Before the High Court

Why Policy Matters: *Google Inc v Australian Competition and Consumer Commission*

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Abstract

In s 18 of the *Australian Consumer Law* forming sch 2 of the *Australian Competition and Consumer Act 2010* (Cth), as with s 52 of the *Trade Practices Act 1974* (Cth) previously, liability for misleading or deceptive conduct is expressed in general terms. In other words, this is a provision that (to use the words of American legal realist Karl Llewellyn) can be 'read in the light of some assumed purpose'. In this article it is argued that the High Court's decision in *Google v ACCC* will be important in establishing the extent to which the provision has achieved its promise of setting standards for what Justice French, writing extra-judicially, has termed 'conduct of public debate in trade or commerce' — being standards which it is suggested here have as much to do with policy as with law.

I Introduction

Previous contributions to 'Before the High Court' have sometimes suggested that the case under consideration can be dealt with on essentially legal terms. So, for instance, in a recent contribution by Robert Burrell and Kimberlee Weatherall on *Roadshow Films Pty Ltd v iiNet Ltd*[1] we find a very thorough analysis of the statutory requirements and legal authorities on authorisation liability under the *Copyright Act 1968* (Cth) but relatively little discussion of the economic policy considerations that might count for or against an ISP's liability in a case such as this. Moreover, by contrast with the authors' rich and nuanced legal discussion, their policy discussion is expressed in rather general and cursory language. Indeed, the final conclusion is that, notwithstanding their 'superficial appeal', the economic arguments merely serve to distract from 'the fundamentally legal questions in issue'.[2] It is likely that the current High Court does find such technical legal approaches helpful; Chief Justice French observed in a recent

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1 Robert Burrell and Kimberlee Weatherall, 'Before the High Court: Providing Services to Copyright Infringers: *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 33 *Sydney Law Review* 801.

2 Ibid 830.

public lecture at The University of Melbourne, policy is 'hard'.[3] However, I prefer to think that there is more to the Court's reasoning than law even if the policy reasoning may not be fully elaborated in its judgments.

In other words, we have to look for the hints about relevant common law and statutory policies and their workings to try to work out the significance being accorded to them in actual cases.[4] Take, as an example, the *iiNet* case.[5] There, French CJ, Crennan and Kiefel JJ suggest that a 'specially targeted legislative schem[e]' might be the most suitable response to the problem of online copyright infringements,[6] and Gummow and Hayne JJ point to the possibility of ISP liability for negligence being justified in economic policy terms but not in situations where the notices provided do not give reasonable grounds to suspect that infringements have actually occurred.[7] On one reading, it might be thought that the majority is endorsing Burrell and Weatherall's argument that 'the broader issues at stake are so significant and so divisive that they must be left to Parliament'.[8] But, on another, and in my view, preferable reading, these judges (all experienced commercial lawyers quite capable of dealing with the policies of the Act) felt that 'authorisation' was thin language on which to craft a graduated response system, such as had been established by legislation in other jurisdictions. As to the minority, it seems that it was quite ready to engage with the policy argument for secondary liability, perhaps as a matter of common law negligence rather than as a matter of 'authorisation',[9] but found the argument wanting in a scenario where, on the inadequate notices provided, iiNet was not in a good position to police infringements: a logical economic argument that Roadshow in this case was unable to overcome.

By contrast, the premise of my 'Before the High Court' contribution is that the policy issues at stake are not only relevant; they are issues that the High Court needs to consider in *Google Inc v Australian Competition and Consumer Commission*.[10] In short, a sound approach to policy is central to the ultimate decision in this case. Given that this is a case to be decided under s 52 of the *Trade Practices Act 1974* (Cth),[11] the statutory language framed generally in terms of 'misleading or deceptive conduct' in trade or commerce seems sufficiently open-ended to catch the situation at hand. That is, of Google's AdWords system lending itself to misleading use of a company's brand name or trade mark (as recognised by the public) to suggest an association or affiliation with a competitor in certain sponsored link responses given to user search queries, while the non-punitive orders available under

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3 Robert French, 'A Public Law Perspective on Intellectual Property' (Francis Gurry Public Lecture, The University of Melbourne, 25 July 2012) <http://www.law.unimelb.edu.au/melbourne-law-school/news-and-events/watch-online/robert-french-ac> 104.4.

4 As French CJ put it in his recent lecture, the 'discernment' of common law and statutory policy balances is part of the 'evaluative judgment' that a court may legitimately engage in: ibid 32.55–33.09.

