

Chapter 47

Turkey

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I. INTRODUCTION

§ 47:1 In general

Turkey has acceded to almost all international treaties relating to the field of intellectual property. Of these treaties, the Bern Convention, the Paris Convention, the Patent Cooperation Treaty, the European Patent Convention, and the World Trade Organization (WTO) Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement are the most well-known.

In June 1995, Turkey adopted a series of new legislative measures relating to intellectual property rights and has since made considerable efforts to align its intellectual property rights system and implementation with international standards. The principles, rules,

and conditions applying to the protection of patents, utility models, trade marks, and industrial designs used to be encompassed in several Decree Laws.

On 10 January 2017, the new Industrial Property Code came into force. The Industrial Property code has now replaced the respective Decree Laws pertaining to the protection of trade marks, patents, geographical indications, and industrial designs, unifying them into a single code. The Regulation on the Implementation of the Intellectual Property Code is also entered into force on April 24, 2017.

The Decree-Laws on the protection of trade marks, patents, and industrial designs will continue to apply to international and national trade mark, design, and patent applications filed before 10 January 2017. The application of the old system ends once the application is registered. Therefore, if a cancellation or non-use action is filed after 10 January 2017 against a mark registered under the old system, the new Industrial Property Code will apply.

The Industrial Property Code was prepared to provide compliance with recent developments in European Union (EU) intellectual property law, to restore the gaps due to the decisions of the Constitutional Court annulling various provisions of the Decree Laws and to make the relevant regulations clearer, more understandable and more systematic, as stated in its preamble.

The Industrial Property Code contains five chapters and approximately 200 provisions, with introductory provisions and common provisions. Book 1 of the Code regulates trade marks, Book 2 regulates geographical indications, Book 3 regulates designs, and Book 4 regulates patents. The Industrial Property Code does not only consolidate the common provisions of the Decree Laws, but also amends some of them. The name of the Turkish Patent Institute also has changed to “Turkish Patent and Trade Mark Authority.”

Regarding the judicial system in Turkey, decisions and activities of all government agencies and administrative bodies are subject to review and challenge before respective judicial authorities. Normally, specialized administrative courts have jurisdiction on all actions relating to the decisions and activities of government bodies or administrative agencies; however, an exception has been made to this rule in relation to the actions and decisions of the Patent and Trade Mark Office, with these acts being made subject to the jurisdiction of the specialized Intellectual Property Courts.

Specialized civil and criminal Intellectual Property Courts have been given special jurisdiction over any and all judicial matters and lawsuits concerning any of the intellectual property laws. In the metropolitan cities of Istanbul, Ankara and Izmir specialized Intellectual Property Courts have been established for these purposes. Where specialized Intellectual Property Courts have not yet been established, the courts of first instances function as specialized Intellectual Prop-

erty Courts that apply the specific rules of these specialized courts. If there is an Intellectual Property Court within the city of the competent court, the action is filed with the competent court. Otherwise, the action is filed with the civil court of first instance.

According to the Patent and Trade Mark Office's database the number of the intellectual property applications and registrations in until March 2020 were as follows:

1. Trade mark applications, 48,121;
2. Trade mark registrations, 24,346;
3. Patent applications, 6,727;
4. Patent registrations, 5,124;
5. Utility model applications, 1,367;
6. Utility model registrations, 49;
7. Design applications, 3,994; and
8. Design registrations, 4,516.

II. PATENTS

§ 47:2 Nature

The principles, rules, and conditions regarding the protection of patents are stated in the Book 4 of the Industrial Property Code. The subject matter of the patent is "invention," although the Industrial Property Code does not include a specific definition for the term invention.

The legislative intent behind not providing such a specific definition of invention is that possible new technological developments remain unhindered by restrictive definitions. According to doctrine, however, an invention is a human idea that solves a technical problem and includes an inventive step. This technical problem can be in the field of nature, human body, gene technique, animal organism, microorganisms, or botany.

The fields of literature, artistic works, and social sciences are outside the technical fields in which a protected invention can be made. Article 82/2 of the Industrial Property Code designates these non-technical fields as non-patentable subject and inventions.

These fields are listed as; discoveries, scientific theories, mathematical methods, plans, methods and rules regarding intellectual, commercial and game activities, literary works, work of arts, scientific works, aesthetic discoveries, computer software, methods without a technical respect and regarding the collection, organization, presentation and transformation of information, and diagnostic, and therapeutic and surgical methods for the treatment of humans or animals.

