Understanding Search Engines: A Legal Perspective of Liability in the Internet Law Vista

Gönenç Gürkaynak
İlay Yılmaz
Derya Durlu

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ABSTRACT

This contribution discusses the legal dimension of the functioning of search engines in an Internet law context, both across the world and in Turkey. The paper initially introduces the subject matter in the growing Internet industry and the role of search engines in distributing and disseminating information. Secondly, a world-wide perspective on the legal dimension of search engines is discussed. Third, the liability of search engines as understood in the Turkish legal context is evaluated. The paper finally concludes by providing an overall evaluation of the general remarks submitted.

Key Words: Search engine, Internet Law, Online Advertisement, Liability, Turkey, Law No. 5651
INTRODUCTION

With the proliferation of information and growth of Internet-related businesses, a new challenge arose to distribute and disseminate information: search engines. Beginning from the 1990’s, when the first pre-Web Internet search engines were created, to the 21st century, when a close-knit digitally-networked environment permeates all over the daily lives of individuals, search engines have come to not only expand and help evolve communication across the world, but they have also allowed a fresh outlook for governments to re-shape their legal frameworks to suit the needs of the ever-growing Internet sector.

The growing market power of search engine operators and their roles in controlling access to information have in particular triggered new legal concerns, encompassing data protection, trademark and copyright infringement, consumer protection, competition law and free speech matters. With emerging market economies, such as Turkey, regulation of search engines and Internet-related businesses is increasingly becoming pivotal in shaping not only policies but also legal frameworks. Hence, the centrality of the issue of search engine liability requires particular attention especially in view of Turkey’s newly developing Internet law legislation.

Under this light, the paper will initially introduce the subject matter in the growing Internet industry and the role of search engines in distributing and disseminating information. Secondly, a world-wide perspective on the legal dimension of search engines will be discussed. Third, the liability of search engines as understood in the Turkish legal context will be evaluated. The paper will finally conclude by providing an overall evaluation of the general remarks submitted.

I. SEARCH ENGINES – HISTORICAL BACKGROUND AND FUNCTIONING

A. Historical Background

The creation of websites that functioned as search engines date back to the early 1990’s,¹ with the first search engine created being Archie, created in 1990 by Alan Emtage, a student at

McGill University in Montreal. Being created as a tool for indexing FTP (File Transfer Protocol) archives, Archie was a searchable database of filenames,\(^2\) intended to recreate a method of storing and retrieving files online.

By the mid-1990’s, search tools such as Infoseek, AltaVista and Excite had emerged, respectively introducing a complex system of search modifiers, enabling natural language search and “transcending classic keyword-based searching with technology that grouped web pages by their underlying concepts” to fine-tune search results to its users.\(^3\)

With a number of search engines emerging and disappearing until the year 2000, Google, as a search engine became one of the most prominent search engines, aiming for the “perfect search engine”, which “…understands exactly what [is] mean[t] and gives … back exactly what [is] wanted”.\(^4\) Following Google were Yahoo! Search, MSN Search, and (Google-based) A9, among the many others that were created after the 21\(^{st}\) Century.

B. Functioning

Search engines are intermediary tools to index the websites and this process is generally named as “crawling” or “web crawl”.

Search results are listed in accordance with the degree of verity/relation with respect to the search term query submitted by the user. This process is known as “indexing”. Search results of relevant search queries appear without the need of external input, (i.e. without the interference of an individual), by the use and application of special software period combinations. The heading and the snippet of each individual search result are also indexed

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automatically through algorithms processed by computers third-party sources that have been entirely created by third parties and not by the search engine operator.

Search engines copy the HTML code of each website that they find and retain this at a temporary pool, which is also called the “cache”. By clicking on the “cache” link of a webpage, the user can reach the snapshot of the website that has been scanned and indexed most recently. At the top of the “cached copy” of a website, a warning appears whereby the indication that the relevant webpage is merely a snapshot of the website from the search engine’s cache and that it is not the main webpage appears. This warning might, in the alternative, also state that the webpage that is seen in the cached copy of the website may not in fact exist. This is a standard feature that is prevalent and found in major search engines.

