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IP court decisions cast doubt on preliminary injunctions

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It has become common for a plaintiff in an invalidation or determination of non-infringement action to demand a precautionary injunction against a defendant patentee to prevent it from enforcing its patent rights against the plaintiff, although there is no explicit legal provision for this in the Turkish Patent Law or procedural law.

The grounds on which such demands are based are highly questionable, considering that a patent term is limited and the period of time in which patent rights are unenforceable cannot be remedied later on. Granting such injunctions at the beginning of an invalidation or determination of a non-infringement action can be unfair, due to the fact that it is not yet known whether the patent will be invalidated after trial or if the non-infringement action will be determined or declined.

The Turkish IP courts' approach to requests for precautionary injunctions vary, according to the judge's perception of this issue. However, in an action filed to determine the non-infringement of a patent, the plaintiff's precautionary injunction demand, which would have prevented the defendant from enforcing its rights against the plaintiff was immediately rejected by the judge, who did not even ask for the defendant's defence. The court reasoned that the subject matter of the action was not the defendant's patent, but rather the plaintiff's acts – more specifically, whether these acts infringed the patent. Therefore, a precautionary injunction could not be granted for an issue that was not the subject matter of the case. More importantly, a precautionary injunction cannot be granted to prevent the use of property rights.

The court's decision is noteworthy for two reasons. First, it emphasises that the patent is not the subject matter of a non-infringement action, which is (in principle) undebatable – although this reasoning has been disregarded by many IP courts so far. Second, the court held that a precautionary injunction cannot be granted against a property right. Although the court did not explain this in detail, it is most likely due to the understanding that property rights are constitutional and cannot be limited via a restraining order.

In another case in which there was a demand for the invalidation of a patent, the court accepted the plaintiff's demand for a precautionary injunction and prevented the patent holder from enforcing its rights against the plaintiff until the end of the trial. The court based its decision on the grounds that procedural law gives the judge wide discretion to interpret the necessity of a precautionary injunction order. However, as per the wording of the procedural law, a precautionary injunction can be granted for the subject matter of the dispute if the acquisition of a right is difficult or impossible due to a change in

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Selin Sinem
Erciyas

the situation or if a delay in proceedings could cause serious damage or disadvantage The court stated that a precautionary injunction decision should also aim to prevent new disputes between parties. Considering this, disadvantage or damages are not necessary for a court to grant a precautionary injunction.

The Industrial Property Law also introduces a specific provision to precautionary injunction demands and decisions. However, its wording gives the right to ask for a precautionary injunction to rights holders only (against possible third parties who are infringing IP rights). Therefore, in both of these cases in which a precautionary injunction was demanded against the rights holder, the courts evaluated the general provision of the procedural law as legal grounds.

Finally, differing perceptions and interpretations of law have played the biggest role in these two IP court decisions. In the second case, the court did not grant the precautionary injunction straight away, but waited until it had received the expert report, which stated that the patent should be invalidated. It is assumed that the court considered that the plaintiff (ie, the patent holder) had sent warning letters to the defendant before the trial and threatened it with enforcing its patent rights. The court therefore emphasised that a precautionary injunction may be granted to prevent further disputes.

Both of these cases are still pending. However, until then, the best solution seems to be to not to grant a precautionary injunction decision, which prevents a rights holder from enforcing its rights against third party at the very beginning of the case, but also not refraining from issuing these injunctions where these are necessary, especially in cases where the subject matter is the patent itself.

For further information contact:

Selin Sinem Erciyas

Gün + Partners

[View website](#)

Email: selin.yalincakli@gun.av.tr

Tel: +90 212 354 00 00

Maral Sayan

Gün + Partners

[View website](#)

Email: maral.sayan@gun.av.tr

Tel: +90 212 354 00 00

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