§ 47:3 Creation of rights

Patent registrations can be obtained either through a direct ap-

plication to the Patent and Trade Mark Office or through the Patent Cooperation Treaty or through the European Patent Convention. If the application is filed directly with the Patent and Trade Mark Office, the Patent and Trade Mark Office examines the patent applications with regards to the required formalities within one to two months of the application date.

The new law reduces the number of requirements for filing an application to make it easier to obtain a filing date. Under the new regime, a request for a patent or utility model which includes the applicant's identity and contact information, along with a description or reference to an earlier application, is sufficient. The abstract, claims, figures (if any), and fee for filing the application can be submitted without further notification within two months; the description also can be amended within the same two-month period. To speed up the granting procedure, the search request must be filed within 12 months from the filing date or at the time of filing by paying the search fee without notification.

The so-called "non-examined" patent system, which allows patents to be granted without a substantive examination for a protection period of seven years, has been removed entirely—such patents were widely considered abusive. The substantive examination procedure for patent applications before the Patent and Trade Mark Office also has been modified, with the new law providing only one examination report instead of the three established by the previous system. In addition, the patent applicant and examiner are limited to only three communications. In terms of procedure, an applicant need request examination only once by paying an examination fee.

It also has the right to submit an opinion in response to the examiner's assessment—which is notified to the applicant as a first communication—and can amend the application provided that it does not exceed its scope. An applicant's replies to the examiner's assessment give it the opportunity to explain its invention in further detail and negotiate.

The application will be granted or rejected based on the examiner's decision, which will then be published in the *Official Patent Bulletin*. The applicant's rights are supported by provisions which establish further processing and re-establishment of rights in case of any non-compliance with deadlines during procedures. The vast majority of non-compliance results from the late payment of annuity fees. Article 101(4) of the new law thus establishes a compensation fee which applicants or right holders who have failed to pay an annuity fee can pay to revive their application or patent.

Rights holders have a six-month grace period in which to make this late payment, along with a surcharge. If the fee is still not paid within this time, the patent right is terminated and the decision published in the *Official Patent Bulletin*. Article 99 of the Industrial Property Code

introduces a post-grant opposition system, according to which third parties can oppose a patent within six months of publication of the grant decision in the bulletin. The scope of objections can include:

1. Lack of patentability criteria according to articles 82 and 83;
2. Lack of sufficient information about the invention with respect to articles 92(1) to (3); and
3. That the patent exceeds the scope of the initial application.

If any third party files an opposition, the patentee is notified and allowed to amend the patent after grant and state its opinion within three months of the objection's notification date. Oppositions are examined by the board in view of the patentee's submissions and amendments, if any. If the board decides that the patent conforms to the Industrial Property Code in its current or amended state, it will be maintained. However, if it decides otherwise then the patent will be declared null and void, which has a retroactive effect.

Accordingly, the applicant is obligated to respond to the international preliminary report and should file amendments if it is necessary. In order to provide the international preliminary report, the applicant should choose one of the Denmark, Sweden, or Russian patent offices as the designated international preliminary search authority.

If an international application is filed with the Patent and Trade Mark Office as the origin office, the Patent and Trade Mark Office gives the international application an international filing date and checks whether the application fulfils the formal requirements. If the formal requirements are fulfilled, the Patent and Trade Mark Office sends a copy of the international application to the International Bureau of Intellectual property and another copy to the International Searching Authority. Following the search report prepared by the International Searching Authority the applicant decides for an international preliminary examination report. After these steps, the usual Patent Cooperation Treaty procedure is to be applied.

The international sign for Turkey is "TR," and Turkey can be designated in a Patent Cooperation Treaty application by selecting and indicating TR among the designated countries. Because Turkey is a member of the European Patent Convention and the European Patent Office patents will be validated in Turkey, by designating the European Patent Convention in a Patent Cooperation Treaty application Turkey also may be indirectly designated through the European Patent Convention.

With regards to a patent application filed in Turkey through the European Patent Convention, according to the Regulation on the Application of the European Patent Convention in Turkey, if the conditions in articles 12 and 13 of this regulation are fulfilled, a European Patent will be treated as a national patent in Turkey. Article 12 states that "the Turkish translation of European Patent certification includ-

ing the description claims and the drawings should be submitted to Patent and Trade Mark Office within three months from acquisition of European Patent right.”

According to article 13, the translation of the European Patent should be published by the Patent and Trade Mark Office and announced in the Official Journal of the Patent and Trade Mark Office. The Turkish text will be determinative in the determination of the scope of protection.

With regard to priority, natural or legal persons who are nationals of any state party to the Paris Convention, or if not nationals, who are domiciled or have an active business in these states, will enjoy a right of priority of 12 months for the purpose of filing an application for obtaining a letter's patent certificate in Turkey, as from the date of filing an application for the grant of a patent certificate before the authorized bodies of these states.

The priority right will have effect as of the date of filing the application for patent or utility model certificate. The priority should be demanded while filing the application and the priority document should be filed within three months. The patentability conditions are novelty, an inventive step that exceeds the state of the art, industrial application, and not being within the context of non-patentable inventions.

Novelty will be determined according to whether or not the solution provided is already within the scope of the state of the art. To be considered as novel, the invention must exceed the state of the art. To determine whether the invention exceeds the state of the art, the knowledge of an expert in the technical field of the invention will be considered. The term “industry” should be interpreted widely. Within this interpretation is should include all the offshoots of the commerce and skilled trade, mining, fishery, huntsman ship, and tourism. While a business concern is not required, the field of self-employment does not fall within the definition industry.

Article 82/2 of the Industrial Property Code lists the items which are non-patentable and cannot be protected. As stated above, these items are listed as: discoveries, scientific theories, mathematical methods, plans, methods and rules regarding intellectual, commercial and game activities, literary works, work of arts, scientific works, aesthetic discoveries, computer software, methods without a technical respect and collection, organization, presentation and transformation of information, and diagnostic, and therapeutic and surgical methods for the treatment of humans or animals.

Furthermore, according to article 82/3, the excluded from the scope of patentability are inventions that are incongruous to public order and public morality, plant and animal species, essentially biological processes for the production of plants and animals, discovery of human body parts and cloning or genetic modification procedures for humans and animals.

§ 47:4 Beneficiaries of rights

The protection for patents in Turkey is available to natural and legal persons who are domiciled or who have industrial or commercial establishments within Turkey or to the persons who have application rights resulting from the terms of the Paris or Bern Conventions or the Agreement Establishing World Trade Organization. Natural or legal persons, other than those referred to above, who are nationals of states that accord legal and de facto protection to the nationals of Turkey also will enjoy patent protection in Turkey according to the reciprocity principle.

The right to a patent will belong to the inventor or to his successor in title and will be transferable. Where an invention has been made jointly by more than one person, unless foreseen otherwise by the parties, the right to request a patent will belong to them jointly. Where an invention has been made independently by several persons at the same time, the right to a patent will belong to the person who has filed the first application or who can claim an earlier priority right on the others.

The person who is the first to apply for a patent will be vested with the right to request the patent until proof to the contrary is established. The name of the inventor will be indicated in the letters patent. The inventor will have the right to request from the applicant or the patentee to be indicated as the inventor in the letter patent. According to the Industrial Property Code, employee inventions are classified as service inventions or free inventions.

Service inventions are those inventions that are made by the employee during the term of their employment, either in a private enterprise or public authority, while performing, as of their obligation, the tasks they have been assigned to or which are based to a great extent on the experience and work or activity of the private enterprise or public authority. An employee that has made a service invention will be under the duty to report, without delay, the invention to his employer in writing.

An employer may claim a right, in part or in whole, for a service invention. The employer may notify the employee of such a claim in writing and such a claim must be made within four months as from the date of receipt of the employee's report by the employer. Where the employer claims ownership on the service invention, the employee will have the right to a reasonable compensation against the employer. In assessing compensation due consideration will particularly be given to the economical/commercial applicability of the service invention, the duties of the employee in the enterprise and the enterprise's contribution to the invention.

Employee inventions not falling under the scope of service inventions will be deemed to be free inventions. An employee who has made a free invention during the term of an employment contract may notify

the employer without delay. Where the invention falls within the field of activity of the employer's enterprise or where the employer's enterprise is making serious attempts to become active in the field of the invention the employee is under the obligation to make an offer to the employer, on a non-exclusive basis, to benefit from the invention on reasonable terms.

§ 47:5 Maintenance

In order to profit from the patent protection either the patent application must be published or the patent right must be obtained. The protection starts from the date of publication of the application in the Official Journal of the Patent and Trade Mark Office. The scope of the protection is determined through the claim or claims.