In order for a search engine to not index certain content, the respective content must first be removed from the website where such is broadcasted. For example, when search results are typed in the search bar of a search engine, the content that is searched for must first be removed from the website www.xyz.com, if the website www.xyz.com were to be listed among the search results which includes the search term sought. This result will also be removed afterwards from among the search results. However, given the voluminous data that the “crawler” must process and consequently filter, the period for which a search engine is to update its indexing might take some time in order to reflect a web user’s most recent visit to a particular webpage.

II. SEARCH ENGINE LIABILITY IN GENERAL

A. General Remarks

Search engine case law started emerging as early as 1996, when the District Court for the Eastern District of Pennsylvania described the functioning of a search engine as follows:

“...Services such as Yahoo, Magellan, Altavista, Webcrawler, and Lycos are all services known as “search engines” which allow users to search for Web sites that contain certain categories of information, or to search for keywords. For example, a Web user looking for the text of Supreme Court opinions would type the words “Supreme Court” into a search engine, and then be presented with a list of World
Wide Web sites that contain Supreme Court information. This list would actually be a series of links to those sites. Having searched out a number of sites that might contain the desired information, the user would then follow individual links, browsing through the information on each site, until the desired material is found. For many content providers on the Web, the ability to be found by these search engines is very important.”

Another interesting case that merits attention is the ACLU v. Reno case, which set out the functionality and importance of web search engines. The Lockheed Martin Corp. v. Network Solutions, Inc. case, a trademark case, also highlighted the role of search engines in a context where the lawsuit was brought by a company against the domain name registrar. The ruling argued that keyword searches on the web (as opposed to cases in which users know the exact address) “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.”

Search engine-specific case-law continued to grow in the 2000’s, with lawsuits being filed against search engine operators regarding the sales of third party trademarks to be used in sponsored links and banner ads. On a similar vein, the number of copy-right related claims against search engine operators also increased, with there being also cases concerning the use of “spiders” for the purpose of content aggregation as well as the problem involving the alleged manipulation of PageRanks by Google.

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8 Id. at 952
11 See EBay Inc. v. Bidder’s Edge, Inc. 100 F.Supp.2d 1058 (N.D.Cal.2000)
B. Case Reviews

1. American Approach to Holding a Search Engine Operator not Liable for Content Broadcasted on the Search Engine

I. The Case of Perfect 10

At the crux of the case that was brought before the US District Court for the Central District of California involved a conflict between intellectual property rights on the one hand and a search engine’s capacity to assemble, organize, store, access, and display intellectual property “content” on the other hand. The question that the court had to assess was whether a search engine is to be held liable for displaying copyrighted images on an “image search” function in the form of “thumbnails” and whether a search engine can be not held liable when it displays copyrighted images served by another website through inline linking.

The plaintiff, Perfect 10, publishes an adult magazine, the “PERFECT 10” and operates the subscription website “perfect10.com”. Perfect 10 had at the time obtained copyright for images it uses on both the magazine and the website from the United States Copyright Office. The defendant in this case was Google, which operates a search engine located at the domain name “google.com”, indexing websites on the Internet via a web “crawler”.

When assessing the case, the US District Court for the Central District of California had to distinguish between “display” and “in-line linking”, while at the same time analyzing available precedents concerning the subject matter of the case. The court also determines whether Google directly infringes Perfect 10’s distribution right by broadcasting the relevant images on the web. The court concludes that Google does not infringe Perfect 10’s right since the distribution of a copyrighted work, which was what the plaintiff alleged to have been infringed by Google, among other claims, must be the “actual dissemination” (emphasis added) of copies of the copyrighted material.

