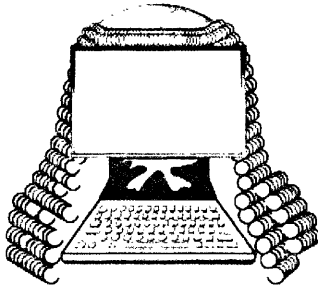


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ACCC v Google

Competitors' names, sponsored links and who is in control?

By Richard Flitcroft

Richard Flitcroft is a Partner at Corrs Chambers Westgarth and acted for the ACCC in both the original hearing (Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd (No 2) [2011] FCA 1086) and the appeal (Australian Competition and Consumer Commission v Google Inc [2012] FCAFC 49).

In 2007, the Australian Competition and Consumer Commission (ACCC) commenced proceedings against Trading Post (an online classified advertisement provider) and Google Inc (Google).

The ACCC alleged that each of those organisations engaged in misleading or deceptive conduct when certain advertisements, or sponsored links, were published on Google's webpage, as responses to search queries entered by consumers.

The ACCC's case had two limbs. The first, that Google engaged in misleading or deceptive conduct in the presentation of its search results on its web page, by not adequately distinguishing between results that were advertisements and results that were 'organic'. The ACCC lost that argument when judgement was delivered in September 2011.¹

The second limb was that particular ads, which Google published for advertisers including Trading Post, were misleading or deceptive or in some respects false, insofar as they misrepresented:

- (a) the existence of an affiliation or association with a competitor of the advertiser; or
- (b) that information about the business which the consumer was searching for could be found at the advertiser's own web-page.

The ACCC also lost that argument in September 2011 against Google, but succeeded in the argument against Trading Post as the advertiser.

The ACCC appealed the decision as it related to Google on a limited basis, and the appeal judgement was

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From the editors...

In this article Richard Flitcroft considers the *ACCC v Google* proceedings and analyses the reasoning of the Federal Court in finding against the ACCC at first instance and then that of the Full Federal Court in finding for the ACCC on appeal. The questions before the court bear on a central legal question for internet intermediaries – the extent of liability for third party content. Importantly, the Full Federal Court found that the publisher's defence that it merely passes on material without knowledge of infringement did not apply in the case of Google's Adwords. The court's reasoning took into account, among other things, the interactive nature of Google's website and the operation of the site's algorithms in displaying advertisements in response to user input.

Sean Lau's article suggests a rethink of current safe harbour provisions in Australia, which allow carriage service providers a defence against claims of copyright infringement claims. In doing so, Sean focuses on ISP liability for the carriage of copyright infringing material, and the difficulties of requiring ISPs to terminate repeat offender user accounts as a condition to invoking the protection of safe harbour provisions. For this reason, Sean concludes that 'parity' is lacking between online and offline copyright protection.

Lastly, Dr Pamela N. Gray and Xenogene Gray provide the first part of a book review of Peter Hinssen, *The New Normal (Gent, Belgium: Mach Media, 2010)*, and explore the possibility for people to obtain affordable online legal services through a computer system.

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delivered in April 2012.² The ACCC succeeded. The Full Federal Court found, contrary to Google's argument, that by reason of the fashion in which the Google search engine operates, and how its proprietary algorithms determine what will be published in response to a search query, Google itself engaged in misleading or deceptive conduct, in publishing an advertisement for a customer which was itself misleading.

By May 2012, we will know if Google intends to seek leave to appeal to the High Court of Australia.

What do the two cases mean for me?

Both of these judgements provide important guidance for advertisers (and their advisers, eg search engine optimisers) and search engine providers who publish advertisements in response to user queries.

The judgement at first instance is most relevant to advertisers insofar as it identifies the structure and content of certain ads which may convey misrepresentations.

The appeal judgement is most relevant to search engine providers (and potentially publishers of advertising generally). It is a decision which provides guidance on the defence available to publishers under the Competition and Consumer Act 2010 (Cth) (CCA).

Guidance for advertisers

Kloster Ford is a car dealership. Trading Post operates as an online publisher of classified advertisements. It publishes advertisements of cars for sale on behalf of individuals and car dealerships.

