

“Legal Boundaries of Online Advertising”

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Abstract. This contribution discusses the legal framework of online advertising and common legal issues pertaining thereto. This paper also addresses the implementation of general legal provisions to online advertising issues in different jurisdictions and the diversity of approaches. It provides the legal boundaries that are specifically applicable to online advertising. The paper then provides a legal analysis on online advertising with a focus on Turkish laws and practice. In the conclusion, there are general evaluations on the legal aspect of online advertising and certain suggestions on the development of a legal framework on online advertising.

1. Introduction

Back in the mid-1990, the Internet medium caught corporations' attention. They sought to tap the power of the Internet¹ in order to communicate with their customers² and to present and promote their products and services. It is commonly accepted that online advertising started when a web magazine, *HotWired*, sold a banner ad to a telecommunications company, *AT&T*, and displayed the ad on its webpage for the first time³, in 1994⁴. It has made great progress since then. Throughout the past decade, online advertising boosted its growth. It eclipsed radio advertising in 2007 and by 2011; online advertising was projected to surpass television revenues⁵. It became a key economic driver in the Internet economy, by funding many websites and services as well⁶. Today it is difficult to surf the Internet without seeing online advertising⁷. As the variety and audience of online advertising increased, different legal issues arose and the necessity to set a legal framework for this area inevitably emerged.

Legal rules regulating advertising are not generally limited to any particular medium through which an advertisement is communicated⁸ and are applicable to the online context as well⁹. For example, under Turkish laws, the scope of the rules governing advertising covers any advertisement, including the written

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¹ J. D. Hart, *Internet Law: A Field Guide*, 2008, BNA Books, Sixth Edition, Ch.8. XII. A. p.577

² G. Schneider, *Electronic Commerce*, 2007, Thomson Course Technology, 2007, Seventh Annual Edition, Ch.4, p.184

³ *But see*, O'Reilly biography, at http://oreilly.com/oreilly/tim_bio.csp: “1993. O'Reilly's Global Network Navigator site (GNN, which was sold to America Online in September 1995) was the first web portal and the first true commercial site on the World Wide Web.”

⁴ B. K. Kaye, and N. Medoff, *Just a Click Away: Advertising on the Internet*, 2001, Massachusetts: Allyn and Bacon
Cited by D. S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, *Journal of Economic Perspectives*, Summer 2009, Vol.23, No.3, p.37-60, available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.23.3.37>

⁵ B. Craig, *Cyber Law, The Law of The Internet and Information Technologies*, 2013, Pearson, First Edition, Ch. 11, p.208

⁶ S. Guha, B. Cheng, P. Francis, *Privad, Practical Privacy in Online Advertising*, Microsoft Research India, and Max Planck Institute for Software Systems, available at <http://research.microsoft.com/en-us/um/people/saikat/pub/imc10-ads/>

⁷ J. D. Ratliff, D. L. Rubinfeld, *Online Advertising: Defining Relevant Markets*, available at http://www.law.berkeley.edu/files/Advertising_Market_Paper_Final.pdf

⁸ Federal Trade Commission, *Dot Com Disclosures (2000)*, available at <http://www.ftc.gov/os/2000/05/0005dotcomstaffreport.pdf>

⁹ ICC International Code of Advertising Practice, 1997, Interpretation, available at http://www.uscib.org/docs/Final_ICC_Comments_on_Codex_Discussion_Paper_on_Advertising.pdf

or oral words, numbers, visual presentations, music and audio effects they contain¹⁰. There is no distinction or limitation as to any mediums through which the advertisements are communicated. But generally it is not always clear what those rules mean, raising issues of interpretation when applied to online communications¹¹. Accordingly, new issues arise almost as fast as technology develops, and new online technologies such as metatags and sponsored search engine results require careful application of rules written at a time when such technologies were yet unimagined¹².

This paper provides an overview of the legal aspects of online advertising and presents an analysis on the common legal issues arising from online advertising and how they are regulated and implemented in different jurisdictions, in particular under Turkish laws.

2. The Legal Aspects of Online Advertising

In the online advertisement industry there are basically three main actors¹³. On one side there are the advertisers that want to reach consumers, on the other side there are the consumers who may or may not be receptive to receiving advertising messages and in between there are the intermediaries¹⁴. This trilateral relation often gives rise to legal issues regarding consumer protection¹⁵, privacy¹⁶, and trademark infringement¹⁷.