14 See supra n. 17 p. 1.
This case merits focus in that the central issue between protection of intellectual property rights on the one hand and promoting access to information on the other merits generates quite an interesting discussion of where a search engine legally stands when matters concerning protection of intellectual property come into play and how a search engine can avoid liability.

II. The Case of Field v. Google\textsuperscript{16}

The United States District Court for the District of Nevada heard this case which was brought by the plaintiff, Blake Field, concerning copyright infringement, against Google Inc. The central allegation in this case was that by allowing Internet users to access copies of 51 of his copyrighted works stored by Google in an online repository, Google violated Field’s exclusive rights to reproduce copies and distribute copies of those works.

When reviewing the case, United States District Court for the District of Nevada clearly explains how Google, Google cache and “cached” links function and concludes that Google’s “cached” links in essence allow users to view pages that the user cannot, for whatever reason, access directly. The court notes that “Given the breadth of the Internet, it is not possible for Google (or other search engines) to personally contact every Web site owner to determine whether the owner wants the pages in its site listed in search results or accessible through “Cached” links.”\textsuperscript{17}

The court required from Google to satisfy the following four elements in relation to its estoppel\textsuperscript{18} defends: 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.\textsuperscript{19} The court essentially held in favor of the defendant, Google, noting that “if

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\textsuperscript{17} Id. at p. 4, para. 17
\textsuperscript{18} 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.
\textsuperscript{19} Id. at p. 9.
\end{flushleft}
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.”

2. An English Approach to Holding a Search Engine Operator not Liable for Content Broadcasted on the Search Engine

Very recently, in 2009, the Queen’s Bench Division of the England and Wales High Court ruled a case (hereafter the “Metropolitan case”) that was brought by Metropolitan International Schools Limited (“MIS”; also referred in the case as “Claimant”) against Designtechnica Corporation (referred in the case as “First Defendant”), Google UK Limited (referred in the case as “Second Defendant”) and Google Inc. (referred in the case as “Third Defendant”). This case merits significance firstly in that it paves the path for English authorities who have not yet dealt with what the court states as a “modern phenomenon”, when it describes Internet communications. Secondly, the Metropolitan case also sheds light unto understanding how an English court has reasoned in determining whether liability could be imposed on Google Inc., and Google UK Limited, in respect of the automated activities of Google Inc.’s search engine.

The Metropolitan case was brought over comments about the Claimant’s distance learning courses that appeared in the forum of a US website. The comments were said to be defamatory and an excerpt from them could be found in Google’s search results.

The Claimant is described as being one of the largest European providers of adult distance learning courses in games development under the name ‘Train2Game’. According to the judgment, the dispute in the Metropolitan case essentially arose when the user forums on the website, Digital Trends, over which the First Defendant runs reviews, contained a thread that comprised 146 postings across 15 pages, calling the Train2Game courses “nothing more than a scam or fraud intended to deceive honest people out of substantial sums of money”. The Claimant asserted arguments with respect to (i) the First Defendant, and (ii) the Second Defendant and the Third Defendant, with the arguments against the Second the Third

20 Id. at p. 15.

Defendants being confined to a search result, whose snippet has been claimed as being defamatory, and which is identified very effectively in the judgment as follows:

“Since 25 March 2009 or around 25 March 2009, on each occasion that an Internet search is performed on ‘Train2Game2, the Second and/or Third Defendant published or caused to be published at www.google.co.uk and/or www.google.com a search return for the Train2Game thread which ... set out the following words defamatory of the Claimant as the third and fourth highest search result: ‘Train2Game new SCAM for Scheidegger’ ...”

The Claimant argued that both Second Defendant and Third Defendant should be held liable because links to these postings appeared in its search results and the snippets also consisted out of these defamatory comments, with the Second Defendant being held liable in particular for the publication of information gathered in response to Google searches.

The Second Defendant pleaded that “... the Claimant has sued the wrong person and should discontinue its claim or have judgment entered against it”, on grounds that it does not operate the Google search engines, carrying on a sales and marketing business, and does not provide online services (as the Claimant alleges).

Finally, the Third Defendant’s argument rested primarily on the fact that “[it] is not, and could not be, in a position to check the truth or accuracy of the vast amount of information crawled over by its automated search engine”. The Third Defendant argued that “[it] is simply not to be regarded as a publisher of the words complained of”, pleading that the Third Defendant is not responsible for anything appearing on the First Defendant’s website, while also arguing that it is not responsible as a matter of law for the content of the “snippet” complained of, as produced by its own search engine. The test for publication, as was questioned by the Third Defendant in this context, was whether the relevant Internet intermediary was knowingly involved in the publication of the relevant words.

The court had to consider whether the Third Defendant should be regarded as a mere facilitator in respect of the publication of the “snippet” and whether, in particular, that would remain a proper interpretation even after the date of notification.
The court held that the Second and Third Defendants have no control over the First Defendant or over what appears on its bulletin boards. Its reasoning rests on the fact that when a search is carried out, it yields a list of pages which are determined (automatically) as being relevant to the query. The technology ranks the pages in order of “perceived” relevance, without human intervention. The judgment states that the search results that are displayed in response to any given query must depend on the successful delivery of crawling, indexing and ranking.

It was averred in the judgment that the Second Defendant does not operate or control any Google branded search engine: moreover, its employees do not have access to any of the technology used to operate and control www.google.com and www.google.co.uk, which are owned and operated by the Third Defendant. The courts rationale could be well put with the following segment from the case itself:

“A search engine … is a different kind of Internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the Third Defendant has authorized or acquiesced in that process. … Third Defendant is not hosting a website and does not have anything from which to “take down” the offending words.”

The court further did not agree with the Claimant’s submissions, stating that Google is merely a conduit to information, not a publisher in its own right:

“… It is fundamentally important to have in mind that the Third Defendant has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user's request unless it has taken some positive step in advance. There being no input from the Third Defendant, therefore, on the scenario [that] has [been] so far posited, it cannot be characterized as a publisher at common law. It has not

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authorized or caused the snippet to appear on the user’s screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.”

In the Metropolitan case, the 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. Needless to say, the judge hinted that there still is a responsibility of search engines to take down content after receiving a complaint about libelous material, though he did not say how fast search engines must act and how effective the take down system must work:

“… There is a degree of international recognition that the operators of search engines should put in place such a system (which could obviously either be on a voluntary basis or put upon a statutory footing) to take account of legitimate complaints about legally objectionable material. … In particular, the material may be objectionable under the domestic law of one jurisdiction while being regarded as legitimate in others. In this case, the evidence shows that Google has taken steps to ensure that certain identified URLs are blocked, in the sense that when web-crawling takes place, the content of such URLs will not be displayed in response to Google searches carried out on Google.co.uk. This has now happened in relation to the “scam” material on many occasions. But I am told that the Third Defendant needs to have specific URLs identified and is not in a position to put in place a more effective block on the specific words complained of without, at the same time, blocking a huge amount of other material which might contain some of the individual words comprising the offending snippet. It may well be that the Third Defendant’s "notice and take down" procedure has not operated as rapidly as Mr. Browne and his client would wish, but it does not follow as a matter of law that between notification and "take down" the Third Defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a "take down" in relation a particular URL, it is hardly possible to fix the Third Defendant with liability on the basis of authorization, approval or acquiescence.”
Various other court rulings as well as regulatory frameworks further support the England and Wales High Court’s foregoing reasoning on not holding search-engines liable just because they broadcast content that violates local laws.

3. Brief References to Some Other European Supporting Court Rulings and Regulatory Frameworks

An example that merits attention in this respect is Palomo v. Google Inc., where the Spain Court of First Instance, on 13 May 2009, heard a complaint in relation to search results providing hyperlinks to sites carrying defamatory content. The court rejected the claim and the third defendant was held not liable in law for disseminating third party content. The court held this decision based on that Google does not have knowledge on that the contents it links are defamatory, and therefore that Google is not liable for providing links to these defamatory contents. Reference was made to European legislation moving towards the position that there should not be any obligation on Internet intermediaries to supervise such content.