5 *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466.

6 Ibid 486 [79].

7 Ibid 494 [116].

8 Burrell and Weatherall, above n 1, 829.

9 See *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466, 494 [120] (eschewing any 'extreme exercise in statutory interpretation' of the statutory provisions on 'authorisation').

10 See High Court of Australia, *Google Inc v Australian Competition and Consumer Commission* S103/2012 < http://www.hcourt.gov.au/cases>.

11 *Trade Practices Act 1974* (Cth) s 53 was also argued.

the *Australian Consumer Law* offer the possibility of a 'specially targeted' scheme to address such conduct.[12] As Justice French, writing extra-judicially, has pertinently observed,[13] s 52's language of 'misleading or deceptive conduct' is capable of a broad interpretation, allowing it to function as 'a norm of commercial conduct which applies in dealings with the public at large, with individuals and between traders'.[14] In the past, this is a doctrine whose scope and limits have been shaped by policy. One might equally expect this to happen in the present case.

II The Legal Decision

Of course the law and facts of a case matter as well. But in the case of *Google v ACCC*, both of these seem to be more on the side of the ACCC, despite Google's protestations. Misleading or deceptive conduct had been found in several instances involving sponsored links in the trial of the case — viz links with keywords purchased by advertisers that would appear in response to a user's Google search at the top or right-hand side of the page.[15] At trial, the ACCC's argument that Google had failed to distinguish adequately between organic search results and sponsored links was rejected.[16] However, the judge accepted that in some instances the sponsored links involved misleading or deceptive conduct on the part of Google's clients, specifically in suggesting an association between the client in question and a competitors – in a way that was, as Nicholas J said, 'reminiscent of a passing off case'.[17]

Although Google continued to debate the point on appeal, the full Federal Court agreed with the trial judge with respect to the four instances before it.[18] These instances do seem quite compelling, including one obvious one where a search of 'Harvey World Travel' yielded a sponsored link to Harvey World Travel's competitor, STA Travel, complete with a URL under the heading 'Harvey Travel'. As Nicholas J put it, 'there are likely to be ordinary and reasonable members of the class [of Google searchers] who infer from the Harvey World Travel advertisement that there is some association between Harvey World Travel and STA Travel'[19] — even in the absence of actual evidence of confusion (being

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12 That the *Trade Practices Act* has now been replaced by the *Competition and Consumer Act 2010* (Cth), with the *Australian Consumer Law* forming sch 2 to that Act, is noted at the end of this column.

13 Robert French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250.

14 Ibid 268; Cf the Chief Justice in his recent lecture, giving s 52 as an example of a statutory provision where 'developmental responsibility' has been explicitly handed to the courts: French, above n 3, 108.58–109.45.

15 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 (Nicholas J). There were eleven claims before the Federal Court, three involving advertisements by Trading Post (which was a defendant in the proceedings but settled with the ACCC) while the remaining eight relate to advertisements by other advertisers who were not parties to the proceedings.

16 Ibid 536 [169].

17 Ibid 522 [89].

18 *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503 ('*ACCC v Google*'). The four that featured in the full Federal Court concerned Harvey World Travel, Honda Australia, Alpha Dog Training, and Just 4X4s Magazine.

19 *ACCC v Trading Post* (2011) 197 FCR 498, 550 [233].

evidence the ACCC did not provide). The full Federal Court agreed,[20] and when Google's application for leave to appeal to the High Court came for hearing,[21] Crennan J succinctly noted that that 'the misrepresentation is a pretty clear one as to an association between Harvey World and STA Travel' in that particular instance.[22]

The more difficult issue is whether Google (as opposed to the advertiser who purchased the misleading keywords) could be held liable for these instances of misleading or deceptive conduct. At trial, Nicholas J pointed to a line of authority under s 52 which indicated that active misleading or deceptive conduct is required rather than acting as a 'mere conduit',[23] and held that this exonerated Google on the basis that it had merely 'passed on' advertisements that others had provided without 'adopting or endorsing' them.[24] On appeal, the full Federal Court also accepted that Google could only be held liable under s 52 if it actively engaged in misleading conduct rather than merely serving as 'a conduit'.[25] Nevertheless, even on this narrow reading, the full Court was prepared to find liability. Thus the Court concluded that Google was engaged in 'responding to [a search] query and providing the URL' rather than 'merely passing on a URL as a statement made by an advertiser for what the statement it is worth'.[26] Indeed, the AdWords program was designed to facilitate the results that had occurred: Google supplied its customers with the ability to select keywords which enabled them 'to trigger sponsored links through Google's search engine based on known associations which are determined by Google's proprietary algorithms' and

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20 *ACCC v Google* (2012) 201 FCR 503, 521 [93] ('the most obvious example of the falsity of the response').