Trading Post commenced a Google AdWords campaign. Under the Google AdWords programme, advertisers select various keywords, which if used in a search query, will result in that advertiser's campaign participating in an auction against all other advertisers who have selected that keyword search term. Subject to various "quality" criteria determined by Google, the advertiser who is the winner of that auction process will have their advertisement published in response to the user's query.

The advertisement must always contain a web address URL – which is the advertiser's URL. When using AdWords, an advertiser will often select as keywords, words associated generally with their product category, or words that are in fact competitor's brands or marks. To facilitate the keyword selection process, Google provides a facility called "keyword insertion" which results in the actual term which the user has searched upon, being inserted into the headline of the advertisement. (This does not need to be activated to run a campaign).

In the Kloster Ford example, Trading Post identified "Kloster Ford" as a keyword, which would be inserted in the advertisement, if published. Someone who searched for Kloster Ford was presented with the below advertisement as their search result:

Kloster Ford

www.tradingpost.com.au New/Used Fords – Search 90,000 + auto ads online. Great finds daily!

This insertion of the competitor's name in the headline was the critical issue as the evidence showed there was in fact no association between Kloster Ford and Trading Post. Kloster Ford did not advertise on Trading Post.

The ACCC alleged and the Court accepted that this advertisement:

- falsely represented an affiliation between Kloster Ford and Trading Post;
- falsely represented an association between Kloster Ford and Trading Post; and
- was likely to mislead or deceive people in incorrectly thinking that information regarding Kloster Ford, or Kloster Ford car sales could be found at the Trading Post website.

Importantly, although not available at the time of the proceedings, the first two aspects now attract civil penalties under sections 29 and 224 of the Australian Consumer Law (ACL) of \$1.1M for a corporation or \$220,000 for an individual.

The third aspect was a contravention of section 52 of the Trade Practices Act (Cth) 1974 (TPA) (now section 18 of the ACL) for which there is no penalty. Notably, it is often the case that conduct which is a contravention of section 18 of the ACL can also be easily characterised as a contravention of section 29 – and thus expose individuals and corporations to penalty.

The ACCC also identified other advertisements which it asserted contravened the TPA in similar aspects. The ACCC did not take action against the advertisers for those advertisements – it focussed its case on Google's conduct in also publishing those advertisements. In each case, the evidence established that there was no link between the advertiser and the competitor whose brand, name or mark had been used in the advertisement. The evidence also established that keyword insertion had been used to insert the competitor's name into the headline.

There were other ads which the ACCC complained about, but these were rejected by the trial Court which held that the ACCC did not conclusively establish that there was no association between the advertiser and the competitor.

What was important and what survives from the decision at first instance is that extreme caution needs to be used when an advertiser uses its competitor's name or brand in an advertisement which it publishes on a website, particularly where the website's functions influence the

ad's content. However where there is in fact a relationship between those two brands or organisations, then representations which are conveyed may not necessarily be false.

The case against Google – and what it means for other search engine providers

In the trial at first instance, the ACCC failed completely in its case against Google. Rather than arguing that Google was knowingly concerned in the misleading or deceptive conduct engaged in by an advertiser, the ACCC's case was that Google was primarily liable for contraventions of the TPA by publishing the advertisements which its customer-advertisers had contracted to be published on its website.

At first instance, the Federal Court found that Google did not "make" the publications and thus it did not engage in misleading or deceptive conduct. The reasoning behind that conclusion was that Google was merely acting as a conduit, passing on the advertisements which had been provided to it by its advertising clients.

In the appeal, the ACCC challenged this point. It argued that there can be two primary contraveners involved in misleading and deceptive conduct when an advertisement is published. In this case, one of those was the advertiser, the other was Google.

There is a provision of the TPA (section 85(3) now found in section 251 of the ACL) which provides a defence for "publishers", where they are publishing advertisements provided to them by others (which may be misleading), but where the publisher has no reason to suspect that that is the case. Most newspapers and television channels rely on this to protect them when they publish advertisements or commercials.

