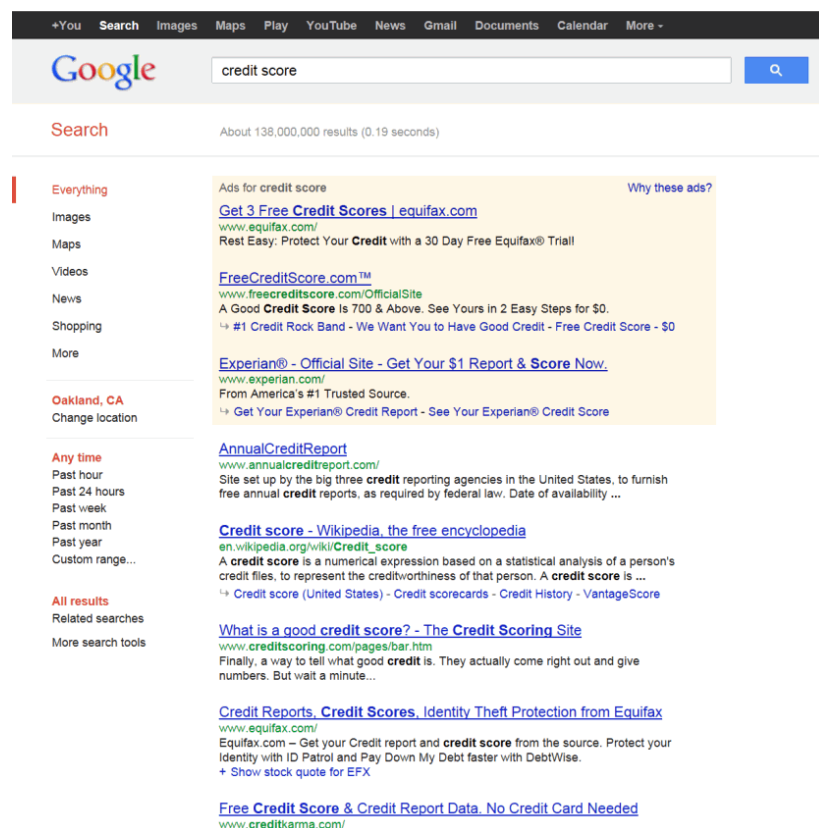


Courts got it wrong on Google? Ads on websites

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Speedread

Well, a medium-speed read in this case. Those in Australasia with third party ads and commentary on their websites and on-line services might be unexpectedly liable, but there's new guidance on avoiding liability, outlined at the end of this article.



In February,¹ we wrote about a win by Google in Australia's highest court under law in both Australia and NZ (as both countries have similar law about misleading and deceptive conduct).² The High Court confirmed that Google did not breach trade practices law as to the ad results along the top and right side of search results, similar to the screen shot above³ (where only the top line results appear). We said that the win should be little comfort for Google and others with ads on their websites, both in Australia and NZ.

News out of the U.S. last week firmly confirms our views, so that Google and others in Australasia can expect to be under the regulatory microscope. U.S regulatory action and surveys appear to be at odds with the Australian court conclusions.

The High Court of Australia had said that normal Google users "would have understood that the sponsored links [such as the top lines in the screen shot] were created by advertisers" and so the ads were not "adopted or endorsed by Google", which may have made Google liable as to misleading and deceptive statements in the ads.

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But the U.S. regulator (the Federal Trade Commission (FTC)) comes to the opposite conclusion about what users would have understood. In doing so, FTC relied upon surveys showing:⁴

- In 2005, 62% of readers were not even aware of the distinction between paid and non-paid results on search engine pages (that is, using the screenshot as an example, the distinction between the paid results along the top and the organic results in the body);
- Although relied on by FTC, that is 8 years old. However, in another survey relied on by the FTC, undertaken in 2012, of the surveyed viewers who viewed the Google screen shot for 10 seconds, only 47% said that the page had ads on it even though the box along the top is devoted to ads. 12% said there were no ads and 41% weren't sure. As to the colour of the box at the top, only 21% got the colour of the box right out of 6 options including "don't know".

An observation on the survey web site relied on FTC noted:⁵

"...portals and search companies like Google & Bing blend it in so well that many users simply can not see it, particularly on laptops and older computers." "Users confusing the yellow background as white shortly after seeing it is anything but an accident....If you have an older monitor or a laptop which you are viewing at an angle these colours are nearly impossible to see."

FTC, following the process in the U.S., has sent a compliance letter last week to Google and others. Expect change there: change in the layout of search engine results as between organic and advertised search results; or proceedings issued by FTC.

Expect the Australasian regulators to take a close look too, based on the FTC approach and the survey information.

What the Australian High Court did

The law is different in Australasia from the U.S. but the observations and survey data provide useful pointers, and there is sufficient legal overlap for the U.S position to be relevant.