21 *Google Inc v Australian Competition and Consumer Commission* [2012] HCATrans 160 (22 June 2012), Gummow, Crennan and Kiefel JJ.

22 Ibid 10.

23 See especially *Yorke v Lucas* (1985) 158 CLR 661, 666: 'merely passing on information for what it is worth' is not without more misleading or deceptive conduct' (Mason A-CJ, Wilson Deane and Dawson JJ); *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, Gleeson CJ, Hayne and Heydon JJ at 605 [38]-[40] (quoting the above passage from *Yorke v Lucas* and adding that the real estate agent in that case 'did no more than communicate what the vendor was representing, without adopting it or endorsing it'); *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305, French CJ and Keifel J at 321 [43] (citing the above discussion from *Butcher v Lachlan* and concluding that '[t]he publication, by an information provider, of third party statements about goods or services, does not, without more, amount to the adoption or making of those statements by the information provider') and Gummow J at 609-10 [57] (stating that 'for the broadcast in question here to give rise to contraventions of s 52 by Channel Seven, it was necessary at least for some 'endorsement' or 'adoption' of what was represented on the programs by the relevant third parties'). Contrast, possibly, *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531 where the Full Court accepted that a television broadcaster was in that case prima facie liable for statements made in individual advertisements under s 53 of the *Trade Practices Act 1974* (Cth) on the basis that both the advertiser and broadcaster 'made' the advertisement, although Bowen CJ added that it may be proper in other cases 'to distinguish statements on the basis that they are expressly or by necessary implication statements of the advertiser and not of the television station': at 533. While Nicholas J held that *Universal Telecasters v Guthrie* had been superseded by the later authorities (*ACCC v Trading Post* (2011) 197 FCR 498, 540 [185]), the full Court considered that the authorities could be reconciled on the common proposition that 'whether or not there is an implied disclaimer or an implied adoption or endorsement is a conclusion of fact which follows from a determination based on all the circumstances of the case': *ACCC v Google* (2012) 201 FCR 503, 519 [81].

24 *ACCC v Trading Post* (2011) 197 FCR 498, 542 [195], 551 [241], 558 [278], 567 [318], 572 [342].

25 *ACCC v Google* (2012) 201 FCR 503, 519 [80].

26 Ibid 521 [92] and 522 [95].

although the keywords were selected by customers 'what is critical to the process is the triggering of the link by Google using its algorithms'.[27] In short, according to the Court, 'it is Google's technology which creates that which is displayed'.[28] Again, if the factual findings are accepted, they would seem to show more than passive support offered here. Indeed we might wonder how it could be imagined that Google acted merely as a 'conduit' for misleading advertisements when it had programmed and operated its system to produce such results.

Given this conclusion, the Court saw no need to consider the vexed question of accessorial liability as defined in the *Trade Practices Act 1974* (Cth) s 75B, which was not even argued by the ACCC. Nevertheless, it noted in the full Federal Court that:

> [t]he role of creative maximisers [who assist advertisers with the selection of keywords] and other Google personnel who liaise with customers … would have been relevant to a claim under s 75B if that had been made.[29]

(As a legal quibble, the claim that brings in an 'involved' party is made under the remedial provisions,[30] not s 75B which merely provides a definition of 'involved', but this is a minor point.) Why limit this reasoning to personnel when Google might itself arguably be considered an accessory of its advertisers? Being framed in terms of aiding, abetting, counselling or procuring another party's contravention of s 52, the language of s 75B(a) seems to be particularly adapted for situations coming closer to passive facilitation of misleading conduct as an intermediary if that was the real gist of the ACCC's complaint. On the other hand, the provision has received a limited interpretation in the past — including a mens rea requirement for aiding, abetting, counselling or procuring, in the sense of knowledge at least 'of the essential matters which go to make up the offence' (or, in this case, the civil wrongdoing) so it may have been thought that this provides too narrow a basis of liability, easily avoidable if creative maximisers became less involved in decisions made by advertisers about keyword selection.[31] More generally, however, the fact that the ACCC chose to argue the case under s 52 suggests that that its real concern was more than simply aiding or abetting, etc, on Google's part (or on the part of employees) – viz that the design of the AdWords system and its operation by Google fostered possible misleading or deceptive conduct that would otherwise not have occurred and more particularly was a product of its active intervention. And it seems that the full Federal Court accepted this distinction in reaching its conclusion under s 52 as well.

