

# “Understanding Search Engines: A Legal Perspective on Liability in the Internet Law Vista”

Gönenç Gürkaynak,\* İlay Yılmaz,\* Derya Durlu\*

**Abstract.** This contribution discusses the legal dimension of search engines in an Internet law context, through both a global lens and a Turkish perspective. This paper introduces search engine liability in the growing Internet industry and the role of search engines in distributing and disseminating information. Next, this paper considers a global perspective on the legal dimension of search engines from United States case law, United Kingdom case law, and other European courts and legislation. This contribution then discusses the liability of search engines in the Turkish legal context. The conclusion provides an overall evaluation of the current status of search engine liability and prospects on its potential development.

## 1. Introduction

In the early 1990s, the proliferation of information available on the Internet and the growth of Internet-related businesses produced new challenges for the distribution and dissemination of information. Search engines enhance information sharing and expand global access to information by allowing users to find online content through keyword searches.<sup>1</sup> As legal issues arise from widespread use of search engines, governments react by attempting to regulate the Internet sector. The search engine operators’ growing market power and ability to control access to information trigger new legal concerns encompassing data protection,<sup>2</sup> trademark<sup>3</sup> and copyright infringement,<sup>4</sup> consumer protection, competition law, and free speech.<sup>5</sup> As emerging economies<sup>6</sup> expand rapidly, Internet access within these economies expands as well.<sup>7</sup> Search engines and Internet-related businesses are influential factors

---

\* Partner, ELIG, Attorneys-at-Law, Istanbul, Turkey, gonenc.gurkaynak@elig.com

\* Associate, ELIG, Attorneys-at-Law, Istanbul, Turkey, ilay.yilmaz@elig.com

\* Associate, ELIG, Attorneys-at-Law, Istanbul, Turkey, derya.durlu@elig.com

<sup>1</sup> See Retail Servs., Inc. v. Freebies Publ’g, 364 F.3d 535, 541 n.1 (4th Cir. 2004).

<sup>2</sup> See Eugene Volokh, Google: First Amendment Protection for Search Engine Results, Volokh.com, Apr. 20, 2012, <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>.

<sup>3</sup> See generally Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012)(alleging direct, contributory, and vicarious trademark infringement liability for search engine using third-party advertising keywords).

<sup>4</sup> See generally Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (alleging copyright infringement for search engine users’ ability to download unauthorized copies of movies and television shows).

<sup>5</sup> See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEP. L. REV. 430 (2008) (addressing the challenges to free speech protections).

<sup>6</sup> Emerging market economies, though not specifically defined, refer generally to fast-growing economies that are open to global capital and innovation, competing with strong existing economies, but still susceptible to instability. See Tarun Khanna & Krishna G. Palepu, *How to Define Emerging*

shaping policies and laws in emerging market economies. Turkey, as an emerging market economy, is particularly concerned with search engine liability in the development of Internet laws.

This contribution provides a global overview of the development of search engine law while analyzing the potential direction of search engine liability in Turkey. First, this paper addresses the development and expansion of the Internet sector, particularly the role of search engines in distributing and disseminating information on the Internet. Second, this paper presents a global perspective on the emerging legal context of search engines, focusing on search engine liability and online advertisements. Third, this paper evaluates search engine liability within the Turkish legal context. Finally, this paper provides an overall evaluation of the anticipated evolution in search engine liability and continuing challenges.

## 2. Search Engine Framework

Determining the legal liability of search engines requires an understanding of the framework within which search engines operate. This section addresses the creation and evolution of search engines as well as the methods used to collect, organize, and dispense online information.

### 2.1. Historical Background

The first search engine was Archie, created in 1990 by Alan Emtage, a student at McGill University in Montreal.<sup>8</sup> Archie was a tool for indexing FTP (File Transfer Protocol) archives through a searchable database of filenames as a method of storing and retrieving files online.<sup>9</sup> Archie's operation was such a success it was later adapted and enhanced to generate new and more advanced search engines.

