

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: