



## **Express law** *fast track information for clients*

21 February 2013

### **High Court finds Google not responsible for misleading 'sponsored links'**

**In *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 (6 February 2013) the High Court examined the responsibility of search engine operators for publication of misleading representations contained in advertisements.**

#### **Summary**

---

The High Court considered whether the conduct of Google Inc was misleading when publishing results, referred to as 'sponsored links', on its search engine.

The Court found that Google did not engage in misleading conduct, as Google did not author the sponsored links and had merely published, without endorsement, the misleading implied representations made by advertisers. The implied representations in question were that the advertiser had some association or affiliation with the business whose name appeared in the headline of the advertisement.

In assessing whether a contravention occurred, the focus should be on the conduct of the relevant party. Often this will be the making of one or more representations; however, the *Trade Practices Act 1974* (now known as the *Competition and Consumer Act 2010*) does not require a representation to have been made for the conduct to be misleading or deceptive. The Court found that, considered as a whole, Google's conduct was not misleading or deceptive; nor did it endorse or adopt the misleading or deceptive representations of advertisers.

A key part of the reasoning was that the relevant misleading implied representations made as a result of the appearance of the sponsored links were determined by the advertisers, such that the advertisers, not Google, were considered the authors of the sponsored links.

Notably, the relevant class of consumers consisted of persons with a basic but not necessarily detailed knowledge of how search engines operate. That is, they were taken to have ordinary rather than specialised knowledge.

The case confirms that, although the provision of information via the internet requires a response to a request made by an internet user, a search engine operator's provision of that response, without more, does not place it in any different position to that of more traditional advertising providers, such as newspaper publishers and radio and television broadcasters.

In addition, the ACCC did not plead that Google was knowingly concerned with a contravention by any advertiser contrary to s 75B of the Trade Practices Act. That remains another possible source of liability for an internet publisher in an appropriate case.

## ***The decision***

---

The five High Court Justices who heard the matter held that Google did not contravene s 52 of the Trade Practices Act, although Justice Hayne did so for reasons different to the other Justices. The joint judgment (French CJ and Kiefel and Crennan JJ), and the separate judgment of Heydon J, found that, because Google did not author the sponsored links and had merely published or displayed misleading representations made by advertisers, without adoption or endorsement, Google had not engaged in misleading or deceptive conduct. Although Hayne J also allowed the appeal, his Honour disagreed that the relevant test was whether Google has endorsed or adopted the implied representation of the advertisers.

The High Court confirmed that:

- whether a corporation that 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 that the corporation has adopted or endorsed that representation
- if that question arises, it will be a question of fact to be decided by reference to all the circumstances of a particular case.

The Court held that Google did not create, in any authorial sense, the sponsored links that it published or displayed. To the extent that it displayed the sponsored links, the search engine was simply a means of communication between advertisers and consumers. Specifically, the Court accepted that:

- Google's feature of 'keyword insertion' (which allows advertisers to include keywords in an advertisement in response to the search terms entered) was simply a 'technical facility' which permitted the relevant advertisement to be seen
- by providing the keyword insertion facility, Google did not endorse or adopt any information conveyed by the advertisement or do anything more than pass it on for what it was worth
- the role of Google personnel in advising or assisting advertisers in the selection of keywords was relevant in determining whether Google had engaged in misleading or deceptive conduct, but the evidence did not establish that Google personnel, as distinct from the advertisers, had chosen the relevant keywords, or otherwise created, endorsed or adopted the sponsored links.

The Court rejected the ACCC's contention that Google and the search engine did not operate analogously to other intermediaries or agents and that the principles established in relation to intermediaries or agents did not apply to the facts of the case. Although the provision of information via the internet necessarily involves a response to a request made by an internet user, this was insufficient to disturb the analogy between Google and other intermediaries.

## ***What are 'sponsored links'?***

---

Sponsored links are a form of advertisement created by, or at the direction of, advertisers who pay Google for advertising text that directs users to a website of the advertiser's choice. It was not in dispute that the sponsored links that were the subject of the proceeding conveyed misleading and deceptive representations and the advertisers had previously been found to have contravened s 52 of the Trade Practices Act.