However the legal boundaries created as remedies to these legal issues have to balance the promotion of competition in the online environment by allowing fair use of trademarks, protection of consumers from deceptive practices and a free zone for businesses in promoting their brands, products or services.

2.1 Consumer Protection

The need for consumer protection in online advertising emerges from misleading and deceptive advertising acts and practices. Like advertisements through traditional mediums such as newspapers or televisions, online advertisements can also mislead consumers both by what they say, and by what they fail to say¹⁸. In essence, online advertisements may harm consumers by deceiving them into entering non-welfare-maximizing transactions¹⁹. The application of general consumer protection rules to online advertising is conducted by the courts' and other authorities' interpretations and implementations in different jurisdictions. Often there are both self-regulatory and statutory means to regulate and oversee online advertising practices.

Having said that, as the United States Federal Trade Commission ("FTC") stressed "*cyberspace is not without boundaries, and deception is unlawful no matter what the medium*"²⁰. The FTC is the principal authority governing and enforcing online advertising in the United States through the federal Lanham Act, supplemented by the self-regulatory National Advertising Division and enforcement by individual states.²¹ The FTC defines its mission as: "*To prevent business practices that are anticompetitive or*

¹⁰ Article 2 of the Regulation on Commercial Advertisements

¹¹ M. J. Radin, J. A. Rothchild, R. A. Reese, G. M. Silverman, *Internet Commerce, The Emerging Legal Framework*, 2006, Foundation Press

¹² *Id.*

¹³ D. S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, *Journal of Economic Perspectives*, Summer 2009, Vol.23, No.3, p.37–60, available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.23.3.37>

¹⁴ *Id.*

¹⁵ *See, e.g.*, *FTC v. Sili Neutraceuticals LLC et al.*, No. 1:07-cv-04541, 2007 WL 2415849 (N.D. Ill. Aug. 13, 2007)

¹⁶ *See, e.g.*, *In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 00 Civ. 0641 (S.D.N.Y., March 28, 2001)

¹⁷ *See, e.g.*, *Playboy Enterprises, Inc. v. Netscape Communications Corp. et al.*, 55 F. Supp. 2d 1070 (C.D. Cal.) (denying injunction), *aff'd*, 202 F.3d 278 (9th Cir. 1999); No. SA CV 99-320 AHS, 2000 U.S. Dist. LEXIS 13418 (C.D. Cal. Sept. 14, 2000) (granting defendant's motion for summary judgment), *rev'd*, 354 F.3d 1020 (9th Cir. 2004)

¹⁸ M. J. Radin, J. A. Rothchild, R. A. Reese, G. M. Silverman, *Internet Commerce, The Emerging Legal Framework*, 2006, Foundation Press, p.303

¹⁹ M. J. Radin, J. A. Rothchild, R. A. Reese, G. M. Silverman, *Internet Commerce, The Emerging Legal Framework*, 2006, Foundation Press, Second Edition, p.291

²⁰ Federal Trade Commission, *Dot Com Disclosures* (2013), available at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>

²¹ *See* Better Business Bureau, *National Advertising Division* (2013), available at <http://www.bbb.org/us/national-advertising-division/>; Columbia University National Attorneys General Program, *Deceptive Advertising* (2013),

deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity."²²

In addition to enforcing the Lanham Act, the FTC published a set of rules, "Dotcom Disclosures" in relation to online advertising, providing guidelines that businesses should consider as they advertise online to ensure that they comply with US law. The FTC's first guideline on online advertising disclosures was published in 2000 and as per the developments in the information technologies since then, FTC published new guidelines in March 2013. "Dotcom Disclosures" include instructions for online advertisers on how to make clear and conspicuous disclosures to prevent an advertisement from being deceptive. It provides a comprehensive and explicit guide, by indicating and giving examples and including images, as to the most recent and most common types of online advertisement, such as space-constrained ads, banner ads and even the advertisements placed in smartphone applications. It provides guidelines as to where, when and how to place disclosures, to ensure that the consumer clearly understands the consequences of their choices and actions. The FTC's aim is to ensure that products and/or services are described truthfully online and that consumers are making conscious transactions²³.

Similar to the FTC and its governance, in the United Kingdom is the British Code of Advertising, Sales Promotion and Direct Marketing²⁴ ("CAP Code"). It provides the rules for non-broadcast advertisements, sales promotions and direct marketing communications, i.e. all types of marketing practices. The CAP Code encompasses, for example, advertisements in newspapers, leaflets, mailings, emails, text transmissions, fax transmissions, online advertisements, other electronic and printed material and this Cap Code is enforced and administered by an independent body, called the Advertising Standards Authority ("ASA"). Unlike the FTC, the ASA is a self-regulatory organization that is independent of the government and the advertisers and does not enforce statutes. The ASA can refer cases to the Office of Fair Trading for legal action as a last resort.