Nevertheless, there is the Court's treatment of the 'publisher's defence' under the *Trade Practices Act* 1974 (Cth) s 85(3), which Google sought to invoke. Given that the defence is concerned with the publication of material that another has provided without the publisher's knowledge or reason to know of its

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27 Ibid 522 [94].

28 Ibid 522 [95].

29 Ibid 523 [98].

30 Including ss 82 (actions for damages), 86C (non-punitive orders) and 87 (other orders). In respect of s 86C involved parties could be subject to orders only in very limited circumstances but the equivalent s 246 Australian Consumer Law offers a broader array of possible orders for involved parties (as defined in s 2 of the Australian Consumer Law) — and was actually the remedial provision relied on in this case: and see below n 33.

31 *Yorke v Lucas* (1985) 158 CLR 661,667 [9] (Mason ACJ, Wilson, Deane and Dawson JJ).

misleading character, it seems strange to contemplate it applying if the proper basis for Google's liability under s 52 was its own design and operation of its Google AdWords technology. Why did the Court not simply say this? Instead, the defence was held not to apply on various grounds including the actions of Google employees involved as 'creative maximisers' in the placing of advertisements, and more generally the fact of Google's notice of the proceedings in the case, the Court being here apparently content to follow the fuller reasoning of Nicholas J at first instance.[32] Further, there is the matter of the compliance program that the Court ordered Google to establish and implement under the terms of s 246(2)(b) of the *Australian Consumer Law*.[33] Rather than requiring the redesign of the AdWords technology to minimise the prospect of confusion, the program requires the appointment of a compliance officer and the introduction of a procedure for takedown of misleading advertisements on request. The limited character of the compliance program arguably implicitly confirmed the passive accessorial character of Google's involvement. But a better view may be that it offers a minimally disruptive and yet adequate solution to the damage that flows from the AdWords system in actual cases — the kind of solution that Google itself might rationally adopt to minimise the fall-out from its AdWords system once its legal liability was accepted. Thus (even taking these further considerations into account) Google's liability under s 52 can be seen as operating in a kind of legal grey area that the provision's broad wording permits: not quite so parasitical as full accessorial liability, albeit one step removed from standard scenarios of a party engaged in misleading or deceptive conduct under s 52.

But does it matter whether Google is liable for its own misleading or deceptive conduct or as an intermediary? I want to suggest that there is more to this question than law. This brings us to policy.

III The Relevance of Policy

In their earlier 'Before the High Court' article, Burrell and Weatherall briefly allude to arguments from economic efficiency which might be drawn on to suggest that liability should fall on the 'cheapest cost avoider', being the party that could have avoided the harm most cheaply,[34] although in the end they dismiss the relevance of such reasoning in the case at hand *inter alia* on the basis that 'it may not be desirable to impose liability on a cheapest cost avoider where

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[32] *ACCC v Google* (2012) 201 FCR 503, 525 [113]–[114]. These are not the only possible ways in which notice might arise. For instance, Nicholas J also accepted that notice might arise where a complaint is made of misleading or deceptive advertising (even before proceedings are launched): *ACCC v Trading Post* (2011) 197 FCR 498, 567 [319] (and contrast also 558 [279] where in the absence of such notice it was said the defence would have applied).

[33] The *Australian Consumer Law* s 246(2)(b) (non-punitive orders) empowers the court to award 'an order for the purpose of ensuring that the person does not engage in the conduct, similar conduct, or related conduct, during the period of the order (which must not be longer than 3 years)'.

[34] Citing Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Tort' (1961) 70 *Yale Law Journal* 499; Guido Calabresi and Jon T Hirchshoff, 'Towards a Test for Strict Liability in Torts' (1972) 81 *Yale Law Journal* 1055. See also (with respect to remedies) Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1989.

to do so would cause substantial interference with legitimate activity'.[35] Thus they conclude that policy is in effect a distraction from the more important legal issues in the *iiNet* case.[36] However, the point that efficiency provides a potentially relevant policy in a case such as *iiNet* is a useful starting place for a policy discussion of *Google v ACCC*. For, essentially, I am arguing for the relevance of a cheapest cost avoider analysis in this case.