Annuity payments¹ are required to maintain the validity of patent applications and patent rights. The Industrial Property Code includes a major change regarding the annuity fees, with the payment of renewal fees now falling due in the third year, instead of the second, and then each subsequent year.

In line with this, the Industrial Property Code also sets out the continuation of suspended procedures. Under this, the applicant must submit a request for continuation within two months of being notified of the consequences of non-compliance, with a deadline established once the necessary fee has been paid. If such a request is accepted, the legal consequences of non-compliance with the deadline will no longer apply.

Provided that an applicant fully complies with all the conditions of the application procedure, it is still possible to file a request to re-establish rights should the application be rejected or considered withdrawn or the patent be considered invalid or any other loss of rights due to not meeting deadlines.

Such a request must be filed within two months of removal of the obstacle causing the non-compliance and at the latest within one year after the initial failed deadline along with payment of a fee. If such a request is approved, then the legal consequences arising from not obeying to the deadlines are considered inapplicable.

§ 47:6 Extension

The term of a patent is 20 years as from the date of filing of the application and it is not extendable.

§ 47:7 Transfer

A patent application or a patent may be transferred to a third party

[Section 47:5]

¹See <http://www.turkpatent.gov.tr>.

and may be inherited, or the right to use the patent application or patent may be subject to a license. Licenses may be exclusive or non-exclusive. Unless the agreement includes a provision to the contrary, the license is accepted as non-exclusive. A patent application or a patent may be pledged.

§ 47:8 Cancellation

A patent will be cancelled upon the expiration of the protection period and subsequent non-renewal within the prescribed period, a court decision for the cancellation or the request for cancellation made by the proprietor of the patent.

The cancellation request of the proprietor will be declared in writing to the Institute. If the cancellation request is filed through an agent, a notarized and apostilled copy is required.

§ 47:9 International aspects

As noted above, patent registrations can be obtained through a direct application to the Patent and Trade Mark Office, through the Patent Cooperation Treaty, or through European Patent Convention.

Natural or legal persons who are nationals of any state party to the Paris Convention, or if not nationals, who are domiciled or have an active business in these states, will enjoy a right of priority of 12 months from the date of filing a valid application for registration of a patent. Foreign natural or legal persons can be represented only by trade mark agents who are authorized to act before the Patent and Trade Mark Office.

§ 47:10 Attacks on ownership

A patent will be declared invalid by the court where:

1. The invention does not meet the patentability requirements;
2. The invention has not been described in a sufficiently explicit and comprehensive manner so as to enable a person skilled in the concerned technical field to implement it;
3. The patent exceeds the scope of the application or is based on a divisional application and exceeds its scope;
4. The holder of a patent does not have the right to a patent; and
5. The patent exceeds the scope of its protection.

A court action for the invalidation of a patent may be instituted during the term of protection or within five years subsequent to the termination of the patent right. With regard to the proceedings, Turkish civil proceedings commence with several preliminary hearings after the completion of an initial exchange of petitions and the collection of the evidence of the parties. Once all of the procedural filings of the petitions are completed within the prescribed deadlines under the

civil procedural law and the filing of evidence by the parties and collection of any applicable evidence that would be summoned from the relevant authorities is completed, the court appoints an expert or a panel consisting of three experts and delivers the file to the experts.

The experts are instructed by the court to prepare a comprehensive report by reviewing the claims and replies of the parties and by reviewing all of the evidence existing in the file. If the court is not satisfied with the “expert’s” report, it may request an additional report from the same experts or from different experts. In this type of court action, a panel of experts is customarily appointed by the court, consisting of one jurist, one subject specialist and one patent expert. Parties are at liberty to file as many petitions as they like and multiple expert opinions may be obtained before making a final decision.

Upon the parties’ request, the district court may appoint another expert or experts panel to obtain a new expert report while the court examines the merits of the case. In principle, the district court should examine the appeal during a hearing, except in the cases stated in the Code of Civil Procedure.

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A district court decision may be further appealed before the Court of Cassation if the conditions of the Code of Civil Procedure are fulfilled. The Court of Cassation is the third and final judicial authority in the new three-level system of civil procedure. Since the new system started operating only recently, it is not yet known how and whether the length of the procedures will be affected.

§ 47:11 Prior inventors or users

A person who has suffered a wrong may apply for invalidity before the court.