In one of its decisions, the ASA held that an advertising claim that stated "FREE YouView box – normally £299!" on the website www.talktalk.co.uk was misleading. Although it was actually available to purchase for £299 for seven days, ASA did not consider that long enough to establish a generally-sold-at price. The ASA held that the claim breached CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation), 3.17 (Prices) and 3.40 (Price comparisons)²⁵. ASA's decision constitutes a common example of how consumer protection law provisions are applied to online advertising disputes in the UK.

Finally, the European Union also has its own consumer protection legislation²⁶. Consumer protection legislation includes directives on unfair contract terms²⁷, unfair commercial practices²⁸ and misleading advertising²⁹. The Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006³⁰ on misleading and comparative advertising, sets out the minimum standards for consumer protection throughout Europe, despite the differences between the legislation and practices of its member states. In this respect the Directive 2006/114/EC constitutes a framework for its member states. It also has its own self-regulation system based on the International Chamber of Commerce's ("ICC") Code of Advertising Practice. ICC's Code of Advertising Practice intends to provide a display of a good practice, enhance reliability confidence, in the advertising and marketing communications across the world, increase overall public confidence, ensure responsibility with respect to children, and promoting freedom of speech in marketing communications. It also reduces governmental control over advertising sector with its self-regulation system which enables voluntary rules and standards of practice that are beyond governmental regulations, set out by self-regulatory organizations such as European Advertising

available at <http://web.law.columbia.edu/attorneys-general/policy-areas/health-law-initiative/resources-publications/deceptive-advertising>.

²² Available at <http://www.ftc.gov/ftc/about.shtm>

²³ See supra note 20

²⁴ Available at <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx>

²⁵ ASA Adjudication on TalkTalk Telecom Ltd., 16 January 2013, available at http://www.asa.org.uk/Rulings/Adjudications/2013/1/TalkTalk-Telecom-Ltd/SHP_ADJ_210958.aspx

²⁶ See http://ec.europa.eu/consumers/rights/index_en.htm

²⁷ Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0013&model=guichett

²⁸ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:01:en:HTML>

²⁹ See http://ec.europa.eu/justice/consumer-marketing/unfair-trade/false-advertising/index_en.htm

³⁰ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0114:en:NOT>

Standards Alliance³¹. In broad terms all advertising should be legal, decent, honest and truthful and should respect the cultural differences of the relevant country.

2.2. Privacy

The increasing use of information technology and the Internet ensures that data protection remains one of the most important and relevant laws that online businesses are required to comply with. The Internet is all about the transfer of information. Not only is the Internet used to disseminate information, but also to collect it. One of the main reasons for the preference of online advertising is its targeted approach to consumers³². However this targeted advertising requires obtaining personal information and data, thus it also leads to privacy concerns³³.

For example, in 2001, privacy litigation was brought against the online advertiser DoubleClick Inc. (now owned by Google) in the United States, alleging that the use of web cookies violated three federal laws. A federal District Court noted that the cookies placed on users' computers were used to gather information about the user, and to provide that user with the online advertising it will be interested in³⁴. However, the court held that DoubleClick Inc. only gathered information concerning a user's activities on an affiliated website and that it did not access information on a user's own computer. Although the court interpreted the use and placement of cookies as interception of electronic communications, it emphasized the user's "consent" and the purpose of the interception. As such, the court dismissed the users', i.e. the plaintiffs', claims regarding violation of privacy provisions.

In the FTC's 1998s first proceeding³⁵ on a privacy issue related to online advertising in the United States, the FTC asserted that GeoCities had failed to disclose how the personal information collected from its registration process would be used. Furthermore the FTC claimed that GeoCities was using the collected information to send promotional messages to its member users. In order to send such promotional messages, GeoCities had to disclose the collected information to third parties. Moreover, FTC charged GeoCities for not posting a clear and prominent privacy notice as per FTC's principles. GeoCities agreed to settle the FTC charges of deceptively collecting personal information. According to the settlement, GeoCities had to post a clear and prominent privacy notice, providing the users with the information such as how the collected information is used, to whom it is disclosed, how it could be removed³⁶.