As a preliminary matter, we should note that the simple language of 'cheapest cost avoider' masks the different kinds of liability that may be imposed on efficiency grounds. For instance, Burrell and Weatherall are clearly concerned with the potential accessorial liability of those engaged primarily in legitimate activities who find their products are used for copyright infringement purposes, as in the *iiNet* case. If the basis for liability in *Google v ACCC* were accessorial liability, then similar questions might need to be asked here. And the answer might come down to the kinds of economic considerations that are said to lie behind 'gatekeeper liability' in other contexts[37] — including the level of influence that Google could exert over the misleading or deceptive conduct of its clients (and its unwillingness to do so without some coercion from the law), its ability to monitor its clients' behaviour, as well as the effect on Google's legitimate business activities of forcing it to do so.[38] And it may be that, as in *iiNet*, a court faced with *Google v ACCC* might reasonably conclude that, if all Google had done was provide facilities which others had used for infringement purposes, such policy considerations should militate against forcing Google to act as a 'policeman' of its clients' activities.[39] Resistance to incorporating a full-blown accessorial liability standard into the *Trade Practices Act* would certainly help to explain, for instance, why the trial judge and full Federal Court were so ready to accept the line of earlier authorities that active misleading is required under s 52 and not merely the passive passing on of information 'for what it is worth' — as well as, and perhaps more significantly, why this constrained interpretation was adopted by earlier Australian courts to begin with (along with their narrow reading of s 75B as requiring relevant knowledge). For if Google is actively engaged in misleading conduct, along with

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35 Burrell and Weatherall, above n 1, 829–30.

36 Ibid 830. Others may consider the question of the effect on legitimate business activity to be part of a more complete economic analysis: so, for instance, Douglas Lichtman and William Landes in 'Indirect Liability for Copyright Infringement: An Economic Perspective' (2003) 16 *Harvard Journal of Law and Technology* 395, conclude that sometimes indirect liability should not be an option on economic grounds: at 407 (although also pointing out that 'conversely — and this is a point typically overlooked in the copyright literature — sometimes other mechanisms are too costly and indirect liability should therefore be the only option': at 408).

37 See generally Renier Kraakman, 'Gatekeepers: The Anatomy of a Third Party Enforcement Strategy' (1986) 2 *Journal of Law and Economics* 53; Lichtman and Landes above n 36; Douglas Lichtman and Eric Posner, 'Holding Internet Service Providers Accountable' (2006) 14 *Supreme Court Economic Review* 221; Jonathan Zittrain, 'A History of Online Gatekeeping' (2006) 19 *Harvard Journal of Law and Technology* 253. See also, for an older discussion, Jeremy Bentham's characterisation of *respondeat superior* in *Principles of Penal Law* as based on an idea of the master as an 'inspector of police' of '[the] imprudence [of those for whom he is answerable]': John Bowring (ed), *The Works of Jeremy Bentham*, vol 1 (William Tait, 1843) 383.

38 Considerations noted by Kraakman, above n 37, 61–2.

39 Cf Katja Weckstrom, 'Liability for Trademark Infringement for Internet Service' (2012) 16 *Marquette Intellectual Property Law Review* 1, arguing against liability along such lines.

its clients, rather than acting as a 'mere conduit' then it is not being held liable merely on the basis that it 'ought to bear liability for the acts of … customers',[40] and the gatekeeper liability analysis that may be used (for instance) with respect to intermediary liability in copyright cases becomes less relevant.

Rather, in the two decisions in *ACCC v Google* to date, Google's liability is framed as the liability of a party which is *itself* engaged in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth): a question which according to the full Court comes down to the quality and level of Google's involvement in the design and operation of its AdWords system. Thus, in contrast to Nicholas J at first instance who could only contemplate Google's liability under s 52 as arising in the unlikely event that ordinary and reasonable members of the class would have understood Google to be endorsing the advertising messages being conveyed by its clients via sponsored links, the full Court expanded the focus to encompass the whole of Google's conduct, including the design of its AdWords system. In my view this is the right approach in policy terms.