In the mid-1990's, new search tools emerged,<sup>10</sup> introducing a complex system of search modifiers, enabling natural language searches, and grouping web pages by their underlying concepts to fine-tune a users' search results.<sup>11</sup> Originally, search engine algorithms were based solely on the text of the webpage—determining its subject matter and relevance based on keywords discussed.<sup>12</sup> Search engine capabilities, however, continued to expand, adding metadata (information about the page itself such as age, number of links, and authorship) into algorithms and assessing relevance based on the number of links.<sup>13</sup>

The search engine market tended to fluctuate—many search engine companies emerged in the late 1990s, only to disappear a few years later; some search engines,

---

*Markets*, Forbes.com (May 27, 2010) <http://www.forbes.com/2010/05/27/winning-in-emerging-markets-opinions-book-excerpts-khanna-palepu.html>.

<sup>7</sup>See generally *Emerging Focus: Emerging Market Economies to Benefit from Robust Growth in Internet Usage and Access*, EUROMONITOR INT'L BLOG, (July, 19, 2011), <http://blog.euromonitor.com/2011/07/emerging-focus-emerging-market-economies-to-benefit-from-robust-growth-in-internet-usage-and-access-.html>.

<sup>8</sup>See Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, Yale J.L. & Tech. 203 (2006).

<sup>9</sup>*Id.*

<sup>10</sup>Including Infoseek, AltaVista, and Excite

<sup>11</sup>*Id.* at 204; see also JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 53 (2005).

<sup>12</sup>See James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 6 (2007).

<sup>13</sup>*Id.*

however, asserted a strong presence in the market. Google, one of the most prominent Internet businesses, emerged as a leader in the search engine sector in 2000. Google's objective was to be the "perfect search engine,"—one that "understands exactly what [is] mean[t] and gives ... back exactly what [is] want[ed]"<sup>14</sup>—and based on its popularity it has generally achieved this objective. Although Google remains a prominent search engine, its competitors—Yahoo!, Bing, etc.—continue to vie for prominence in the online search engine market through innovation and expansion based on developments in search engine technology.<sup>15</sup>

## 2.2. Functioning

The technology search engines use is an important component to determining potential liability from legal issues. The methods for collecting, storing, and disseminating Internet-based content determine the scope of potential responsibility for a search engine.

Search engines are intermediary tools to catalog websites using a process referred to as "crawling."<sup>16</sup> Search engines gather the content through automated software by "crawling" through different web pages, copying the HTML code of each website found, and then retaining this in a temporary pool or "cache."<sup>17</sup> The software compiles these different websites into a comprehensive index. Search results are generated from the search engine's index based on the search term query submitted by the user.<sup>18</sup> The heading and a snippet of each individual search result are indexed through computer-processed algorithms. By clicking the "cache" link of a webpage, the user views the most recent scanned and indexed snapshot of the website<sup>19</sup>.

To avoid indexing certain content through a search engine's web-crawl, the content must be removed from the original website or be encrypted to prevent the web-crawl from locating the content.<sup>20</sup> However, search engine indexing updates may not occur frequently given the voluminous data that the "crawler" must process and filter and therefore removal or encryption may not immediately remove the content from search engine results.

The potential challenges to search engine liability are based primarily on the technology used to operate a search engine. The crawling process, cache system, and dissemination method are all scrutinized to determine the culpability of search engines in particular circumstances.

## 3. Overview of Search Engine Liability

Search engines are unmistakably Internet-based operations; Internet-based laws for content providers, host providers, and online business operators, however, can be

---

<sup>14</sup> See e.g. Corporate Information, available at <http://www.google.com/corporate/history.html> (July 9, 2012).

<sup>15</sup> See SEARCH ENGINE WATCH, <http://searchenginewatch.com/> (July 12, 2012) (providing regular updates for internet search engine activity).

<sup>16</sup> See Viva R. Moffat, *Regulating Search*, 22 HARV. J. L. & TECH. 475, 481 (2009).

<sup>17</sup> *Id.*

<sup>18</sup> Viva R. Moffat, *Regulating Search*, 22 HARV. J. L. & TECH. 475, 481 (2009).

<sup>19</sup> At the top of the "cached copy" of a website, a warning may appear, indicating that the relevant webpage is a snapshot of the website from the cache and not the main webpage. This warning might also state that the website may no longer exist.

<sup>20</sup> Viva R. Moffat, *Regulating Search*, 22 HARV. J. L. & TECH. 475, 482 (2009).

challenging to apply to search engines. Search engines are distinct from these other operations in both objective and technology, which requires courts and legislatures to address legal issues related to search engines from a different perspective.

Relevant case law emerged shortly after search engines rose to Internet prominence and primarily addressed the definition of search engines as distinct from other Internet-based entities. *ACLU v. Reno*<sup>21</sup> defined the functionality and importance of web search engines as services that “allow users to search for Web sites that contain certain categories of information” and provide a list of links to relevant websites.<sup>22</sup> Other early American cases noted additional distinctions between search engines and Internet-based businesses. *Lockheed Martin Corp. v. Network Solutions, Inc.*,<sup>23</sup> was a trademark infringement suit brought by a company against the domain name registrar. The court held that keyword searches “often yield thousands of possible Web sites,” and that “[s]uch a cumbersome process is rarely satisfactory to businesses seeking to use the Web as a marketing tool.”<sup>24</sup>

As Internet use expands, search engine law continues to grow. Search engine operators face increasing legal action related to intellectual property and data protection including third-party trademark infringement from advertising,<sup>25</sup> copyright violation from search result displays,<sup>26</sup> content aggregation from “crawling,”<sup>27</sup> and manipulation of search result rankings.<sup>28</sup> This section examines search engine liability through a multi-jurisdictional review of general intellectual property rights and defamation; it also explores the similar but distinct challenges generated by online advertisements.

### *3.1. Intellectual Property, Defamation, and Search Engine Liability*

Since the Internet is not bound by geographic constraints, legal issues concerning search engines are not bound by geographic constraints. The following cases and regulations demonstrate the pervasive search engine issues transcending jurisdictional boundaries. The most frequent types of claims against search engines arise from intellectual property violations and personal defamation suits. This section addresses search engine related intellectual property and defamation issues in the United States, the United Kingdom, and Europe.

#### *3.1.1. American Case Law on Search Engine Liability*

American courts have addressed a significant number of claims against search engines and have developed extensive jurisprudence on search engine liability, particularly related to intellectual property disputes and defamation.

Protecting intellectual property rights and promoting access to information are important issues in determining search engine liability. *Perfect 10*,<sup>29</sup> involved an

---

<sup>21</sup> 929 F. Supp. 824 (E.D. Pa. 1996).

<sup>22</sup> *Id.* at 837.

<sup>23</sup> 985 F. Supp. 949 (D. Cal. 1997).

<sup>24</sup> *Id.* at 952.

<sup>25</sup> See *Government Employees Inc. Co. v. Google, Inc.* 330 F. Supp. 2d 700 (D. Va. 2004).

<sup>26</sup> See *Perfect 10 v. Google, Inc.*, 78 U.S.P.Q. 2d 1072 (C.D. Cal. 2006); *Field v. Google, Inc.* F. Supp. 2d, 77 U.S.P.Q.2d 1738 (D. Nev. 2006).

<sup>27</sup> See *EBay Inc. v. Bidder's Edge, Inc.* 100 F.Supp.2d 1058 (N.D.Cal.2000)

<sup>28</sup> See *Search King, Inc. v. Google Technology Inc.*, No.CIV-02-1457-M, 2003 WL 214645568 (W.D.Okla. 2003).

<sup>29</sup> 78 U.S.P.Q. 2d 1072 (C.D. Cal. 2006).

intellectual property conflict over a search engine's capacity to assemble, organize, store, access, and display intellectual property protected "content." The plaintiff, Perfect 10, published a magazine and operated a subscription website; it registered the images it used with the United States Copyright Office. The defendant, Google, operated a search engine and indexed websites on the Internet via a web "crawler."

The court focused on whether a search engine could be liable for displaying "thumbnails" of copyrighted images on an "image search" and whether a search engine could be liable for displaying copyrighted images from another website through hyperlinks.<sup>30</sup> The court also addressed whether Google directly infringed Perfect 10's distribution right by broadcasting the relevant images on the web. The court distinguished between "display" and "inline linking," while analyzing available precedents.<sup>31</sup> The court held that Google did not infringe Perfect 10's right to distribution since infringement required "*actual* dissemination" (emphasis added) of the copyrighted material.<sup>32</sup>

Defamation is another common basis for lawsuits brought against search engines. In *Field v. Google*,<sup>33</sup> Blake Field filed a copyright infringement claim against Google Inc. for allowing Internet users' access to copies of 51 of his registered works, which violated Field's exclusive right to reproduce copies and distribute copies of those works. The court required Google to satisfy four elements for its estoppel<sup>34</sup> defense. Because Google's "cached" links allow users to view pages that the user cannot easily access directly, the court held in favor of Google, noting that "if Google copies or distributes Field's copyrighted works by allowing access to them through 'cached' links, Google's conduct is fair use of those works as a matter of law."<sup>35</sup>

The aforementioned cases and their progeny indicate the limitations on liability for search engines under American jurisprudence.

