

THE INTELLECTUAL
PROPERTY
REVIEW

EIGHTH EDITION

Editor
Dominick A Conde

THE LAWREVIEWS

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PROPERTY
REVIEW

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PREFACE

While there has been a push to provide uniform and harmonised intellectual property coverage worldwide, it seems at every turn there are events that pull that goal further away. Thus, there remain significant differences and gaps in intellectual property coverage globally. This is exacerbated by the increase in international trade where practitioners need to know the law in many individual countries, and they also need to understand the differences between those countries.

While jurisdictional differences can be anticipated and addressed, these differences are further magnified by the geopolitical turmoil that persists worldwide. As was the case the previous year, the United Kingdom's Brexit vote and potential departure from the European Union continue to leave a cloud over establishing a Unified Patent Court in Europe. That uncertainty continues in part because even as of 3 April 2019, there has been no Brexit deal and, adding to the uncertainty, Germany has not ratified the UPC. Whether the UPC will ever come to fruition is debatable. Another example is the trade 'wars' between the United States and China. One of the principal disputes is that the US has accused China of misusing US intellectual property rights and has implemented tariffs in an effort to convince China to stop those alleged misuses. While those negotiations are ongoing, the trade dispute has heightened tensions between the countries and lessened efforts at worldwide cooperation on intellectual property matters.

To aid practitioners who are navigating this ever changing landscape of global intellectual property, we now present the eighth edition of *The Intellectual Property Review*. In this edition, we present 24 chapters that provide an overview of the forms of intellectual property coverage available in each particular jurisdiction, along with an update of its most recent developments. Each chapter is written and assembled by leading practitioners in that jurisdiction. While all involved have striven to make this review both accurate and comprehensive, we must note that it is necessarily a summary and overview, and we strongly recommend that the reader seek the advice of experienced advisers for any specific intellectual property matter. Contact information for the authors of each chapter is provided at the end of this review.

Dominick A Conde

Venable LLP

New York

May 2019

TURKEY

Hatice Ekici Tağa and Burak Ozdagistanli¹

I FORMS OF INTELLECTUAL PROPERTY PROTECTION

i Overview

Turkey is one of the most important jurisdictions for intellectual property law, litigation and enforcement. It is a transportation hub between Europe and Asia. Most textile companies either have manufacturing facilities in Turkey or outsource manufacturing of their products to companies in Turkey. Protection of IP rights is therefore very important in Turkey.

IP cases are handled by specific IP courts (intellectual property civil courts and intellectual property criminal courts) in Turkey. These courts are located in most of the large cities. Judges in those courts handle only IP cases, therefore this creates a more predictable litigation and enforcement environment in Turkey.

Further, Turkish intellectual property law is closely aligned with EU law and international norms. Therefore, Turkey is well positioned for protection of IP rights both in terms of modern and EU-aligned legislation and IP litigation. Having said that, there are of course many local features that are explained in the rest of this chapter.

With regard to the alignment to EU laws, Turkey is a signatory to the following key treaties and conventions. All of the treaties and conventions mentioned below have been enacted and are part of local IP law:

- a* the Paris Convention;
- b* the Patent Cooperation Treaty (PCT);
- c* the European Patent Convention;
- d* the Berne Convention;
- e* the Madrid Protocol;
- f* the Hague Agreement; and
- g* the Rome Convention

Turkey is also a member of the World Trade Organisation (WTO) and is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

ii Legislation

In Turkey, there are two main laws to protect IP rights: the Industrial Property Law No. 6769 and the Law on Intellectual and Artistic Works No. 5846.

¹ Hatice Ekici Tağa and Burak Ozdagistanli are managing partners at Ozdagistanli Ekici Attorney Partnership.

Patents, utility models, trademarks, industrial designs and geographical indications are mainly protected by the Industrial Property Law. Copyrights are protected under the Law on Intellectual and Artistic Works. According to Turkish law, protection is also possible under general provisions such as those on unfair competition.

Brief descriptions for the commonly recognised IP rights in Turkey are given below. See Sections III and IV for information on how to secure protection for these rights, limits of protection and how to enforce these rights.

iii Trademarks

A trademark is a sign that distinguishes your products or services from those of your competitors. Names, designs, logos, letters and numerals can be registered as a trademark. Trademarks can also include the shape of the products or their packaging.

iv Copyrights

Original works that bear the characteristics and originality of the author are protected by copyright. These works are classified by the Law on Intellectual and Artistic Works as follows:

- a* science and literature;
- b* music;
- c* fine art; and
- d* cinema.

