely on s 75B of the *Trade Practices Act*, which finds people who have 'aided, abetted, counselled or procured the contravention' of the Act to be "'involved in [the] contravention" for the purpose of the enforcement and remedies provisions in Pt VI.'⁴¹ So although it can be seen that search engines or companies that provide services like 'AdWords' do not necessarily contravene s 52 of the *Trade Practices Act* simply because the sponsored link or advertisement is misleading or deceptive, the question remains open as to whether the Court would be able to find companies in Google's position liable in such a case under a different provision.

37 Ibid.

38 Ibid.

39 [2013] EWHC 1291 (Ch) 36

40 Ibid.

41 *Google Inc v ACCC* [2013] HCA 1 [4].