### 3.1.2. English Case Law on Search Engine Liability

Courts in the United Kingdom addressed Internet law related to search engines similar to the United States. Although there are two preceding cases that provide the foundation for search engine liability in the United Kingdom, this section will focus on the contributions to this genre from a 2009 case.

In 2009, Metropolitan International Schools Limited brought a defamation case against Designt Technica Corporation, Google UK Limited, and Google Inc.<sup>36</sup> This case established precedence for addressing Internet-based entities and provided a distinction

---

<sup>30</sup> See supra n. 17 p. 1.

<sup>31</sup> Cf. *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503; *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F.Supp.2d 1114 (C.D. Cal. 2001); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1168-69 (C.D. Cal. 2002).

<sup>32</sup> *Perfect 10 v. Google, Inc.*, 78 U.S.P.Q. 2d 1072 (C.D. Cal. 2006).

<sup>33</sup> F. Supp. 2d, 77 U.S.P.Q.2d 1738 (D. Nev. 2006).

<sup>34</sup> *Id.* at p. 9 Whether or not Field, as the plaintiff is estopped from asserting a copyright claim "if he has aided the defendant in infringing or otherwise induced it to infringe or has committed covert acts such as holding out ... by silence or in action, quoting *Quinn*, 23 F. Supp. 2d at 753. These elements were whether (1) Field knew of Google's allegedly infringing conduct; (2) Field intended that Google rely upon his conduct or acted so that Google had a right to believe it was so intended; (3) Google was ignorant of the true facts; and (4) Google detrimentally relied on Field's conduct.

<sup>35</sup> *Id.* at p. 15.

<sup>36</sup> *Metropolitan International Schools Limited v. Designt Technica Corporation, Google UK Limited and Google Inc.* [2009] EWHC 1765 (QB)

between search engines and other Internet-based entities. This case also provided a rational basis for apportioning liability for online actions, and serves as a foundation for future cases addressing Internet activity and search engines.

The court held that the search engine operators exercised no control over Designtecnica's actions because a search yields a list of pages determined (automatically) relevant to the query. The technology ranks the pages in order of "perceived" relevance, without human intervention; the search results to any given query depend on successful crawling, indexing, and ranking.

The court held that a search engine is "a different kind of Internet intermediary," which prevented the search engine from exercising complete control over the search terms and search results.<sup>37</sup> The court determined that Google was merely a conduit to information, not a publisher in its own right.

In the Metropolitan case, Justice Eady clearly states that the significance of notification to the proprietor of a search engine merits attention and in that regard, the Third Defendant is not in a position to "take down" the offending words in the way that the Claimant could have done. The opinion referenced search engines' responsibility to remove content after receiving a complaint about libelous material, though the speed and effectiveness of removal was not addressed.

Other courts and regulations lend additional support to the reasoning on search-engines liability based on broadcast content that violates local laws.

### 3.1.2. *European Cases and Regulatory Frameworks on Search Engine Liability*

In civil law countries, court decisions related to search engines do not retain the same authority as in common law countries. There are, however, a few notable court decisions in Europe that demonstrate a comprehensive appreciation for the limits of search engine liability. In *Palomo v. Google Inc.*,<sup>38</sup> Spain's Court of First Instance heard a complaint regarding search result hyperlinks to websites with defamatory content. The court rejected the claim and held that the search engine was not liable for disseminating third party content. The court's rationale was that the search engine was unaware that the linked content was defamatory. The court also referenced the direction of European legislation indicating that there is no obligation for Internet intermediaries to supervise such content.

In *SARL Publison System v SARL Google France*<sup>39</sup>, claims were brought regarding an allegedly defamatory "snippet" appearing in the search engine results with a hyperlink to the primary site. The court held that a search engine was not obliged to consider the legality of a website that appears among the search results. Similarly in *Jensen v. Google Netherlands*,<sup>40</sup> the court held that Google was not responsible for the outcome of a search (i.e. the claimant's name). The reasoning recognized that search engines bring up "technical, automatic and passive" results, independent from the knowledge of the search engine operator.