These categories are *numerus clausus*, but there are some sub-categories such as computer software that are listed under 'scientific and literary works'. Note that the first owner of a work can only be the author or in other words the individual who is the creator of a copyright in Turkey.

v Industrial designs

The appearance of the whole or a part of a product can be registered as a design. This includes features such as the product's lines, colour, texture and shape.

vi Patents and utility models

A new invention can be protected as a patent or utility model. Both patents and utility models require the invention to be novel and capable of industrial application. The requirements for acquiring a utility model are less stringent than for patents. The registration process for utility models is significantly simpler and faster than for patents. The length of protection is also different for patents and utility models.

vii Geographical indications

Signs indicating the origin of a product can be registered as geographical indications. Products that have a specific quality, reputation or characteristic attributable to a particular place, area, region or country can be a geographical indication.

II RECENT DEVELOPMENTS

Until 10 January 2017, decree laws, such as the Trademark Decree and the Patent Decree, covered the industrial property rights. On 10 January 2017, the Industrial Property Law (the

New Law) entered into force and abolished previous IP-related decree laws. The New Law includes most of the provisions that were present in the abolished decree laws, as well as some new provisions.

One of the most essential amendments in the trademark law is the coexistence principle. The New Law allows the registration of a trademark that is identical or indistinguishably similar to an earlier dated trademark registration or application if the prior trademark's owner provides consent.

Previously, there was no clear provision for losing a trademark right by remaining silent. But now, it is clearly stipulated that 'in case a trademark owner has remained silent for the five consecutive years where he knows or should know that the later dated trademark is used, he cannot allege his/her trademark as an invalidation ground unless the subject trademark registration was filed in bad faith'.

The New Law abolished all criminal sanctions for patent infringement. Criminal sanctions apply only for trademark infringements, not for patent, utility model, industrial design or geographical indication infringements.

Additionally, all patents will now be granted upon examination. There will no longer be a granting of patents without an examination process. Moreover, the New Law introduced a post-grant opposition system for patents. These improvements will lead to stronger patents in Turkey.

Furthermore, mediation for commercial disputes regarding receivables and compensation claims has recently become mandatory in Turkey. This recent development was implemented on 1 January 2019. In this regard, the IP right owner must complete the applicable mandatory mediation proceedings before filing a lawsuit in relation to a commercial payment claim.

III OBTAINING PROTECTION

i Trademarks

All distinctive and graphically representable signs, such as words, names, acronyms, letters, numbers, devices, holograms, the three-dimensional form of a good or its packaging and any combination of the mentioned signs, including sound marks graphically represented can be registered as a trademark.

The trademark application should be filed with the Turkish Patent and Trademark Office. Alternatively, as Turkey is a member of the Madrid Protocol, an international application can be filed through WIPO by designating Turkey.

It is possible to claim priority based on an earlier application filed in another country, provided that the country where the earlier application is made is a member of the Paris Convention.

The application will first be examined by the Turkish Patent and Trademark Office. The Patent and Trademark Office can reject the application on absolute grounds stipulated in Article 5 of the Industrial Property Law. The absolute grounds for refusal are:

- a* non-compliance with the legal requirements of the Industrial Property Law;
- b* existence of an identical or indistinguishably similar earlier trademark or trademark application, covering the same or same type of goods or services;
- c* descriptiveness;
- d* if the mark has become customary in current and established trade practices;

- e* if the mark consists of a shape resulting from the nature of the goods, or necessary to obtain a technical result or which gives substantial value to the goods;
- f* deceptiveness;
- g* no authorisation from the relevant authorities for the use of the mark;
- h* the mark involves armorial bearings, emblems or hallmarks with historical and cultural value that are of concern to the public, and the registration of which is not authorised by the relevant authorities;
- i* the mark involves religious values or symbols;
- j* the mark is contrary to public policy and public morals; and
- k* the mark is composed of or contains a registered geographical indication

If the Turkish Patent and Trademark Office does not reject the application on absolute grounds, the Office will authorise the publication of the trademark in the Official Bulletin.

Third parties can oppose the application based on absolute or relative grounds as stipulated in Article 6 of the Industrial Property Law. The time limit for filing an opposition is two months from the publication date in the Official Bulletin.