In another dispute, the FTC commenced an inquiry into whether DoubleClick had engaged in unfair trade practices by tracking the online activities of Internet users and combining the tracking data with detailed personal profiles in a public database³⁷. The Electronic Privacy Information Center, i.e. the complainant, had alleged that the data tracking was done without the knowledge of users and in violation of DoubleClick's assurances included its privacy policy that such tracking information would remain anonymous. The FTC closed its investigation after obtaining DoubleClick's assurance that it would not link users' browsing activities to their buying habits. As part of the settlement, DoubleClick modified its privacy policy to disclose its use of pixel tags, and agreed to create an opt-out for cookies and to clarify its Internet address finder email practices.

Furthermore in 2012 the FTC received a complaint alleging that Facebook shared information in ways that were inconsistent with its statements to consumers (i.e. its users) and that its practice was unfair and deceptive³⁸. There was a list of violations in the complaint submitted to FTC, including sharing personal information with the advertisers³⁹. Facebook proposed a settlement to FTC which required Facebook to take several steps to ensure adherence to its promises in the future, including giving clear and prominent

³¹ See <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/marketing-and-advertising/self-regulation/>

³² See, B. Craig, *Cyber Law, The Law of The Internet and Information Technologies*, 2013, Pearson, Ch.11, p.208

³³ *Id.*

³⁴ *In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 00 Civ. 0641 (S.D.N.Y., March 28, 2001)

³⁵ J. D. Hart, *Internet Law: A Field Guide*, 2008, BNA Books, Sixth Edition, Ch.8. XII. A. Spam, Advertising and Spyware, Ch.6.III.D.3.a. Data Collection and Privacy, p.377

³⁶ *In re Geocities*, FTC No. 982-3051, Agreement Containing Consent Order (Aug. 13, 1998), available at <http://www.ftc.gov/os/1998/08/geo-ord.htm>

³⁷ See, S. Olsen, *FTC Drops Probe into DoubleClick Privacy Practices*, CNET News.com (Jan. 22, 2001), available at http://news.com.com/2100-1023_3-251325.html.

³⁸ *In the Matter of Facebook, Inc.* FTC File No. 092 3184 Letters to Commenters, available at <http://www.ftc.gov/os/caselist/0923184/120810facebookcmbltrs.pdf>

³⁹ See <http://ftc.gov/opa/2011/11/privacysettlement.shtm>

notice to consumers and obtaining their consent before sharing their information by overstepping their privacy settings, and maintaining a comprehensive privacy program to protect consumers' information, and giving consent to third parties privacy audits⁴⁰. FTC approved the settlement and did not further investigate or impose any penalties. The settlement did not attest whether Facebook violated the law or not. However FTC may impose penalties upon violation of the settlement in the future⁴¹.

As the cases above illustrate, legal issues related to privacy are typically dependent on the privacy policies of the online advertisers or other intermediaries, in other words dependent on the agreement between the parties. However, these policies should provide assurances and be clear and well-communicated to the users⁴².

In this regard, in 2012 the European Commission has proposed a comprehensive reform of its Directive 95/46/EC⁴³ on the protection of individuals with regard to the processing of personal data and on the free movement of such data protection rules for the purposes of promoting online privacy rights and increasing reliability of European digital market⁴⁴.

Another issue that is particular for online advertising within the scope of both consumer protection and privacy is unsolicited commercial e-mail messages, in other words “junk” e-mail or in other words “spam”⁴⁵. The burden of ever-increasing spam required a revised legal framework and a change in the e-mail messaging system⁴⁶.

For example, in 2002, European Parliament adopted a strict anti-spam measure, the Telecommunications Data Protection Directive⁴⁷. The Directive provided an opt-in approach, i.e. companies may not send unsolicited emails to prospective customers unless the customers previously agreed to receive them. On the other hand, the United States enacted opt-out based Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”) in 2003⁴⁸. Contrary to the European Parliament’s approach, the United States’ approach enables companies to send unsolicited e-mails to prospective customers, without requiring any consent. However, unsolicited e-mail generating companies are obliged to provide an opt-out option for the recipients, enabling them to stop receiving these e-mail messages if they are willing to.

2.3. Trademark Infringement

In online advertising, some companies seek to improve their rankings in search engine results by placing selected search terms in metatags⁴⁹ and by purchasing keywords from search engines⁵⁰. This is an appropriate and a fair way of advertising unless it constitutes any trademark infringements. Trademark infringements may occur from third parties’ use of the trademark owner’s mark, or a confusingly similar mark, to identify the third party’s goods or services or falsely to imply an association between the trademark owner and the third party.