The Electronic Commerce Act was enacted in Bulgaria, in December 2006, removing any 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 being responsible for content broadcasted by third parties. More specifically, Article 15 of Law No. 365 on Electronic Commerce provides protection to search engine service if it is not aware that the information broadcasted is illegal. If the search engine service is, however, aware of such illegal broadcast, then it may not be liable if it were to act expediently in order to remove such content or block the access to such content.

In SARL Publison System v SARL Google France, the claims were made in relation to a “snippet” appearing on Google’s search engine results and a hyperlink to the primary site. This “snippet” was allegedly defamatory. The court held that a search engine was not obliged to look into the legality of the website that appears among Google’s search results. The court

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23 Enactment date 7 June 2002.
24 Court of Appeal (Paris), 19 March 2009.
further held that, so long as an indexing robot is at play, and so long as it does not creates or hosts the disputed information, Google had no obligation to monitor its search results.

In a Dutch case, *Jensen v. Google Netherlands*, the court ruled that Google cannot be held responsible for the outcome of a search instruction (i.e. the claimant’s name), stating that “Google has made it sufficiently clear that it has no (preventive) involvement with or influence over the contents of the links to the websites and with or over the contents of the websites which are automatically obtained as search results after entering of, in the case in hand, the search term Jensen + Urmia + Brigitte.” The court’s reasoning stemmed from the fact that the search engine functioned such that it brought up “technical, automatic and passive” results, independent from the knowledge of the search engine operator.

C. Online Advertisements:

The same applies to the online advertisements. Even when one acknowledges that there is a use that violates the rights of a third party, such use concerns the advertiser. In fact, the content of the advertisement and the keywords tagged therein are provided by the advertiser and the advertiser is obliged to give correct and factual information and documents to the legal entity which merely provides the display of the advertisement on the Internet. A search engine, similar to its functioning for listing the websites which include the search terms, lists the online advertisements and functions merely as an intermediary to meet the Internet users with them. When an Internet user performs a search on the basis of one or more words, the search engine will display the sites which appear best to correspond to those words, in decreasing order of relevance. These are referred to as the ‘natural’ results of the search. Therefore, who could be liable for the infringing content and keywords of an advertisement is the advertiser himself, as the search engine has no control over and no obligation to monitor the content provided therein.

Generally, there is an automated process for the selection of keywords and the creation of ads. Advertisers select the keywords, draft the commercial message, and input the link to their site.

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25 District Court of Amsterdam, 26 April 2007.
26 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
The advertiser is responsible for all keywords, categories and/or other channeling mechanisms broadcasted over the Internet, advertisement creations produced by the advertiser or for the advertiser, the properties channeled by the advertisement creation, the services or the products subject to the advertisement. In other words, within the scope of the notified keywords, category and other channeling mechanisms, the legal entity that merely provides the display of the advertisement on the Internet places the advertisement on the sponsored connections section on the search engine results page. Furthermore, the short text that appears on the title of each search result and on the body of the search result is gathered automatically by the algorithms processed by a computer from third party sources created solely by third parties.

This matter is also stated within European Court of Justice’s decision on Google France. In its relevant decision, European Court of Justice states that the Internet service provider that keeps the keyword notified by the advertiser which is the same as the trademark of the third parties, and that organizes the visual of the relevant advertisement (AdWords) does not have any usage regarding the trademark of the third parties. The decision explicitly recognizes at paragraph 99 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”.

It is also decided in the relevant decision that the Internet service provider cannot have any information on the kept data or cannot have the authority to control on the data, and therefore in cases where it does not have an active role on the data, it cannot be responsible for the data it keeps upon the advertiser’s request. It is stated in the same decision that the presence of a connection between the chosen keyword and the searched word entered into the search engine by an Internet user shall not be evaluated as if Google alone has any information pertaining to the data that are entered into the system by the advertisers and that are kept over the hosts, or as if Google has any authority to control on such data.

The relevant decision also sets out that an Internet 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 in the course of trade for its own goods or services. The decision defines it as “…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 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.”27

D. Summary

In summary, the following conclusions may be deduced from the explanations laid out above:

• A search engine operator is not the person who creates, changes and uploads the content on the Internet. Therefore, if there were to be an infringement as a result of content broadcasted, 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 this infringement.

• The search engine operator, who has no control over the uploaded content and therefore intermediates the content merely with technical algorithms (without any external input), does not have any responsibility to monitor the relevant content. The search engine operator is also not the person who is to be held accountable for infringing the protected rights. Therefore, search engine operators are not liable under both criminal and civil law perspectives for listing the infringing content that appears among their search results.

III. SEARCH ENGINE LIABILITY – TURKISH LAW PERSPECTIVE

The Turkish legal framework regulating Internet law and related fields is yet to be developed with both academic writings as well as case-law given how early a stage Internet law is in Turkey as compared to developed as well as developing countries. While search engine operations have the potential of raising many legal problems, the need to regulate liability for

27 European Court of Justice, C-236/08 and C-238/08 Google France and Google [2010] ECR I-0000 para. 56 and 57.
legal and natural persons involved and conducting their businesses in this area is becoming ever more pressing considering the growing number of Internet law-related problems.

A. Legal Status of a Search Engine under Turkish Laws:

Telecommunications Authority (“TA”) been the regulatory body within the Turkish legal framework, aiming to regulate the Internet based on Law No. 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed Through Such Broadcasts (“Law No. 5651”). As is also stated in Article 1 of Law No. 5651, the main aim and purpose of Law No. 5651 is to regulate the obligations and responsibilities of content providers, hosting providers, access providers and mass use providers, and to set out the grounds and procedures for preventing crimes committed on the Internet by content, hosting and access providers.

In view of this framework, the question then arises as to where search engines stand in terms of the various categories of Internet actors enumerated under Law No. 5651. In order to analyze the status of search engines under Turkish laws, an overview of the different categories of web providers must first be looked into.

The definitions of the above three Internet actors, together with some key terms relevant to the field, are stipulated under Article 1 of Law No. 5651:

“e) Access Provider means real persons or legal entities that provide access to Internet for its users,

f) Content Provider means real persons or legal entities that create, amend or provide all kinds of information or data presented to users on the Internet,

g) Internet Medium means, except for personal or institutional computer systems or computer systems used for communication, any medium formed on the Internet that is open to public,

h) Broadcasts Made on the Internet (Medium) means Data available on the Internet (Medium) content of which is reachable by unlimited number of persons,

i) Mass Use Provider means real persons or legal entities providing people the opportunity to use the Internet for a pre-determined period of time in a determined place,
m) Hosting Provider means real persons or legal entities that provide or run systems to contain services and content.

When the key terms defined in Law No. 5651 are scrutinized, one can easily observe that search engines are not in fact the person or the entity providing systems that host the content broadcasted via the Internet. In fact, search engines neither create, nor host any of the third party content. It is for this reason that search engines do not fall within the scope of a “hosting provider” or a “content provider”, as defined and interpreted in light of Law No. 5651.

However, in practice, problems still ensue when relevant authorized authorities apply legal rules, which, in substance, have not yet been fully developed to meet the evolving practical needs, and in fulfilling user requests. For example, a request to remove content from search engine results, when the content is still live (i.e. when the content has not yet been removed), is one of the most common problems that, in practice, recurs time and again. Websites listed among the search results are created by and the content in those websites is uploaded by third parties. In other words, these websites are owned by third parties and not by the respective search engine operator itself. In fact, it is legally or technically not possible for the search engine operator to interfere with the relevant content. Therefore, the relevant content should first and foremost be removed from the relevant website where it is being broadcasted in order for such content to fall out of the radar of algorithmic formulae of search engines.