When a user entered search terms into the Google search engine, Google determined which sponsored links to display. That determination was based on a number of factors, including the search terms used.

Google offered a facility – known as ‘keyword insertion’ – that allowed the text of sponsored links to be dynamically updated to include keywords nominated by advertisers when those keywords matched a customer’s search terms. This feature had the consequence that sponsored links appeared differently to users depending on the search terms used. The text of the sponsored links and keywords were selected by the advertisers, not Google.

### ***Who are the consumers comprising ‘the relevant class’?***

---

The Court accepted that the class of consumers against which the likely effect of sponsored links should be assessed comprised people who:

- have access to a computer connected to the internet
- have some basic knowledge and understanding of computers, the web and search engines, including the Google search engine
- will not necessarily have a detailed familiarity with the search engine, but they should be taken to have at least some elementary understanding of how it works
- would understand that Google is a commercial enterprise and that Google generates revenue by causing advertisements to appear on its results pages
- would understand that the use by Google of the word ‘sponsored’ in relation to links indicates that the links are paid for in the sense that the sponsors of those links have paid Google to cause them to appear on the results pages delivered in response to search queries.

### ***Did Google author, endorse or adopt the relevant advertisements?***

---

The starting point for the ACCC’s arguments was that the clickable headline in each of the sponsored links contained the name of a trader (and, in one case, the URL of a trader) different from that of the relevant advertiser. Referring to the keyword insertion facility, the ACCC argued that Google had inserted search terms chosen by users of the Google search engine as headlines in the sponsored links and was therefore responsible for the collocation of the clickable headline containing the name (and, in one case, the URL) of another trader and the advertiser’s URL.

Google emphasised that each relevant aspect of a sponsored link – the headline, the advertising text, the advertiser’s URL, the keywords and the use of keyword insertion – was specified by the advertiser and that Google merely implemented the advertiser’s instructions. Google submitted that the technical facilities it provided were different in kind, but not in principle, from facilities provided to advertisers by other intermediaries such as publishers and broadcasters.

The Court agreed that keyword insertion and clickable headlines were simply ‘technical facilities’ that permitted the relevant advertisement to be seen, providing these facilities did not have the consequence that Google itself thereby endorsed or adopted any information conveyed by the advertisement or did anything more than pass it on for what it is worth.

### ***Defence available to publishers***

---

Although the question did not ultimately arise, the Court discussed the circumstances in which the defence available to publishers under s 85(3) of the Trade Practices Act (now s 251 of the Australian Consumer Law) may operate. The joint judgment considered that, where publication of an advertisement gives rise to a misleading or deceptive representation by the publisher, in order to rely on the defence the intermediary may need to establish that there was an appropriate system in place to show that it did not know and had no reason to suspect that the publication of the advertisement was misleading or deceptive.

***When might an intermediary be held responsible for the publication or advertisements?***

---

The Court emphasised two aspects of Google's conduct: firstly, that the relevant class of consumers understood the sponsored links to be advertisements and did not consider Google to be making the representations; and, secondly, that Google did not author any of the text contained within the advertisements. Although there was evidence that Google had suggested keywords in some instances, the advertisers were ultimately responsible for their selection and use.

In circumstances where the relevant class of consumers would not appreciate that the representations were advertisements or where the intermediary authored part of the text of an advertisement, it may be open to show that the intermediary made, or alternatively, endorsed or adopted the representations. For example, if the advertiser selected part of the text but an intermediary included a graphic or text that the advertiser did not provide, this may be sufficient to establish a contravention on the part of the intermediary.

*For further information please contact:*

**David Ablett**

Senior Executive Lawyer

T 03 9242 1247

[david.ablett@ags.gov.au](mailto:david.ablett@ags.gov.au)

**Nikolas Tumbri**

Senior Lawyer

T 03 9242 1330

[nikolas.tumbri@ags.gov.au](mailto:nikolas.tumbri@ags.gov.au)

**Laura Deschamps Ferrari**

Lawyer

T 03 9242 1354

[laura.deschampsferrari@ags.gov.au](mailto:laura.deschampsferrari@ags.gov.au)

---

**Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.**

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:

<mailto:unsubscribe@ags.gov.au>