⁴⁰ FTC Approves Final Settlement With Facebook, available at <http://ftc.gov/opa/2012/08/facebook.shtm>

⁴¹ See <http://ftc.gov/opa/2011/11/privacysettlement.shtm>

⁴² See, B. Craig, *Cyber Law, The Law of The Internet and Information Technologies*, 2013, Pearson, First Edition, Ch.11, p.217

⁴³ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:NOT>

⁴⁴ See, http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm

⁴⁵ Bryan Craig, *Cyber Law, The Law of The Internet and Information Technologies*, 2013, Pearson, First Edition, Ch.11, p.208

⁴⁶ P. B. Maggs, J. T. Soma, J. A. Sprowl, *Internet and Computer Law Cases-Comments-Questions*, 2010, WEST, Third Edition, p.444

⁴⁷ See Directive on Privacy and Electronic Communication, Directive 2002/58/EC of the European Parliament and of the Council, 2002 O.J. (L 201) 37, available at <http://register.consilium.eu.int/pdf/en/05/st03/st03677.en05.pdf>.

⁴⁸ J. D. Hart, *Internet Law: A Field Guide*, 2008, BNA Books, Sixth Edition, Ch.8. XII. A. Spam, Advertising and Spyware, p.632

⁴⁹ A metatag is a word or code embedded in a data field on a website that is not normally part of any publicly viewable web page. Search engines read a website’s metatags to determine the subject(s) addressed on the site so that the search engine can determine whether the site is responsive to a search query input by a user. J. D. Hart, *Internet Law: A Field Guide*, 2008, BNA Books, Sixth Edition, Ch.2. II., p. 74

⁵⁰ M. J. Radin, J. A. Rothchild, R. A. Reese, G. M. Silverman, *Internet Commerce, The Emerging Legal Framework*, 2006, Foundation Press, Second Edition, Ch.4, p.314

In a dispute in the U.S., a federal District Court held that the purchase of keyword advertisements triggered by a search containing another company's trademark should be deemed as use of that trademark in commerce and that it is sufficient to give rise to trademark infringement claims⁵¹.

However the law is far from settled and there are also court decisions reaching the opposite result. Courts have concluded that using the trademarks of another to trigger online advertisements is not a "use in commerce"⁵² except where the "use" of the mark is visible to end users⁵³. In this approach, the court interprets trademark infringement as limited to the use of another's trademark on products and services which are visible to consumers and users. Therefore, these courts concluded that there is no infringement.

From this point of view, in one case, the U.S. federal District Court dismissed trademark infringement claims against the defendant's purchase of the keyword "Zocor", the plaintiff's popular anti-cholesterol medication's name, from search engines to trigger the display of sponsored links to defendant's websites⁵⁴. The court stated that such purchases did not constitute the requisite use in commerce of plaintiff's mark necessary to sustain such claims. The court also granted defendant's motion to dismiss trademark infringement claims arising out of its use of plaintiff's trademark "Zocor" on its website, at which the defendant sold both plaintiff's own product, as well as a generic version described as "generic simvastatin". "Simvastatin" is the active ingredient in "Zocor." Because it also sold branded Zocor at its website, the court held that this was a permitted fair use of plaintiff's mark.

On the other hand, French⁵⁵ and German⁵⁶ courts seem to be reluctant to liberalize online advertising. They have implemented a more restraining approach in the disputes regarding trademark infringements through sponsored links. In 2005 German court held that the layout of the defendant's site can lead to confusion, and that the sponsored links to the plaintiff's competitors were sufficient to determine trademark infringement⁵⁷. The dispute was on the defendant's use of the plaintiff's trademark as a keyword in its sponsored links on a search engine. French courts also adopted a unified approach, parallel to German courts, for trademark infringements through online advertising in France⁵⁸.

Vice versa. The European Court of Justice brings another perspective to the issue of trademark infringements through keywords and sponsored links with its decision of 23 March 2010. The court stated that a third party's use of a sign which is identical with or similar to a trademark owner's mark at least implies that the third party is using the sign in its own commercial communication. However, the court also stated that intermediaries that allow its clients, i.e. the advertisers, to use signs which are identical with, or similar to, trademarks, do not themselves use those signs⁵⁹. Therefore the Court held that online advertising intermediaries' sales of another's trademark as keyword does not constitute a trademark infringement. This decision is an important one promoting the improvement of online advertising and a good example to follow for the conservative European Courts.