Another problem that might arise with respect to search engines is users’ requests to ban search for specific search terms and remove all of the items of a particular content appearing among a particular search result. Search engine operators can neither prohibit the users from conducting search by specific search terms, nor can they remove all the search results appearing related to these specific search terms. In order to clarify what the boundaries are for determining the liability of search engine operators, one should turn to the applicable legal rules, where the liabilities of Internet actors are set in clearer terms.

28 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.
Articles 4 and 5 of Law No. 5651 regulate the responsibilities of content providers and hosting providers. They respectively read as follows:

**Article 4** – (1) *Content Provider is responsible for any kind of content it presents on the Internet.*

(2) *Content Provider shall not be responsible for the content belong to a third party to which it gives a link. However, if it is clear from the Content Provider’s way of presenting such third party content, to which the link leads, that it adopts the content and aims to provide access to that specific content, it may be held liable pursuant to general provisions.*

**Article 5** – (1) *Hosting Provider is not responsible to check the hosted content or make a research whether the content constitutes an unlawful activity.*

(2) *Without prejudice to the provision regulation the Hosting Providers criminal liabilities, the Hosting Provider shall, to the extent it is technically possible; remove the illegal content from broadcast, provided that it has been informed about the illegal content pursuant to Articles 8 and 9 of this Law.*

As can be seen, Law No. 5651 clearly sets out that the person who is responsible for any kind of content presented on the Internet is the content provider. This provision applies also to the content being broadcasted on the Internet and listed among the search engine results as a result of the search conducted with specific search terms. The legislature has not chosen to hold the hosting provider to particular content responsible by checking the uploaded content, although it provides or runs systems to contain services and content. Therefore, it is legally not possible to hold a search engine operator liable for merely listing live contents and providing organized information to users. It is worth stating that even if it was legally and technically possible to remove live content from search engine results, it would not be “deleted”, per se, from the Internet medium, as the relevant website would still be broadcasting it. In such a case, both criminal and civil liability would rest on the content provider or on the hosting provider who would fall within the scope of Law No. 5651 and who does not comply with obligations set out in the law.
In practice, the following argument may be developed and furthered: appearance of content among search engine results, when such content has been already removed from the relevant website, might allow one to reach a conclusion that a search engine operator might in fact be considered as a content provider. The crux of the debate rests upon the interpretation of the content provider definition: A content provider must be the natural or legal person who both creates, changes and provides the content. In view of the foregoing interpretations, a search engine cannot be considered as a content provider, as it does not fall under the definition of content provider found under Turkish laws and is not an Internet actor who creates the content of an online broadcast.

In addition to the above, Article 4 of Law No. 5651 sets that the content provider is responsible for any content that it uploads on the Internet. In this respect, if one considers the search engine operator as a content provider for the content appearing among the search results, this consequently entail that the search engine operator be held liable for all of the illegal content uploaded to each and every website across the world, and later removed from the relevant websites.

Accordingly, even if the content is removed from the relevant website but it appears among the search engine results, the search engine operator cannot be considered as a content provider within the meanings attributed to it under Turkish legislation.

Although there is no specific regulation as to how the removal of such content from search engine results should be done, it would be appropriate to follow the procedure set out under Article 929 of Law No. 5651 by way of analogy, regardless of whether this provision applies to only content providers and hosting providers.

29 The relevant article reads as follows: “Article 9 – (1) Any real person or legal entity, who claims that his rights are violated due to a content may apply to that Content Provider, or to the Hosting Provider if the Content Provider may not be reached, and request removal of such content from broadcast, and instead publish/broadcast of his reply, which shall not exceed the scope of the suspended content for one week period.

The Content or Hosting Provider shall comply with such request within two days as of receipt of the written request. If the request is not complied within this period, it will be deemed to be denied.