The FTC approach and the survey data outlined above doesn't fit well with this conclusion by the majority in the High Court:⁶

The primary judge's findings about the way in which ordinary and reasonable users of the Google search engine would understand the sponsored links were not disturbed in the Full Court. These findings – that ordinary and reasonable users would have understood the sponsored links to be statements made by advertisers which

Google had not endorsed, and was merely passing on for what they were worth – were plainly correct. They also support the conclusion reached above. On its face, each sponsored link indicates that its source is not Google, but an advertiser. The heading "Sponsored Links" appears above both top left sponsored links and right side sponsored links, and the URL of the advertiser, appearing within each sponsored link, clearly indicates its source. Ordinary and reasonable users of the Google search engine would have understood that the sponsored links were created by advertisers. Such users would also have understood that representations made by the sponsored links were those of the advertisers, and were not adopted or endorsed by Google.

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Importantly though, no survey evidence was produced to the courts by the regulator to show the level of confusion and lack of understanding. Thus the courts cannot be criticised for coming to the conclusion they came too: they can only work with the evidence that is available to them. In that sense, the courts did not get it wrong.

Survey evidence in Australasian cases?

Next time round though, the regulators may well seek to put in survey evidence. That is admissible in Australasian courts so long as it is sufficiently robust and relevant.⁷ And, while the FTC has relied on the surveys noted above, we don't know if they are sufficiently robust to rely upon in Court. But the results are so compelling that there are signs that robust surveys may come to similar conclusions (even if the new surveys came to only 50% of the conclusions, there would still be strong signs of problems).

Valuable tips from the FTC

Anyone hosting third party ads should be alert to the risks in this area. The FTC compliance letter⁸ to search engine operators provides some useful insights, such as:

- Any method of dealing with ads so they are separate may be used, "so long as it is noticeable and understandable to consumers". That's similar to the Australasian concept of addressing what "ordinary and reasonable users... would understand". This is not about nit-picking analysis after the event by lawyers, but a pragmatic assessment about what ordinary users (typically consumers) would understand.
- FTC said: "We have observed that, increasingly, search engines have introduced background shading that is significantly less visible or "luminous" and that consumers may not be able to detect on many computer monitors or mobile devices. Reliance on this method to distinguish advertising results requires that search engines select hues of sufficient luminosity to account for varying monitor types, technology settings, and lighting conditions." As well as "luminous" colours, strong borders are needed.

- FTC also said: "In addition to the visual cues a search engine may use to distinguish advertising, it also should have a text label that: (1) uses language that explicitly and unambiguously conveys if a search result is advertising; (2) is large and visible enough for consumers to notice it; and (3) is located near the search result (or group of search results) that it qualifies and where consumers will see it." There are tips too about placement of the words on the page.
- New types of platforms such as social networks will call for new ways to solve this. Using highlighted boxes may not be suitable.

Impact on Google

The stakes are high for providers such as Google. As an article yesterday in Forbes observes:⁹

"Obviously, the FTC wouldn't have issued this letter if it was happy with current industry practices. Over the years, Google (\$GOOG) in particular has made it noticeably harder to visually separate the ads from organic listings, by lightening the ad shading box and making the text label more obscure. Undoubtedly, the FTC expects Google and the other search engines to change how ads appear on their current search results pages. ... I expect search engines will attempt to comply with the FTC's request by tinkering with both the visual cues and the text label. Given Google's existing multi-front battles with the FTC, I doubt Google will pick an unnecessary fight.

Still, this is a high-stakes matter for Google; the FTC's letter directly implicates Google's cash cow. Even a minor decrease in clickthrough rates or advertiser bids could reduce Google's revenues by billions of dollars a year. Furthermore, if the cues and labels train consumers to ignore search ads (similar to "banner blindness"¹⁰), they could devastate search engine revenues."

But the article also goes on to show how Google in fact may gain more revenues by these changes.

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Since the surveys noted above, and the court case, Google appears has changed references in the top box from “*Sponsored link*” to “*Ads for x*” (with a comment on NZ results: “*Why these ads?*”). This does make it clearer.

Will the Australasian regulators and the courts regard that as enough, in the context of the sort of issues raised by the FTC and the surveys?

1. <http://www.wigleylaw.com/assets/Uploads/Google-win-is-little-comfort-for-Google-media-and-content-carriers.pdf>

2. E.g. Section 18 Australian Consumer Law and Section 9 Fair Trading Act (NZ)

3. Since the survey below, and the court case, Google appears to have changed references in the top box from “*Sponsored link*” to “*Ads for x*” (with a comment “*Why these ads?*” In NZ search results). This does make it clearer but query whether the regulators and the courts will regard that as enough, in the context of the sort of issues raised by the FTC.

4. See letter to search engine operators to FTC at <http://www.ftc.gov/os/2013/06/130625searchenginegeneralletter.pdf>

5. <http://www.seobook.com/consumer-ad-awareness-search-results>

6. *Google v ACCC* [2013] HCA 1 at Para 70

7. *Gault on Commercial Law* at Para 9.21 and 9.22

8. <http://www.ftc.gov/os/2013/06/130625searchenginegeneralletter.pdf>

9. <http://www.forbes.com/sites/ericgoldman/2013/07/02/will-the-ftcs-crackdown-on-search-ad-disclosures-hurt-googles-revenues/>

10. https://en.wikipedia.org/wiki/Banner_blindness

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