Internet legislation on the Internet also regulates search engine actions and liability in European countries. Bulgaria's Electronic Commerce Act,<sup>41</sup> enacted in December

---

<sup>37</sup> *Id.*; see generally *Godfrey v Demon Internet Ltd*, [2001] QB 201 and *Bunt v Tilley*, [2006] EWHC 407 (QB).

<sup>38</sup> Court of First Instance No. 19, Madrid, 13 May, 2009 (affirmed by the Madrid Court of Appeals, 19 February, 2010).

<sup>39</sup> Court of Appeal (Paris), 19 March 2009.

<sup>40</sup> District Court of Amsterdam, 26 April 2007.

<sup>41</sup> Electronic Commerce Act of Bulgaria

2006, removed liability from automated search engine services for contents where the transmission of the data has been already initiated, the data recipient has already been chosen, or where the data obtained is already chosen or altered.

The legislative framework in Romania has also been revised to protect search engine services from responsibility for content broadcasted by third parties. Article 15 of Law No. 365 on Electronic Commerce<sup>42</sup> provides protection to search engine services unaware that the broadcasted information is illegal. If the search engine service is aware of the illegal broadcast it may avoid liability by removing or blocking access to the content.

Other jurisdictions can learn from these approaches when generating their own laws on search engine liability and Internet law.

### *3.2. Online Advertisements and Search Engine Liability*

Content provider liability also applies to online advertisements. A use that violates the rights of a third party concerns the advertiser rather than the search engine. The content and keywords of an advertisement are provided by the advertiser. A search engine generates list of advertisements based on keyword searches and acts as an intermediary listing the online advertisements for Internet users. When an Internet user performs a keyword search, the search engine displays the advertisements that correspond to those words. These are referred to as the 'natural' results of the search.<sup>43</sup> Therefore, the advertiser should be liable for an advertisement's content and keywords since the search engine exercises no control and has no obligation to monitor the content.

An automated process allows advertisers to create an advertisement by selecting the keywords, drafting the commercial message, and adding a link to their website. The advertiser is responsible for the keywords, categories and/or other channeling mechanisms; the advertisement produced by or for the advertiser; and the services or products in the advertisement. The search engine places the advertisement on the sponsored section of the results page. The short text that appears on each search result is automatically generated by computer processed algorithms created by third parties. Therefore, the Internet service provider that allows an advertiser to use a third party trademarked keyword and then displays the advertisement is not violating the trademark rights of a third party.<sup>44</sup>

The Internet service provider cannot store data information and cannot control the data, and therefore, it cannot be responsible for the data kept upon the advertiser's request. A connection between a keyword and a search word shall not be evaluated as if a search engine has the authority to control such data. Additionally, an Internet service provider that stores a keyword sign identical to a trademark and organizes the advertisement display on the basis of that keyword is not using that sign in the course of trade for its own goods or services.<sup>45</sup> Online advertisements, although a successful

---

<sup>42</sup> Enactment date 7 June 2002.

<sup>43</sup> European Court of Justice, C-236/08 and C-238/08 *Google France and Google* [2010] ECR I-0000 para. 22; European Court of Justice, C-278/08 *BergSpechte* [2010], para. 5-7

<sup>44</sup> In *Google v. France*, the European Court of Justice held that, "an internet referencing service provider which stores, as a keyword, a sign identical with a trademark and organizes the display of ads on the basis of that keyword does not use that sign within the meaning of Article 5(1) of Directive 89/104 or of Article 9(1)(a) and (b) of Regulation No 40/94". European Court of Justice, C-236/08 and C-238/08 *Google France and Google* [2010] ECR I-0000 para. 99.

<sup>45</sup> "...In that regard, suffice it to note that the use, by a third party, of a sign identical with, or similar to, the proprietor's trade mark implies, at the very least, that that third party uses the sign in its own

component of a search engine's business model, generate similar results to other search-engine based lawsuits; search engine are not liable for a third party's content and excessive monitoring expectations are unrealistic.