The relative grounds for refusal are that:

- a* the application is identical or similar to an earlier trademark registration or application and covers identical or similar goods or services, and there is a likelihood of confusion between them;
- b* it is an unauthorised application for an identical or indistinguishably similar trademark by the agent or representative of the trademark owner in their own name, without valid justification;
- c* there is prior and genuine ownership by a third party of the mark applied for;
- d* there is a well-known mark under Article 6 bis of the Paris Convention;
- e* there is an earlier trademark registration or application well-known in Turkey;
- f* the application contains the name, trade name, photograph, copyright or industrial property right of a third party;
- g* the application is identical or similar to a trademark registration, the protection period of which has ended due to non-renewal, covers identical or similar goods or services, the application is filed within two years of the end of the protection period of the earlier registration, and the earlier registration is put to use within this two-year period; and
- h* the application is filed in bad-faith.

If the application is *ex officio* rejected or rejected based on a third party's opposition, the applicant will be entitled to object to the rejection within two months of receiving the relevant notification. In this case, the Re-examination and Evaluation Board will examine the objection. The decision of the Re-examination and Evaluation Board is the final decision of the Turkish Patent and Trademark Office. To object to this decision, a court action can be initiated within two months of the notification of the final decision.

If no rejection or opposition occurs, the trademark will be registered after the payment of registration fees. The trademark registration process typically takes approximately seven to eight months, provided there are no objections or opposition. Having said that, protection of a trademark starts as of the first application date and, therefore, during the registration process the trademark is entitled to protection.

The term of protection of a registered trademark is 10 years from the date of filing of the application. Registration is renewable for further periods of 10 years perpetually.

ii Industrial designs

In Turkey, unregistered designs can be protected under unfair competition and copyright provisions, and are also protected under the Industrial Property Law, provided that the unregistered design is novel, individual and made available to the public for the first time in Turkey.

Unregistered design protection starts from the moment the design is made available to the public in Turkey and lasts for three years.

The application for the registration of an industrial design should be filed with the Turkish Patent and Trademark Office. The industrial design can be registered if it is novel and has individual character.

A design is deemed novel if it has not been made publicly available anywhere else in the world prior to the application date or the priority date. However, the application can be filed in Turkey up to 12 months after first disclosure of the design. If the Turkish Patent and Trademark Office finds that the application is appropriate for registration, the industrial design is registered without any further administrative steps. However, third parties may file an opposition to a registration at the Turkish Patent and Trademark Office within three months of the publication date of registration.

Registered design protection starts from the filing date and lasts for five years. It can be renewed for four consecutive periods of five years, for up to 25 years in total.

iii Patents

An invention is patentable in Turkey, if it is novel, involves an inventive step and is capable of industrial application.

The Industrial Property Law stipulates that the following are not considered as inventions and therefore cannot be registered as a patent:

- a* discoveries, scientific theories, mathematical method;
- b* plans, methods and rules in relation to mental acts, business and game activities;
- c* computer programs;
- d* literary and artistic works, scientific works, creations having an aesthetic characteristic; and
- e* delivery of information.

The Industrial Property Law also stipulates that the following are accepted as inventions but cannot be registered as a patent:

- a* inventions violating public order or morality;
- b* plant and animal varieties or species or biological processes for producing or breeding plants and animals, excepting microbiological processes or products of them;
- c* all treatment methods including diagnostic and surgical methods on humans or animals;
- d* simple discovery of one of the elements of the human body, including a gene sequence; and
- e* human cloning processes, the use of human embryos for industrial or commercial purposes, certain processes for modifying the human genetic code.

Patent applications are filed with the Turkish Patent and Trademark Office. Once the Office publishes the patent in the Official Bulletin, third parties can file an opposition within six months of the publication date (post-grant opposition procedure). The grounds of objection can be as follows:

- a* the patent subject matter does not fulfil the patentability conditions;
- b* the invention has not been sufficiently disclosed; and
- c* the patent subject matter exceeds the scope of the application.

Patent protection starts from the date of the application. The term of protection is 20 years and this term is not renewable.

iv Copyright

In Turkey, copyrights are mainly protected under the Law on Intellectual and Artistic Works. Registration is not required to establish rights. Note that cinematographic and musical works must be registered before the General Directorate of Copyrights, part of the Ministry of Culture and Tourism, to exploit these rights and facilitate proof of ownership, but not for creation of the rights.