There are also cases where generating unsolicited e-mail messages may lead to trademark infringements. In a dispute in the United States, a federal District Court held that the defendant violated

⁵¹ *Edina Realty, Inc. v. TheMLSOnline.com*, 2006 WL 737064, Civil No. 04-4371 (D. Minn. 2006) (JRT/FLN)

⁵² *Hamzik v. Zale Corp./Delaware*, No. 3:06-cv-1300, 2007 WL 1174863 (N.D.N.Y. Apr. 19, 2007) (noting that no "use" occurs for purposes of the Lanham Act where the use of the mark was invisible to users, but if a defendant displays its mark along with plaintiff's mark, the defendant's actions could constitute "use in commerce")

⁵³ *See FragranceNet.com, Inc. v. FragranceX.com, Inc.*, 493 F. Supp. 2d 545 (E.D.N.Y. 2007) (defendant's use of keywords was not a "use in commerce" because plaintiff's mark was not placed on any goods or containers or displays and the use was not intended to indicate source or origin)

⁵⁴ *Merck & Co., Inc., et al. v. Mediplan Health Consulting, Inc., d/b/a RxNorth.com* 425 F.Supp.2d 402 (S.D.N.Y., March 30, 2006)

⁵⁵ *Societe Google France v. Societe Viaticum & Societe Luteciel*, No. R.G. 03/00051 (CA Paris Mar. 10, 2005) (Fr.) (holding Google France liable for trademark infringement for its sale of plaintiff's trademarked terms to plaintiff's competitors; when Google users ran a search for these marks, the triggered competitors' advertisements would appear on the search results page near the natural Google search results)

⁵⁶ *Zinke v. Placht*, No. 2a O 20/05 (LG Dusseldorf Mar. 30, 2005) (F.R.G.) (affirming the issuance of a temporary injunction by a German court where results of a search for the mark "Aladon" displayed competitor's sponsored links more prominently than the listing for the trademark owner)

⁵⁷ *Id.*

⁵⁸ *See* http://www.whitecase.com/files/Publication/ed18515e-132c-4bbc-a8b8-0107acbcd727/Presentation/PublicationAttachment/72ff30d1-8fd3-4b54-9ec5-309c5b4e7987/article_Keywords_May_11_05_2.pdf

⁵⁹ *Google France and Google Inc. et al. v. Louis Vuitton Malletier et al.* available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=814803>

the Federal Trademark Dilution Act of 1995, i.e. infringed the plaintiff's (an online services company, America Online Inc.⁶⁰) rights arising from its trademark ownership, by sending the spam e-mail messages subject to the dispute⁶¹. Dilution occurred because the plaintiff's mark was tarnished by its association with the transmission of spam that advertised pornographic materials. Each e-mail contained a fake header, which falsely indicated that the spam was sent from the plaintiff. Defendant also identified its spam targets by harvesting e-mail addresses of the plaintiff's subscribers from the plaintiff's chat rooms.

Another aspect of the issue is the "initial interest confusion doctrine"⁶². In a case before the United States Court of Appeals for the Ninth Circuit, the court determined that use of another's trademark in the metatags of websites may constitute trademark infringement, if initial interest confusion is likely to occur. According to the court, initial interest confusion occurs when another's trademark is used in order to capture the consumers' initial interest, even if it does not result in an actual benefit for the one using another's trademark⁶³.

3. Turkish Law Overview

With respect to online advertising, the Turkish legal system lacks a comprehensive and specific law. However the void is filled by various provisions which can be found within different legislations. There are three main aspects to the issue within the scope of Turkish legislation and practice: consumer protection, trademark infringement and Internet law. Turkish law lacks legal provisions on privacy violations and unsolicited commercial e-mail messages through online advertising, which are not precisely filled with general provisions. The authority for determining the principles and procedures for commercials and advertisements, and for monitoring and controlling conformity with the consumer protection laws and related legislation in Turkey is the Advertisement Board⁶⁴. Advertisement Board also imposes penalties for breaches of laws and unfair practices, by also considering universally accepted definitions and rules⁶⁵.

3.1. Consumer Protection

The Law No. 4077 on Consumer Protection ("Consumer Law") sets forth the general principles for all commercials and advertisements that are directed at the consumers⁶⁶. Pursuant to the provision, in broad terms, commercials and advertisements must comply with the laws, the principles determined by the Advertisement Board, public moral, public order, and personal rights, and must be honest and truthful. Furthermore, the law prohibits deceptive, misleading advertisements, advertisements abusing one's lack of experience or knowledge, jeopardizing consumers' security of life and property, advertisements encouraging violence and perpetration, corrupting public health, abusing minors, patients, elders and handicapped persons, and implicit advertisements.