A landmark decision on this topic is the European Court of Justice's *Google v. Louis Vuitton* decision.<sup>46</sup> The court held that an internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organizes the display of advertisements on the basis of that keyword does not use that sign<sup>47</sup>, thereby not holding Google liable for trademark infringement. The court reasoned that the proprietor of a trademark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trademark or goods or services identical with those for which that mark is registered.<sup>48</sup> Secondly, the court held that if an internet referencing service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored, that service provider (i.e. Google) cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

### 3.3. Summary of Search Engine Liability

These cases and regulations indicate a growing consensus on the extent of search engine liability. Because a search engine operator does not create, change, and upload the content on the Internet, it cannot be held liable for infringement. The individual who creates, changes, and uploads the content on the Internet (i.e. the content provider) would be the appropriate person to hold liable for infringement. The search engine operator also does not have any responsibility to monitor content and is not accountable for infringing the protected content rights of third parties. Therefore, search engine operators are not liable under criminal or civil law for listing infringing content among search results.

The aforementioned cases and regulations establish a multi-jurisdictional framework for approaching search engine liability. This framework provides a useful tool for emerging market economies; as rising Internet use generates challenging legal issues, these courts and legislatures can adopt an approach that harmonizes with existing international jurisprudence on search engine liability.

## 4. Turkish Law Perspective

The legal framework regulating Internet law in Turkey is not as developed as other jurisdictions. The growing number of Internet related issues, however, requires Turkey to evaluate its existing laws and address legal liability issues regarding search engine conduct.

---

*commercial communication. A referencing service provider allows its clients to use signs which are identical with, or similar to, trademarks, without itself using those signs. That conclusion is not called into question by the fact that that service provider is paid by its clients for the use of those signs. The fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign.”* European Court of Justice, C-236/08 and C-238/08 *Google France and Google* [2010] ECR I-0000 para. 56 and 57.

<sup>46</sup> European Court of Justice, C-236/08, *Google France SARL, Google Inc. v. Louis Vuitton Malletier SA* [23 March 2010] (Joined cases: C-236/08 to C-238/08).

<sup>47</sup> *Id.* at para. 121(2).

<sup>48</sup> *Id.* at para. 121(1).



#### *4.1. Search Engine Liability under Turkish Law*

The Telecommunications Authority (“TA”) is the regulatory body addressing Internet-based issues under Law No. 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed Through Such Broadcasts (“Law No. 5651”). Law No. 5651’s purpose is to regulate the obligations and responsibilities of content providers, hosting providers, access providers, and mass use providers, by establishing procedures for preventing crimes committed on the Internet by these providers.<sup>49</sup>

The position of search engines is questionable within the various categories of Internet actors enumerated under Law No. 5651. Attempts to categorize search engines as content providers, hosting providers, or access providers fail to incorporate the nuances of search engine functions. An “access provider” provides a user with access to the Internet.<sup>50</sup> A “content provider” creates, amends, or provides information and data to Internet users.<sup>51</sup> A “hosting provider” operates the system that contains services and content.<sup>52</sup> Based on the key terms defined in Law No. 5651, however, search engines do not fall within the scope of an “access provider,” a “hosting provider,” or a “content provider.” Users do not obtain Internet access through a search engine; search engines do not provide systems that host content broadcasted via the Internet; search engines neither create, nor provide any of the third party content.

Problems still ensue when legal authorities apply legal rules that are not developed to address and fulfill content removal requests.<sup>53</sup> A user’s request to remove content from search engine results, when the content is still live and has not been removed from the website is a recurring problem. Websites and their content listed among search results are created by and uploaded by third parties; websites are owned by third parties, not the search engine operator, which makes it legally and technically impossible for search engine operators to interfere with the content. The relevant content must be removed from the original website for the content to avoid the search engine’s algorithmic formulae. The impossibility and illegality, however, does not prevent claims from being filed for non-removal of certain content from search engine results.

Another recurring issue includes requests to ban specific word searches and remove particular content from a search result. Search engine operators can neither prohibit users from using specific search terms, nor can they remove the search results related to these search terms. The existing legal rules for content and host providers are typically suggested to clarify boundaries for search engine liability, since the liability of these Internet actors are clearer.

Under Turkish law a “content provider is responsible for any kind of content it presents on the Internet” but it is not responsible for the content of third party links unless the content provider indicates its intent to provide access to the specific third party content.<sup>54</sup> A “hosting provider” is not responsible for researching the legality of

---

<sup>49</sup> Article 1 of Law No. 5651.

<sup>50</sup> Law No. 5651, art. (1)(e).