There is no need to file any application to gain the copyright protection as it exists automatically when the work is created. However, a time stamp can help prove the time of creation. In Turkey, rights holders generally apply to the Ministry of Culture and Tourism for the registration of the work and this helps to prove the ownership and creation date of work. Software, games, books and other intellectual and artistic works can be subject to this optional registration. Certification by a notary public is also common practice in Turkey to prove the creation date of work.

Copyright protection starts from creation of the work and lasts for 70 years after the author's death.

IV ENFORCEMENT OF RIGHTS

Turkish law provides an effective enforcement procedure for protection of IP rights. Usually, the first step for enforcement is determining an IP infringement. Once an infringement is determined, it is advisable to send a cease-and-desist letter from a notary public as this may lead to an easier and faster relief for the IP owner.

If infringement continues or if an IP owner wants to move forward with enforcement as the first step, it is possible to request determination of evidence from civil courts or request to obtain search warrants from criminal courts to conduct raids and secure evidence.

i Possible venues for enforcement

Under Turkish law, it is possible to enforce IP rights before the criminal law courts and civil law courts.

In terms of civil law protection, IP infringement actions are filed before the specialised civil courts of industrial and IP rights in Istanbul, Ankara and Izmir. In other cities, one of the regular civil courts (if there are more than two courts the third civil court, otherwise the first civil court) is assigned as a specialised IP court.

It is also possible to enforce IP rights before specific criminal courts of industrial and IP rights in Istanbul, Ankara and Izmir for cases where the legislation stipulates imprisonment

or judicial monetary penalty for infringement of a certain IP right. In other cities, one of the regular criminal courts (if there are more than two courts the third criminal court, otherwise the first criminal court) is assigned as a specialised IP court.

It is possible that any goods or products that infringe IP rights may be confiscated by the customs authorities during their import, export or transit. The customs authority, without the necessity of a court or public prosecutor order, may confiscate any goods that breach IP rights and notify the IP right owner afterwards to follow the next procedures such as the initiation of a civil case or the obtaining of an injunction.

ii Requirements for jurisdiction and venue

Turkish courts have jurisdiction in IP infringement cases if either the IP right is registered in Turkey or the defendant resides in Turkey or the tortuous act is committed in Turkey. According to Turkish law, if the place the tortuous act is committed is not the place where the damage has occurred, the law of the state where the damage has occurred shall govern.

The applicable jurisdiction in Turkey may be one of the following:

- a* the regular domicile of the IP right holder;
- b* the place where the infringement was committed; and
- c* the place where the act of infringement produced consequences.

iii Obtaining relevant evidence of infringement and discovery

Under Turkish Civil Procedural Law, the burden of proof lies on the claimant. Therefore, it is very important to collect relevant evidence before initiating a lawsuit.

One of the methods that is widely used is determination of evidence where, by order of a court, an examination can be made with experts or a judge and evidence can be collected. This examination usually entails visiting a premises to document the situation to be used as evidence.

Another method, which can be used in cases where IP infringement may result in criminal sanctions, is obtaining a search warrant and asking for an expert examination. For this method, the right holder applies to the public prosecutor, requesting that the prosecutor ask for a search warrant from the magistrates' court. If the magistrates' court accepts the public prosecutor's request, the public prosecutor appoints an expert and orders the search warrant to be executed with the police.

Other than those methods, any legally obtained evidence may be used in courts and these may be purchases made from the seller of counterfeit goods, relevant payment slips, opinions obtained from laboratories, etc.

iv Trial decision-maker

As mentioned above, there are special IP courts in Turkey, and accordingly judges for IP cases are specialists. Further, technical expertise is also very important and in almost in all cases, the judge asks for an expert examination from a court-appointed expert or court-appointed expert panel. As a result, the expert report is a significant element of the judicial process. There is no jury trial in Turkey.

v Structure of the trial

Civil procedure in Turkey is mainly based on writing. The briefs of the parties and the written expert report are the most significant documents.

Before the trial, the claimant provides his or her claim petition to the court and the defendant responds to it with a response petition. Afterwards, secondary petitions are provided to the court by the claimant and defendant in that order. All evidence, claims and defences of parties must be submitted to the court at this stage with their respective petitions. In principle, the admission of additional evidence or the bringing of new claims and defences is not allowed under procedural law after the completion of this stage.