First, it brings Google's liability closer to what was contemplated in the law and economics literature when the expression 'cheaper cost avoider' was coined in the early 1970s to explain the legal liability of enterprises held responsible for dangerous activities or defective products that cause harm. It treats liability under s 52 as akin to the liability for defective products that the *Trade Practices Act* also created,[41] and which in another context I have analysed as an application of cheapest cost avoider reasoning.[42] And second, it fits with the history and purpose of the Act, passed as a radical initiative of law-building by the Whitlam government, modelled to an extent on the US *Federal Trade Commission Act*, which similarly prohibits 'unfair or deceptive acts or practices' in trade and gives oversight to a public regulator.[43] Of course the full interpretation that s 52 might receive with respect to Google's AdWords system in 2012 was barely in contemplation in 1974 — as Justice French pointed out in 1988, even then its future was still developing and 'the story of s 52 [was] a long way from its conclusion'.[44] In earlier decades, it was the activities of industrialists that were being fixed with product liability on the basis that they were thought to be the cheapest cost avoiders of the physical harms that their activities produced. But in the present century something similar might be said of efforts to fix an enterprise such as Google with legal liability for the economic harms produced by its industrial activities, centred on devising and operating systems used for trading information.

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40 As Burrell and Weatherall put it with respect to ISP liability for copyright infringement: above n 1, 829.

41 The provisions in Part VA of the *Trade Practices Act 1974* (Cth) resulted from a joint Report of the Australian Law Reform Commission (itself a radical innovation of the Whitlam Government) and the Victorian Law Reform Commission: *Product Liability*, ALRC Report No 51, VLRC Report No 27, AGPS, 1989. However, while these recommended a form of absolute liability, the provisions as drafted were modelled more closely on the European Product Liability Directive of 1985 (No 85/374/EEC) and common law product liability in US law.

42 Megan Richardson, 'Towards a Test for Strict Liability in Tort: A Modified Proposal for Australian Product Liability' (1996) 4 *Torts Law Journal* 24.

43 Specifically, Federal Trade Commission Act 15 USC § 5 (Unfair methods of competition unlawful; prevention by Commission).

44 French, above n 13 at 268.

It is worth adding, as Guido Calabresi and Jon Hirschoff note in their classic article on the economics of product liability,[45] that in the case of liability for dangerous or defective goods 'liability has never meant that the party held … liable was to be a general insurer for a victim no matter how or where the victim comes to grief'.[46] Rather, they say, the language of cheapest cost avoider serves to explain the particular tests that courts adopt in practice to determine the scope and limits of such liability – tests such as 'natural or unnatural use', the presence of a 'defect', and (on the part of an injured party) the defence of 'assumption of risk'.[47] In short, such tests can be seen as legal techniques to further the economic goal of minimizing the costs of accidents taking into account also the costs of avoidance. Specifically, as between injurer and victim, they tell us pertinent information such as 'who has the greater knowledge of the risk involved and who is better able to choose to avoid that risk by altering behavior should the risk appear to great'.[48] Moreover, as Calabresi and Hirschoff also point out, the reasoning can also be extended to scenarios where more than one potential injurer can be found. Thus if 'both the manufacturer and the user [of a product] are in a better position than the third party victim to make the cost-benefit analysis, then [as a general rule] the victim should recover, whether he sues the manufacturer or user'.[49] Similarly, on the question of Google's liability for misleading or deceptive conduct under s 52 it may be argued that legal tests such as whether AdWords is a product of Google's design and whether Google provides the response to user search queries rather than merely 'passing on' information provided by advertisers as a mere conduit, are all tests designed to determine which party as between Google, the advertisers and those injured by misleading or deceptive conduct should bear the burden of avoiding the harm (or of bearing the harm if avoidance is not worthwhile).[50]

While Calabresi and Hirschoff characterise cheapest cost avoider liability as a kind of strict liability which does not depend upon fault, I suggest that it is better viewed as an intermediate form of liability. That is, liability falls between the extremes of a statute or judge-mandated absolute liability (holding an enterprise liable simply on the basis that its product 'caused' the injury),[51] and traditional common law negligence liability which requires a case-by-case analysis to determine whether the burden of precautions was worth the benefits of avoiding harms multiplied by their prospect in a given case (ie whether B<PL in the famous phrase of Learned Hand J in *United States v Caroll Towing*).[52]

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45 Guido and Calabresi, above n 34.

46 Ibid 1056.

47 Ibid 1068, although Calabresi and Hirschoff find harder to explain the common use of contributory negligence defences, which they argue tend to draw product liability back to a negligence standard.

48 Ibid 1066.

49 Ibid 1072.

50 Thus the fact of a compliance program does not preclude Google from settling with individual complainants or choosing a more interventionist approach to reduce risk including redesign of its AdWords program.

51 See Jane Stapleton, *Product Liability* (Butterworths, 1994) ch 8.

52 *United States v Carroll Towing* Co. 159 F 2d 169 (2d Cir 1947): 'Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: ie, whether B less than PL.': at 173.