<sup>51</sup> Law No. 5651, art. (1)(f).

<sup>52</sup> Law No. 5651, art. (1)(m).

<sup>53</sup> User requests are individual requests addressing certain concerns and seeking remedies for alleged violations of an individual’s or an entity’s right. Such user requests, under Turkish law, can be addressed via regular postal means, via official notices or via e-mail messages.

<sup>54</sup> Law No. 5651, art. (4).

the hosted content; when the hosting provider is made aware of the illegal content it should, if possible, remove the content.<sup>55</sup>

Law No. 5651 establishes that the content provider is responsible for content broadcasted on the Internet rather than the hosting provider. This provision should be extended to content listed among the search engine results. Since the legislature is not holding the hosting provider responsible for uploaded content, it should not be legally possible to hold a search engine operator liable for listing live content and providing organized information to users. Even if it was legally and technically possible to remove live content from search engine results, it would not be “deleted” from the Internet because it would still be broadcast on the relevant website. Criminal and civil liability would rest with the content provider under the scope of Law No. 5651.

However, Turkish courts in practice have nevertheless held Google liable, as a search engine operator, for removing live contents appearing on its search results. While the volume of case-law shedding light unto how the applicable internet legislation should be interpreted is meager, three cases merit particular attention in understanding how courts in an emerging country such as Turkey can reason to hold a search engine liable for content that search engine has no control over: the decision of the İzmir 9<sup>th</sup> Criminal Court of Peace<sup>56</sup>, the decision of the Pendik 3<sup>rd</sup> Criminal Court of Peace,<sup>57</sup> and the decision of the Ankara 3<sup>rd</sup> Criminal Court of Peace.<sup>58</sup>

The line of thought adopted by the Turkish judges in all three cases was that the respective content appearing among Google’s search term results was violating the complainant’s personal rights and was accessible; hence the courts ordered that such content be removed by Google from its search results. This line of reasoning may be criticized for equating a search engine’s obligations with those of the content providers’ and hosting providers’, as Law No. 5651 clearly states that any person who claims that his rights are violated due to content shall apply to the content provider, or to the hosting provider in cases where the content provider is not found, for removal of such content. These cases clearly show that Turkish courts are yet to establish precedents that correctly observe legal provisions.

Content appearing among search engine results after the content has been removed from the relevant website, however, might indicate a search engine operator acting as a content provider. The preceding interpretations, however, suggest that a search engine cannot be considered a content provider because it is not fulfilling the definition of a content provider under Turkish laws and it is not the content creator.

Additionally, Article 4 of Law No. 5651 establishes that the content provider is responsible for any content it uploads on the Internet. If the search engine operator is considered a content provider for the content appearing among the search results, the search engine operator could be liable for all illegal content uploaded to websites across the world.

Although no specific regulation exists for content removal from search engine results, Law No. 5651 establishes a procedure for content removal by a content provider or host provider that could be applied to search engines.

Search engine operators could potentially be liable for content removed from the original website but still appearing among search results under Article 9 of Law No. 5651.

---

<sup>55</sup> Law No. 5651, art. (5).

<sup>56</sup> İzmir 9<sup>th</sup> Criminal Court of Peace, Misc. File No. 2012/461, Misc. Decision No. 2012/107 [4 July 2012].

<sup>57</sup> Pendik 3<sup>rd</sup> Criminal Court of Peace, Misc. No. 2011/961 [7 October 2011]

<sup>58</sup> Ankara 3<sup>rd</sup> Criminal Court of Peace, Misc. No. 2011/1351 [2012].

Another topic of interest that is increasingly coming to the fore to mold how liability may or may not be attributed to search engines for online content is that of search-term suggestions. Search-term suggestion (or the “Keyword Suggestion Tool” as Google phrases<sup>59</sup>) is a function of a search engine whereby a word, phrase or a website name, when typed to the search engine’s search bar, presents a list of keywords and phrases that the relevant search engine most closely relates them to the typed search-term due to frequency of search or popularity of search of the relevant term.

