

GOOGLE INC v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S175/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCFCA 49

Dates of judgments: 3 April 2012 & 4 May 2012

Special leave granted: 22 June 2012

Google Inc. (“Google”) runs an internet search engine, a search of which produces both organic and sponsored links. Organic links are displayed free of charge, while sponsored links are highlighted paid advertisements. When a user enters a search term, Google returns a list of organic search results. These are matching web pages ranked in order of relevance determined by a complex algorithm developed by Google. The process of producing sponsored links however is determined through Google’s AdWords program. When a user enters a search term, an internal “auction” is triggered that determines which sponsored links to show, in which order to show them and how much Google charges its advertisers. An AdWords customer may elect to trigger advertisements (or participate in an auction that will determine which advertising text will be displayed as a sponsored link) by choosing three different types of keywords. These are ‘exact match’, ‘phrase match’ or ‘broad match’. Hence a search of a key word or phrase may trigger a number of similar, but commercially unrelated results.

At issue in this matter is whether Google has engaged in misleading and deceptive conduct contrary to section 52 of the *Trade Practices Act 1975* (Cth) (“the Act”). It particularly concerns those sponsored links triggered by searches relating to: “Harvey World Travel”, “Honda.com.au”, “Alpha Dog Training” and “Just 4x4s Magazine”. The Australian Competition and Consumer Commission (“ACCC”) alleged that Google infringed section 52 by displaying an advertiser’s web address in a sponsored link which also included the name of a competitor. This conduct is said to amount to a misrepresentation of the commercial relationship between the two. Google submitted that it was merely acting as the advertisers’ conduit.

The primary judge held that each of the advertisers had engaged in misleading and deceptive conduct by falsely representing that there was a commercial association between themselves and another. His Honour however held that Google had neither endorsed nor adopted the advertisements in question.

On 3 April 2012 the Full Federal Court (Keane CJ, Jacobson & Lander JJ) unanimously upheld the ACCC’s appeal, finding that the primary judge had erred in failing to conclude that Google had engaged in misleading and deceptive conduct. Their Honours held that what appears on Google’s webpage is Google’s response to the user’s specific search inquiry. They further held that in the four relevant instances, through use of its proprietary algorithms, Google had actively created the message that it presented. It did not merely repeat or pass on the advertisers’ statements.

The grounds of appeal include:

- The Full Court erred in finding that Google had made the representations contained in each of STA Travel's Harvey World Travel advertisement, Carsales' Honda.com.au advertisement, Ausdog's Alpha Dog Training advertisement and Trading Post's Just 4x4s Magazine advertisement which were displayed on the results pages of Google's internet search engine, and that Google had thereby engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

On 5 July 2012 the Respondent filed a notice of contention, the ground of which is:

- The Full Court erred in its finding at ([98]) that the role of creative maximisers and other Google personnel who advised and assisted customers in the selection of keywords as part of the Adwords programme was not relevant in determining whether Google made the representations.