As Calabresi and Hirschoff persuasively argue, the 'cheapest cost avoider standard' has the advantage over a common law negligence standard in that once a defendant is assessed to be the cheapest cost avoider the decision is left to that party as to whether and what precautions should be adopted — being a decision that the defendant may be best placed to perform. By the same token, it is also arguably preferable to absolute liability where defendants are held liable simply on the basis that they can best afford to pay for injuries — ie in effect are the cheapest insurers — or that they are engaged in profitable activities so should bear any associated costs of those activities, albeit it is realistic to expect that courts will pay some attention to such broader social policy goals.[53] If anything, the standard comes closer to a negligence liability,[54] while potentially overcoming some of the historical deficiencies of that standard. Thus, while common law negligence historically tends to focus on the care adopted with respect to the conduct of the activity in a particular instance, cheapest cost avoider liability can focus on the way the activity is designed and operates as a more general matter.[55] As such, it can consider cost-avoidance in a more holistic way. This is relevant to the liability of Google under s 52 — premised on the fact that Google has control of its AdWords system and practices, and that modifying one or other of these is the best technique for minimising the risks of pervasive misleading or deceptive conduct from sponsored links that may work to undermine public trust in the internet as an environment for trade or commerce.

Finally, that such a modified or qualified negligence liability standard may make sense in policy terms is hinted at by French J in his extrajudicial comments on s 52, where he presciently observes a possible future use of the provision 'to develop a public interest jurisprudence that is not concerned with particular transactions so much as the setting of standards for the conduct of public debate in trade or commerce'.[56] A broader policy concern to set normative standards for the conduct of public debate helps to explain why the statute did not specify and the Australian courts did not construe it to require a traditional standard of fraud or negligent misrepresentation, as previously required under the common law. Equally, it helps to explain the judicial imposition of such limiting standards as the need for active rather than passive misrepresentation (not merely acting as 'a conduit') — all for going to the legitimacy of law being used to prescribe what French J rightly describes as 'a norm of commercial conduct which applies in dealings with the public at large, with individuals and between traders'.[57]

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53 As Calabresi and Hirchoff point out: see above n 34, 1076–83, although suggesting that ideally such broader social policy concerns will be combined with rather than be used to override economic considerations of primary accident cost avoidance, and arguing further that courts have by and large followed this approach.

54 Indeed, there are some who argue the standard is one of negligence or one that closely approximates it: see, eg, Richard Posner, *Economic Analysis of Law* (Aspen, 8th ed, 2011) ch 6; Ian Malkin and Joan Wright, 'Product Liability Under the Trade Practices Act — Adequately Compensating for Personal Injury?' (1993) 1 *Torts Law Journal* 63; Don Dewees, David Duff and Michael Trebilcock, *Exploring the Domain of Accident Law* (Oxford University Press, 1996) ch 4.

55 See Calabresi and Hirchoff above n 34 at 1067–9 (although pointing out that product liability decisions might still be made a greater level of specificity than, say, decisions about ultrahazardous activities).

56 French, above n 13, 250.

57 Ibid 268. Such norms ideally rest on some moral authority giving weight to the social standard of conduct expressed: see Robert Cooter, 'Expressive Law and Economics' (1998) 27 *Journal of Legal Studies* 585.

IV Other Jurisdictions

Of course the Google AdWords system is not just limited to Australia, so we should be aware that it is not just in Australia that we see a possible trend towards the imposition of normative standards of commercial conduct on Google with respect to its AdWords system. The European Court of Justice in the *Louis Vuitton* case took a narrow line on Google's liability for trade mark infringements of advertisers that may arise from sponsored links, but nevertheless intimated that Google could not necessarily rely on the safe harbour provisions of the European E-Commerce Directive of 2000 (which also specifies that acting as a 'mere conduit' is not sufficient for liability),[58] to exempt itself from liability as a matter of trade mark law — at least so long as there may have been a 'role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords'.[59] And that the Court did not ultimately decide this question, rather remitting it to national courts to determine, suggests it was aware of the fact that Google's AdWords system and its operation can be modified (as it has in the past) to comply with the legal standards.[60]