On the other hand, while the Consumer Law draws a general framework for the commercials and advertisements from the consumer protection perspective, the Regulation on Commercial Advertisements

⁶⁰ See <http://www.corp.aol.com/about-aol/overview>

⁶¹ *America Online v. LCGM, Inc., et al.* 46 F. Supp.2d 444, Civ. Act. No. 98-102-A, (E.D. Va., Nov. 10, 1998), available at <http://www.i-lawgroup.com/AOL%20v.%20LCGM.pdf>

⁶² D. C. Glazer, D. R. Dhamija, *Revisiting Initial Interest Confusion On The Internet*, available at <http://fordhamipconference.com/wp-content/uploads/2011/04/Glazer-1.pdf>

⁶³ "West Coast's use of "moviebuff.com" in metatags will still result in what is known as initial interest confusion. Web surfers looking for Brookfield's "MovieBuff" products who are taken by a search engine to "westcoastvideo.com" will find a database similar enough to "MovieBuff" such that a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "moviebuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark. Recently in *Dr. Seuss*, we explicitly recognized that the use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement'" *Brookfield Communications Inc. v. West Coast Entertainment Corp.* 174 F.3d 1036 (9th Cir. April 22, 1999), available at <http://caselaw.findlaw.com/us-9th-circuit/1068417.html>

⁶⁴ Article 17 of the Law with number 4077 on Consumer Protection

⁶⁵ *Id.*

⁶⁶ Article 16 of the Law with number 4077 on Consumer Protection

(“Regulation”), which is also based on the Consumer Law, establishes a detailed set of rules for commercials and advertisements, and elaborates the general principles set forth in the Consumer Law. In practice, it constitutes the main reference for any advertisement disputes. The Regulation covers any commercial and advertisement including the written or oral words, numbers, visual presentations, music and audio effects they contain⁶⁷.

The Regulation defines the commercials and advertisements that are in the scope of its application. The Regulation defines commercials and advertisements as the announcements that are considered a marketing communication, broadcasted by an advertiser in any channels for the purposes of presenting a product, informing and convincing the target audience, or increasing or conducting the sale of a product.

For these reasons, the Regulation also captures online advertisements. There are large numbers of cases where the Regulation is applied to online advertising matters. This can be found in numerous decisions of the Advertisement Board, which have addressed well-known and highly popular websites such as www.facebook.com⁶⁸ and www.booking.com⁶⁹.

Also a special communiqué on the Usage of Subtitles and Footnotes in the Commercials and Advertisements sets out detailed rules for commercial subtitles and footnotes. This communiqué might be interpreted to apply to online advertisements such as banner ads.

Besides all of the above, the international regulations such as the International Chamber of Commerce Codes of Advertising and Marketing Practice are considered in the interpretation and application of the domestic advertisement regulations. The Consumer Law stipulates that the Advertisement Board takes into account the universally accepted definitions and rules in the determination of the principles to be applied to the commercials and advertisements⁷⁰.

3.2. Trademark Infringement

Under Turkish laws, Turkish Commercial Code with number 6102 regulates unfair competition situations⁷¹. Even though the law itself is not directly focusing on advertisement issues, it constitutes an important set of rules for advertisement legislation. It also encompasses trademark infringements. However, Decree Law No. 556 on Protection of Trademarks (“Decree Law”) provides more specific provisions as to trademark infringements. Pursuant to the Decree Law, a trademark owner can prohibit the use of a trademark on the Internet as a keyword, directing code, domain name or similar form in an illegitimate manner and with a commercial effect⁷². Therefore the trademark protection in online advertising is explicitly covered under the Decree Law.