Whether a corporation has engaged in misleading conduct or has merely acted as a conduit for another entity is a question of fact. As such the Full Federal Court turned to the facts surrounding Google's publishing of the advertisements. The Court accepted the ACCC's argument that Google is not simply a publisher passing on material as a mere conduit but rather is primarily involved in the conduct of publishing the misleading statements – in fact, it "makes" them. There is no question that Google publishes advertisements. However, the Court recognised the effect of prior authorities to the effect that "the intermediary's conduct must be considered as a whole to determine whether the intermediary was merely passing on the information".

The Court found that Google was primarily involved for a number of reasons and rejected Google's argument that ads served up on its web page would be seen by a consumer as similar to an advertisement presented on a billboard, or a newspaper – simply being published by Google, as the representation of the advertiser alone.

In coming to its conclusion that Google was primarily involved in the misleading statements, the Court identified several factors, namely:

- The Google web page is interactive. A user enters a search query. What appears on Google's web page, or is "served" in response to that query is Google's response to the user's query. That it happens to include in the headline a keyword chosen by the advertiser does not make it any the less Google's response.³
- Google's conduct consists of the display of the sponsored link (found in this case to convey a false or misleading representation).⁴ The display of that sponsored link is effected by Google's search engine. It is Google's response to the user's search. That response is determined by the various algorithms which Google chooses to apply in determining what is "relevant" or "responsive" to the query.⁵
- Similarly, the decision as to whether any result or advertisement will be displayed on Google's web page is determined solely by Google. It is Google's algorithms, drawing on known "associations" which determine whether a particular search result will be identified as adequately relevant to warrant publication on Google's web page. That is, Google is involved in the decision whether to publish the advertisement. This differs from a billboard or a newspaper where the advertiser determines whether the content is published and solely what that content is.⁶
- Google's AdWords programme allows an advertiser to select or widen the circumstances where an advertisement may be published. An advertiser can elect to have the campaign operate on three settings: exact match, phrase match or broad match. Exact match will trigger sponsored links only if the query entered by the user is exactly the keyword chosen by the AdWords customer.

Phrase match will trigger sponsored links based on any word in the phrase. Broad match triggers sponsored links based on known associations determined by Google's search algorithms. In this last category, the advertiser relinquishes the decision to Google, and has no knowledge as to whether a particular query entered by a user could or will result in the publication of their advertisement.

As the Full Court said at [95]:

"Google's search engine calls up and displays the response to the user's enquiry. It is Google's technology which creates that which is displayed. Google did not merely repeat or pass on a statement by the advertiser: 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".

The Full Court also considered the AdWords Programme Terms which bind all advertisers. It held that under these terms, the advertisers agree with Google that they are solely responsible for all advertising, keywords and URLs. The terms also state that the advertisements and keywords chosen by the advertisers must "directly relate" to the content on the landing page of the advertisement.

The Full Court recognised that for each of the advertisements, the advertisers appeared to be in breach of these obligations (by providing keywords and URLs that do not directly relate to the content of the landing page). However, it stated that it does not follow from this that, as between Google and the user or Google and the advertiser's competitor, the conduct in question is solely that of the advertiser.

This case makes clear that where a search engine's own procedures determine whether an advertisement will be published and operate so as to generate or influence the content of that advertisement, it will be acting as more than a mere conduit of the advertiser's campaign. It also emphasises that risk allocation arrangements between parties to contracts cannot prevent the party intended to be (financially) protected, from being found to have engaged in contravening conduct itself.

¹ Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd [2011] FCA 1086
<http://www.austlii.edu.au/au/cases/cth/fca/2011/1086.html>.

² Australian Competition and Consumer Commission v Google Inc [2012] FCAFC 49
<http://www.austlii.edu.au/au/cases/cth/fcafc/2012/49.html>

³ Above n 2 at [87], [91] and [92].

⁴ The ACCC's appeal focussed on the Harvey World Travel, Honda, Alpha Dog and Just 4x4s advertisements, which are set out in the accompanying table. Each of these was found by the trial judge to be misleading or deceptive, or to convey a false representation.

⁵ Above n 2 at [88] and [94].

⁶ Above n 2 at [94].