§ 47:12 Public interest intervention

The State Prosecutor or related official authorities may apply for invalidity before the court. However, such application is rare in practice.

§ 47:13 Infringement actions

The Industrial Property Code provides a wide range of civil remedies to rights holders for the effective protection of their rights. Criminal remedies of the former Decree Law for such purposes were cancelled by the Constitutional Court in 2009, and criminal remedies are not applicable to patent infringement cases in scope of the Industrial Property Code as well.

Attorney fees vary, depending on the experience and seniority of the lawyer and thus it is not possible to give an exact figure. However, court fees are relatively insignificant. Court duties may be in the range of US \$300, while expert fees (if appointed) may be US \$600 to US \$1,200, depending on the qualifications of the expert.

§ 47:14 Nature of infringement

The Industrial Property code lists the infringement actions in article 141 in accordance with the numerous clauses principle. Accordingly, partial or complete production of the patented product without the permission of the patentee to sell, distribute, or carry on trading; to export the partially or completely counterfeited goods which are the products of the infringement; to use the method of the patent without the permission of the patentee; or to sell, distribute, or carry on the trading of the products which are obtained through the method of the patent, expansion of a license, or a compulsory license without permission or assignment of the license right to the third party without permission usurp the right of patent, and are listed as patent infringement.

With regard to the civil remedies, the rights holder may apply for determination of the infringement, cessation and prevention the infringing acts, restoration of the results of the infringing acts, and may subsequently apply for damages. The rights holder also may demand from the court the seizure of the infringing products, the establishment of proprietorship over the infringing products, the destruction of the infringing products and the publication of the court's judgment. Furthermore, it is possible for third parties to apply to the court for a declaratory judgment for a determination that their intended activities do not infringe the registered intellectual property rights.

§ 47:15 Action for damages

The Industrial Property Code has determined three types of action for damages, namely:

1. Damages for pecuniary loss;
2. Damages for mental anguish; and
3. Damages for loss of prestige.

Damages for pecuniary loss are constituted from the value of actual loss and loss of income. The value of actual loss means the reduction of the property holdings of the rights holder. Reduction can occur by increasing the indebtedness or decreasing the earnings.

In order to calculate the loss of income the rights holder must choose one of the three methods of calculation. In the first method of calculating the loss of income, the possible income occurring without the unfair competition of the infringer is taken into account. In the second

method, the loss of income is calculated according to the earnings due to the infringement of the infringer. In the third method, the loss of income is calculated according to the license fee that would be paid if the trade mark was used through a license agreement by the infringer.

While seeking damages, the claimant should pick one of the methods to allow the court to make the calculation. In practice, the third method is usually preferred as this method usually constitutes a higher amount and is easier to calculate provided that the claimant can provide the court with a sample license agreement. Indeed, the first two methods have some difficulties as it is not always possible to calculate the accurate amount while, under the third method, experts are generally able to calculate a satisfactory amount based on the sample agreement.

It is not obligatory to choose one of these methods while filing the action, and the court should ask the claimant's choice of method during the course of the proceedings. Damages for moral damages also can be demanded by the rights holder, although only if the infringer acts with an element of fault in the infringing acts. In addition, a proprietor of an intellectual property right may request extra damages for the harm incurred from the improper use of intellectual property right by the infringing party that was detrimental to the reputation of the intellectual property right.

Ascertaining the amount of damages in infringement cases may become complicated and time consuming as it involves additional expert inspection of the books and records of the infringing parties as well as appointment of accounting experts for the calculation of damages. Therefore, it may delay the delivery of judgment in respect of cessation of infringements. Thus, it is wise to commence damages proceedings separate from actions for the prevention and cessation of the infringing actions.

§ 47:16 Injunctions

The Industrial Property Code provides special provisions for preliminary measures for the prevention of ongoing or anticipated infringements of rights, as well as measures for the preservation of evidence. Where there is a likelihood of infringement and irreparable damages, the courts may issue preliminary injunctions.

Preliminary injunctions may be sought and may be granted prior to or during the substantive proceedings relating to intellectual property. The claimant must prove that they are the rights holder, that their rights are being infringed or there is a high likelihood of infringement and that they may suffer irreparable harm or damages. The high likelihood of infringement is interpreted as imminent danger of infringement. The courts are encouraged to issue preliminary injunctions in a manner that will secure the enforcement of the final judgment.