There has been a remarkable increase in trademark infringement claims regarding online advertising in the Turkish jurisdiction. In a recent dispute, which would set a significant precedent for similar future disputes, Profilo filed a lawsuit against both defendants Google Inc. and Pronet, claiming damages arising from alleged trademark infringement. The plaintiff claimed that its registered trademarks “profilo guvenlik” and “profilo protect” appear among the sponsored links when these keywords are searched on the Google search engine, and that these search results are displayed in the respective sponsored links under Pronet’s own website, www.pronet.com.tr. The plaintiff alleged that its trademarks are being used as leading codes through the advertisement agreement that is signed between Google Inc. and Pronet and that through this agreement; www.google.com.tr is allegedly directing Profilo’s potential customers to Pronet, thereby infringing the relevant provisions under Decree Law No. 556 on Protection of Trademarks. The court decided to dismiss the case in terms of the intermediary Google Inc. based on lack of standing. This decision indicates the Turkish courts’ tendency for liabilities of intermediaries regarding online advertising disputes and should certainly be considered as a significant precedent attesting that Internet intermediaries should not be held liable for the content (i.e. advertisement) provided by the content providers, for the future disputes. The Court decided that the other defendant Pronet had to cease

⁶⁷ Article 2 of the Regulation on Commercial Advertisements, Official Gazette No.14.06.2003/25138

⁶⁸ Advertisement Board Decision, File No: 2011/2028, Advertisement Board 198 Press Bulletin

⁶⁹ Advertisement Board Decision, File No: 2011/1209

⁷⁰ Article 17 of the Law with number 4077 on Consumer Protection

⁷¹ Article 54 of Turkish Commercial Code with number 6102

⁷² Article 9 of the Decree Law No. 556 on Protection of Trademarks

the use of the plaintiff's trademark in its advertisements, and to pay TRL76,000 pecuniary damages and TRL 5000 non-pecuniary damages to the plaintiff Profilo⁷³.

3.3. Internet Law

The Law No. 5651 on Regulation on Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("Law No. 5651") is the only law that particularly provides a regime for broadcasts through the Internet. However, Law No. 5651 is not commonly applied to advertisement cases by the authorities in practice. Still, it is a remarkable regulation that should be considered for online advertising, especially in terms of understanding liabilities of Internet actors. The Law No. 5651 determines allocation of liabilities with respect to illegal contents on the Internet medium and is the only law specifically regulating the Internet medium. Therefore in Turkey, when a dispute arises with respect to online advertising, the Law No. 5651 shall be considered and initially evaluated necessarily.

4. Conclusion

As the rapid growth of online advertising continues, inevitably there will be new legal issues arising. Therefore, there is a need for certain uniformed principles to be accepted collectively. A variety of different approaches causes unpredictability and uncertainty. In an ever-evolving environment such as the Internet, at least fundamental uniformity is required, in order to maintain reliability in online transactions and prevent infringements and/or unfair or deceptive acts and practices. Online advertising should be treated beyond national policies due to its comprehensive nature as it is attempted in the European Union. The general obligations and rights of the online advertising actors and allocation of liabilities should be unified at least at the minimum level. Setting minimum standards in all jurisdictions would provide foreseeability, reliability and development of the marketing communications. Regulating the rest may remain in the hands of self-regulatory authorities and/or national regulatory authorities which should be flexible and actively involved enough to seize the needs of the developing marketing communications and technologies. In order to achieve this purpose, authorities might establish a global structure such as an institution or an organization specialized in advertising related legal matters. Besides, there may be a supervisory council within the same structure which might supervise national authorities and act as a supra-national authority which may enforce its decisions on national level.

However uniformity should not be understood in a way to provide constraints on online advertising that prevents the market to develop and to move forward. Uniformity serves for the consistency and reliability of online advertising world-wide. Increase of reliability, consistency and confidence in the online advertising would certainly increase its benefits for consumers, advertisers and the companies marketing their products or services.

Unlike the European Union member states' strict application of legislative framework on advertising practices, the application of online advertising rules should be liberalized for promoting new developments and competitive environment. Unified rules should only provide basic principles and procedures on which the regulatory authorities would build up their interpretations and determinations. These rules should welcome the innovations that the sector would bring in the future.

In the Internet medium, in a moment's time an expression may have numerous consequences in many different jurisdictions. Therefore, online advertising issues should be dealt sensitively, considering collective justice. Online advertising has two phases consisting of both the commercial and the consumer correlatively. There should be a balance in the legal boundaries between these two sides. Legal provisions providing online advertisers a free zone for collecting user data and for promoting and convincing consumers should provide protection for the consumers regarding deceptive ads and privacy invading practices. On the other hand, while protecting consumers, the competitive environment of commerce should be maintained. This balance is important also for both enabling consumers to reach products that they actually desire and to maintain a fair commercial environment.

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⁷³ Istanbul 2nd Civil Court of Industrial and Intellectual Property Rights' decision with number 2010/140 E., dated 19.03.2013



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