(2) In case the request is deemed to be denied, the complainant may apply to the relevant Criminal Court of Peace within 15 days and request from the court to render a decision for such content, and instead
As a final note on this issue, search engine operators may be held liable with respect to content that is removed from the relevant website but that still appears among the search engine results, contingent upon the procedure set under Article 9 of Law No. 5651 and that the respective search engine operator did not implement the court decision referred to in Article 9.

B. Online Advertisement:

Within the context of search engine liability, online advertising remains to be another problematic issue that needs a clearer and a more unified approach employed by public authorities interpreting the law and ensuring appropriate application of the legislation. To shed light unto the matter, it would be appropriate to provide with the search engine operator’s status when the advertiser uses a third party’s registered trademark as a keyword or in the advertisement, or violates a third party’s rights or laws.

As per Article 9/2-e of the Decree Law No. 556 on Protection of Trademarks, the use of a sign (i.e. trademark) or another sign similar to it as a domain name, directing code, keyword, or in other similar forms in a way so as to create commercial effect on the Internet can be prohibited, provided that the individual using the sign does not have any right over the use of the sign or any legitimate connection thereto. Accordingly, the use of a registered trademark that belongs to a third party by an online advertiser in online advertisements, let alone the tagging of that keyword constitutes the violation of the foregoing provision, provided that the advertiser does not have any right over the use of the sign or any legitimate connection to the sign. In other words, the advertiser would be in violation of this article for merely tagging a keyword that is a registered trademark of a third party. The search engine operator and the service provider of the advertisement product are not the persons who tag or use these keywords in the advertisement. The advertisements must also be in compliance with the publish/broadcast of his reply, which shall not exceed the scope of the suspended content for one week period. The Court shall decide within three days without holding any hearing. Decision of the Court may be objected pursuant to relevant provision of the Criminal Procedural Law.

(3)The Content or Hosting Provider shall remove the content from broadcast and start broadcasting of the complainant’s reply within two days as of the receipt of the relevant Court order.”
provisions of Regulation on Principles and Procedures for Commercial Advertisements and Announcements and other applicable legislation.

The advertiser, on its own initiative, 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, the prohibition of the use of unlawful content request might be directed to the advertiser as well as to the person who is the provider of the respective service (i.e. service provider), per Article 9 of the Law No. 5651.

In case an online advertiser uses a registered trademark as keywords or in the advertisement, or any other content that is in violation of the applicable laws or a third party’s rights, the advertisement would appear among the search engine results, when the relevant registered trademark or the unlawful content is searched via the search bar. Similar to the live contents which are being broadcasted in third-party websites, the same provisions apply to the search engine operators for the online advertisements. In such a case, it is also legally not possible to hold a search engine operator liable, for merely listing these advertisements wherein a registered trademark or any other unlawful content is used by the advertiser. Likewise, if the use of a registered trademark which is tagged as a keyword or the unlawful content in the advertisement is ceased, the advertisement would no longer appear among the search engine results.

The search engine operator, here, is not the content and/or hosting provider of the relevant advertisement. Therefore, all the legal (criminal and civil) liability would rest on the advertiser who tags or uses unlawful keywords or content within the online advertisement on its own initiative, and the advertiser is the correct addressee of the claims that could arise from the relevant online advertisement.

**CONCLUSION**

With the growing number of legal practices that are both shaped by the courts across the world and legislative frameworks on Internet Law, the role and status of search engines, from a legal perspective, will continue to raise legal concerns, especially in light of Turkish legislation that is currently applicable in interpreting and understanding a field that has yet to grow out of its shell. The first step for eliminating these legal concerns could be ceasing the
approach to the search engine operators as if they are responsible for any online content which appears among the search engine results. Considering the multifarious aspects of search engines that arise in a backdrop of the legal framework as that found in Turkey, it would be without doubt a chance for emerging markets to follow global approaches adopted by courts across the globe in holding or not holding search engines liable for the content that they merely are, as one English Court above referred to, an “intermediary” to the information provided on the Internet.