Preliminary injunction may be sought for cessation or prevention of the infringing activities as well as for seizure of the counterfeit infringing goods. Goods seized under preliminary injunction are safeguarded under the court's custody until the final adjudication of the substantive proceedings. A reasonable amount of deposit in terms of cash, bank performance bonds or government bonds or the like is usually required in order to secure the rights of the defendant and third parties whose rights and positions may be prejudiced by the preliminary injunction.

Preliminary injunctions can be requested at any stage of the civil proceedings. Injunctions granted prior to commencement of substantive proceedings will automatically lapse if substantive proceedings are not commenced within 10 days of obtaining the injunction. Preliminary injunction can be maintained until the final judgment becomes procedurally final or may be altered by the judge at any appropriate time during the trial. Bank guarantees or other form or guarantees may be submitted in lieu of a preliminary injunction subject to the court's decision.

§ 47:17 Confiscation

The owner of a patent whose rights have been infringed may ask the court to order confiscation of products manufactured or imported in infringement of rights conferred by a patent or of means directly used in manufacturing such products and of means permitting the use of a patented process.

The owner of the patent also may apply for the proprietorship over the products and means confiscated, apply for precautionary measures to prevent the continued infringement of rights conferred by a patent, especially modifying the shapes of the products and means, or, where inevitable for the preclusion of acts of infringement, the destruction of the products and means confiscated.

§ 47:18 Customs actions

Turkey has an intellectual property rights protection system in the customs areas that is compatible with EU regulations and the international agreements to which Turkey is a party.

There is an official system for protection of intellectual property rights by Turkish Customs that requires only a single application, for each and every intellectual property right, to be filed through the website of General Directorate of Customs in Ankara, and these intellectual property applications cover all shipments made subject to importation and exportation, as well as transit trade and shipments located in any Turkish free trade zones.

Customs authorities can seize suspected goods ex officio, after which Customs inform the rights holders, invite them to check the relevant

shipments and take any necessary action. Customs authorities that discover suspected goods entering the country will grant a temporary suspension decision and the rights holder will be requested to check the products, obtain samples or take pictures of those products and provide a preliminary injunction decision or a criminal seizure order within 10 working days starting from the notification of the decision. The intellectual property owners are entitled to request an additional 10-day period should the process requires more time, such as in the cases where the actual examination of the sample takes longer. However, such extension requests can be rejected.

III. UTILITY MODELS

§ 47:19 Nature

The acquisition of utility model rights is regulated by the articles 142-145 of the Industrial Property Code. According to article 145 of the Code, in the absence of provisions specifically applicable to utility model certificates, the provisions pertaining to patents also will apply for utility model certificates, provided that they are not incompatible with the characteristic of utility model certificates.

§ 47:20 Creation of rights

Utility model applications are filed with the Patent and Trade Mark Office and examined for compliance with formal requirements. If a deficiency is found or if a utility model certificate cannot be granted for any other reason, the applicant is permitted to amend the claim or submit an opposition within two months of notification.

As to utility model applications, the new Industrial Property Code introduces another important amendment with regard to prosecution, which now obliges a novelty search for grant. This new provision strengthens the content of utility model applications and prevents arbitrary filings. There is no post-grant opposition system for utility models.

After examining the response of the applicant and any amendments to the application, the Patent and Trade Mark Office decides whether or not to grant a utility model certificate for all or part of the claims. The application is then published in the Official Bulletin. Within three months of the publication of the application, each person or organization with a legal interest in the case may file an opposition and the applicant is subsequently notified of the oppositions.

Within three months of the date on which an opposition is served, the applicant may submit a reasoned opinion against the opposition. The applicant also may amend the claim, or request a certificate without considering the oppositions. The courts are authorized to resolve any disputes arising from the question of whether the applicant is entitled to request a utility model certificate.

Although the claims are filed with the Patent and Trade Mark Office, the Patent and Trade Mark Office is not authorized to resolve these disputes. After the applicant's response period expires, the Patent and Trade Mark Office decides whether to grant the utility model certificate. Once the allotted period for filing an opposition has expired, the Patent and Trade Mark Office will not consider any subsequent oppositions filed by third parties.

After this period and following payment of the requisite fees, the utility model certificate is delivered to the applicant. After a certificate has been issued, third parties may file an opposition only on the grounds of perceived procedural deficiencies. It is not necessary to have filed a prior opposition in order to oppose the certificate once it has been approved. If the grounds for opposition are found to be justified, the Patent and Trade Mark Office returns the application to the stage in which the deficiency was found and restarts the procedure from that point.