A 2010 decision of the Turkish criminal court of peace provides an important precedent in regards to how Turkish courts should interpret and apply the provisions of Law No. 5651 in terms of search term suggestions, in Turkey’s nascent Internet law framework.<sup>60</sup> The court held that Google cannot be held responsible for search-term suggestions appearing on its search engine when the search term “recep konuk corruption” and “recep konuk’s corruptions” appear. The court reasoned that what is being requested for removal is the search term suggestions and not content as understood by Law No. 5651. The court premised its reasoning as follows:

*“The removal of content which is reached through these search results can be requested from the content provider in accordance with ... Law No. 5651. ...[T]he obligations of the access providers are within the context of Article 6 and the request should be made to the access provider.”*

Although directing the request to the access provider is not the correct procedure, the court held an interesting decision which might be used as supporting document in similar removal requests for search term suggestions, as the court grants that search terms suggestions are not considered content as understood under Law No. 5651.

#### *4.2. Online Advertisements under Turkish Law*

Within search engine liability, online advertising remains another issue requiring a clear and unified approach to ensure appropriate application of the law.

The law on the protection of trademarks<sup>61</sup> prohibits the non-authorized use of a sign (i.e. trademark) or something similar as a domain name, directing code, keyword, or other similar mark that creates commercial effect on the Internet. Using a third party’s registered trademark in online advertisements or tagging a keyword that is a third party’s registered trademark constitutes trademark infringement.<sup>62</sup> The search engine operator and the service provider, however, are not responsible for the selection and use of keywords and signs in online advertisements; the advertiser selects the keywords and the content of the online advertisement. The search engine provider has no control over this content, either technically or legally. However, a request to prohibit the use of unlawful content can be directed at the advertiser and the service provider, per Article 9 of the Law No. 5651.

When an online advertiser uses a registered trademark in the advertisement, it appears among the search engine results when the trademark is the subject of a search. Similar to live contents broadcasted by third-party websites, the same provisions should apply to search engine operators for online advertisements. It should not be legally possible to hold a search engine operator liable for listing advertisements wherein a

---

<sup>59</sup> Google Support, ‘Using the Keyword Tool to get keyword and ad group ideas’, available at <http://support.google.com/adwords/bin/answer.py?hl=en&answer=2470029&from=64886&rd=1>.

<sup>60</sup> The 10<sup>th</sup> Konya Criminal Court of Peace, Misc. No. 2011/278 [6 July 2011].

<sup>61</sup> Decree Law No. 556.

<sup>62</sup> The advertisements must also be in compliance with the provisions of Regulation on Principles and Procedures for Commercial Advertisements and Announcements and other applicable legislation.

registered trademark or other unlawful content is used by the advertiser and not the search engine. The search engine operator is not the content or hosting provider of the relevant advertisement because it did not create the content and it is not hosting the content but rather acting as the access point between the user and the content. Therefore, criminal and civil legal liability rests with the advertiser who uses a trademark within the online advertisement.

## **5. Conclusion**

The significance of search engine law has gained new momentum with a growing number of judicial as well as legislative interpretations of legal provisions in the backdrop of sophisticated computer algorithms. Traditional understandings for imposing legal liability may be altered by courts in both developed and emerging countries to accurately address the interrelationships between the functioning of search engines and different fields, such as intellectual property and defamation. When doing so, the functioning and the purposes for which search engines operate must be correctly understood and not mistaken for facilitating the dissemination of unlawful content.

The role and status of search engines might continue to raise legal concerns for emerging markets, such as Turkey, considering that there is an insufficient amount of case law to shed light onto how legislation is interpreted by judicial authorities. This is in part due to the young age of the Internet legislation that is in force, and in other part due to the lack of judicial know-how concerning matters pertaining to the Internet law vista.

The first step to eliminate such legal concerns would be the recognition that search engine operators are not responsible for the content appearing among search results. This entails a parallel understanding that search engine operators, such as Google, cannot be held responsible for unlawful content that is broadcasted on the Internet, by third parties, when such content is still live. On the other hand, search engine operators may face the risk of being held liable for unlawful content which has been already removed by the content providers, but is still appearing among a particular search engine result. Depending on various court practices, this may impose upon search engine providers the duty to take the necessary technical and legal precautions to remove such content from appearing among their search results when these contents are not live. Second, legal definitions that clearly define and set the boundaries for what types of providers are held responsible for the content broadcasted on the Internet are necessary for the letter of the law to converge with the spirit of the law. Defining search engine operators separate from content and hosting providers is an opportunity for emerging markets to harmonize with courts across the globe in recognizing that search engines are an “intermediary” to the information on the Internet.