Even in the US, where Google might have previously assumed relative immunity for legal liability attributable to its AdWords system,[61] a recent decision of the Fourth Circuit suggests that as Google matures into an industrial behemoth any previous possible latitude the law might have allowed is coming to an end. Thus Google's application for summary judgment in an action by Rosetta Stone Ltd, claiming trade mark infringement, contributory infringement and trade mark dilution, was rejected on appeal in April this year and the case has been remitted to the trial court for decision on the merits.[62] Interestingly, there was substantial evidence of actual confusion regarding sponsored links put forward in this case. In particular, the Court noted that a consumer survey report 'yielded a net confusion rate of 17 percent' – that is '17 percent of consumers [who encounter sponsored links] demonstrate actual confusion'.[63] Further, Google's in-house studies showed that 'the likelihood of confusion remains high' when trade mark terms were used a sponsored link in response to a search query.[64] The Court attributed that confusion to Google's conduct.[65] Further, although the Court at first instance had been prepared to infer that purchasers of Rosetta Stone products would generally be

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58 See *Directive on Electronic Commerce of 2000/31*, OJ 2000 L 178, 1, s 4 (intermediary liability).

59 *Joined Cases C-236/08 to C-238/08. Google France and Google Inc et al v Louis Vuitton Malletier et al*, judgment of the European Court of Justice (Grand Chamber), 23 March 2010, at [106]–[120].

60 For a helpful discussion of the national approaches, see Stefan Bechtold, 'Google AdWords and European Trademark Law' (2011) 54 *Communication of the ACM* 30.

61 See, eg, *Network Automation, Inc v Advanced Systems Concepts, Inc* 638 F3d 1137 (9th Cir 2011), inter alia concluding that the prospects of likely confusion from the defendant advertiser's use of sponsored links in that case should take into account the increasing sophistication of modern internet users: at 1152.

62 *Rosetta Stone Ltd v Google, Inc* 676 F3d 144 (4th Cir, 2012).

63 Ibid 159.

64 Ibid 158–9.

65 The Court accepted that 'those studies, one of which reflected that "94% of users were confused at least once," were probative as to actual confusion in connection with Google's use of trademarks': ibid.

well-educated consumers who would make carefully researched sophisticated decisions about their online purchases, the Court on appeal was not prepared to draw that factual conclusion without further evidence, especially taking into account the evidence that was already available to the Court of individuals who purchased counterfeit Rosetta Stone products in reliance on sponsored links.[66]

Indeed, the latter evidence shows how the problem of misleading or deceptive conduct from Google's AdWords system can easily extend beyond legitimate competitors to counterfeit producers whose products are exceedingly difficult to distinguish from those of a trade mark owner. In these circumstances, it is not just a question of who is the cheapest cost avoider as between potential defendants both available to be sued at reasonably low cost but who is the cheapest cost avoider as between what may practically be the *only* available defendant within the jurisdiction, who appears unwilling to act except under pressure from law,[67] and a plaintiff with limited capacity for self-protection. Here the law, in ascribing responsibility, serves an especially important public interest role.

V Concluding Comments

The *Trade Practices Act 1974* (Cth) has now been superseded by the *Competition and Consumer Act 2010* (Cth) but that does not mean that it is no longer relevant. Its pertinent provisions are substantially replicated in the new Act's *Australian Consumer Law*. So, instead of s 52 of the *Trade Practices Act* prohibiting misleading or deceptive conduct in trade or commerce, we now look to s 18 of the *Australian Consumer Law*.[68] Nevertheless, what has not changed with the new provision is that liability for misleading or deceptive conduct is expressed in general terms. In other words, this is a provision that (to use the words of American legal realist Karl Llewellyn) can be 'read in the light of some assumed purpose'.[69] We find some indication of that purpose in Justice French's important early article, but it is only with the benefit of the High Court's decision in *Google v ACCC* that we will be able to assess the extent to which this provision has achieved its promise of 'setting the standards for conduct of public debate in trade or commerce'[70] — being standards which I have suggested have as much to do with policy as with law.

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66 Ibid, 156–8: detailed testimony from five consumers and a recorded 262 further complaints from customers regarding the purchase of pirated/counterfeit software lodged with Rosetta Stone.

67 As shown by the fact that Rosetta had given some 200 notices of sponsored links being used to advertise counterfeit Rosetta Stone products and even after these notices Google continued to allow those same advertisers to use Rosetta Stone marks in their sponsored links for other websites.

68 Similarly, for the publisher's defence in s 85(3) of the *Trade Practices Act* see *Australian Consumer Law* s 251; and for the definition of 'involved' in the s 75B *Trade Practices Act* see *Australian Consumer Law* s 2.

69 Karl Llewellyn, *The Common Law Tradition* (Little, Brown and Company, 1960) 374.

70 French, above n 13, 250.