During the hearings, the judge will listen to the parties but, as mentioned above, the trial is based on the written documents submitted to the court. The hearing may be used as a tool to point out some of the critical issues for the judge to concentrate on.

IP litigation relies on documentary evidence that would be provided by the parties or the expert report obtained by the court. While it is possible to take witness statements, it is not the usual practice in IP litigation and witness statements rarely preclude documentary evidence.

It is also important to note that there are certain minimum requirements for a document to be accepted as proof before the court. For example, all agreements that are related to the transfer of copyrights must be made in writing.

vi Infringement

Patent and trademark protection prevents third parties from offering or making available goods or products that are the subject matter of the patent or that are branded with that trademark.

vii Defences

Trademarks

The most common defence in Turkey is that the challenged trademark has no distinctive character, or is deceptive or descriptive.

In Turkey, the defendant can also claim as a defence that he or she is the prior rights holder or that the trademark owner has not been using the trademark for a period of at least five years. The defendant can file a separate invalidation or revocation action on the grounds of non-use or being the prior user.

The principle that a right can be lost by remaining silent can also be used as a defence. The defendant can claim that the trademark owner is acting in bad faith by filing the infringement claim after a long period of tolerance.

Designs

In a design infringement case, the defendant may argue that the registered design should be cancelled, and that the use of the design was a technical necessity or a personal use, or for an experimental, educational or repairing purpose.

Patents

In Turkey, the most common defence against infringement claims is filing an invalidity action against the patent.

A defence relating to prior user rights can be also raised as the patent owners do not have the right to prevent persons from using the invention if they began to use it in good faith before the application date.

The defendants can also raise an exhaustion defence, which is essentially an exemption to patent infringement. The release of a product bearing an IP right anywhere in the world is sufficient for the exhaustion of the IP right in Turkey.

Copyright

The Law on Intellectual and Artistic Works stipulates specific situations when using copyrighted work without the right holder's permission shall not constitute copyright infringement. Those exceptions that are commonly used as a defence are as follows:

- a* personal use;
- b* use for educational purposes in schools or other educational institutions;
- c* use within 'freedom of quotations';
- d* influential use to create an original and independent work;
- e* use due to public order or in the interests of the community; and
- f* expiration of copyright.

viii Time to first-level decision

In most cases, it is possible to obtain a first-level decision in an IP infringement case or other dispute within 18 to 24 months. This term includes expert examination as well.

ix Remedies

The remedies available in Turkey include:

- a* the cessation of the infringing acts;
- b* the confiscation or destruction of the infringing products, and the equipment and machinery used to produce the products;
- c* compensation for material and moral damages; and
- d* the publication of the court's decision.

Preliminary injunctions are also available in Turkey before or during the substantive proceedings. The claimant must prove that:

- a* it is the rights holder;
- b* its rights are being infringed or there is a high likelihood of infringement; and
- c* it may suffer irreparable harm or damages.

The rights owners may apply for a preliminary injunction for the cessation or prevention of the infringing activities, as well as for seizure of the infringing goods.

There are no criminal remedies for design and patent infringements. However, for trademark and copyright infringements, criminal remedies, including imprisonment and fines, are available.

x Appellate review

In Turkey, final decisions of the courts of first instance can be appealed before the district courts and the decisions of the district courts can be appealed before the courts of appeal. An appeal does not automatically stop the execution of the decision and the suspension of the execution should be requested together with the appeal. Appeal proceedings last between 18 months and two years. With respect to preliminary injunctions, district court decisions are final and cannot be appealed before the court of appeal.

xi Alternatives to litigation

As of 1 January 2019, mediation is mandatory for IP-related disputes regarding receivables and compensation claims. However, there is no restriction on applying mediation to other disputes as well.

IP-related disputes can also be resolved by arbitration. Under the Turkish Civil Procedure Law, arbitral decisions are executable without needing any judicial approval or decision.

Alternative dispute resolution methods have significant advantages such as the arbitrators' expertise, the confidentiality of the proceedings and the flexibility to adapt the proceedings to different situations.

V TRENDS AND OUTLOOK

The Turkish government strongly promotes the mediation system. In the near future, mediation is expected to be mandatory as a precondition to formal litigation relating to all IP disputes. In this regard, alternative dispute resolution methods will be more important and effective in practice.

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