The protection starts from the date of publication of the application in the official journal of Patent and Trade Mark Office. The scope of the protection is determined through the claim or claims. According to article 142 of the Industrial Property Code, inventions that are novel and applicable in industry will be protected by grant of Utility Model Certificate. The Industrial Property Code does not require the third condition of surpassing the state of the art. Utility models are different to patents in respect of lacking the requirement to have surpassed the state of the art.

The applicant for a utility model certificate may request the Patent and Trade Mark Office to convert the concerned application into an application for a patent prior to the decision of the Patent and Trade Mark Office to grant the utility model certificate. Within one month from the date of such request, the Patent and Trade Mark Office may notify the applicant that the application for Utility Model Certificate will be further prosecuted as an application for a patent and will inform them of the documents required to this effect.

The applicant will then be obliged to file the requested documents within one month from the date of notification of the Patent and Trade Mark Office. If the applicant fails to file the required documents within this time period, the request for conversion will be deemed not to have been made and the application will be processed as an application for a utility model certificate. When the application for utility model certificate is converted into an application for a patent, the application for utility model certificate will remain without effect.

§ 47:21 Beneficiaries of rights

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:22 Maintenance

In order to profit from the utility model certificate protection, either the utility model application must be published or the utility model right must be obtained. The Utility Model Certificate is granted for a period of 10 years as from the date of filing of the application.

§ 47:23 Extension

The protection term of 10 years is not extendable.

§ 47:24 Transfer

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:25 Cancellation

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:26 International aspects

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:27 Attacks on ownership

A utility model will be declared invalid by the court when:

1. The utility model is not novel and applicable in industry;
2. The invention subject to the utility model certificate has not been described in a sufficiently explicit and comprehensive manner so as to enable its implementation by a person skilled in that field;
3. The utility model certificate exceeds the scope of the application filed for the utility model certificate or, in cases where the utility model certificate is based on a divisional application if that utility model exceeds the scope of the application as originally filed; and
4. The holder of the utility model certificate does not have the right to a utility model certificate.

The invalidation of a utility model certificate may be requested at any time during its term of protection. Where the grounds for invalidation affect only part of the utility model certificate, it will be decided to partially invalidate the part through the cancellation of the claim or claims related to the concerned part. An individual claim may not be partially invalidated.

§ 47:28 Prior inventors or users

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:29 Public interest

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

§ 47:30 Infringement actions

Because there are no provisions specifically applicable to utility model certificates, the provisions pertaining to patents will apply (see text, above).

IV. COPYRIGHTS**§ 47:31 Nature**

Thus, work must be the result of independent, creative effort by the author, and must fall within one of four categories of work, namely: scientific and literary, musical, artistic, or cinematographic works.

Thus, the work must be the result of independent, creative effort by the author, and must fall within one of four categories of work, namely: scientific and literary, musical, artistic, or cinematographic works.

§ 47:32 Creation of rights

Under the Law of Literary and Artistic Works, no official registration procedure is required for the existence and validity of copyrights. In order for a work to be protected under the Law, it must simply meet the objective and subjective conditions. The objective condition is that the work should be regarded within the scope of any of the four work types defined in the Law (i.e., literary and scientific works, musical works, artistic works, and cinematographic works). The subjective condition is originality.

These four categories are exhaustively listed the Law of Literary and Artistic Works numbered 5846; however, any kind of creation not specifically listed in the Law as qualifying as work under these categories can still be protected as a work, provided it meets the abovementioned two conditions and may be considered as a work by interpretation. Thus, creations that do not specifically fall under the scope of these four types of works, but do qualify as original works, can be considered as falling within any of the four types of the works by way of legal interpretation, depending on the conditions of each individual case and nature of the creative work.

These four categories are exhaustively listed the Law of Literary and Artistic Works numbered 5846; however, any kind of creation not specifically listed in the Law as qualifying as work under these categories can still be protected as a work, provided it meets the abovementioned two conditions and may be considered as a work by interpretation.

Therefore, under article 5 of the Copyrights Regulation, film and phonogram producers who make the first record of cinema films and phonograms may record and register their phonograms or cinema works with the General Directorate.

This is not to establish a right, but to create a record to provide evidence, so that copyrights may be more easily protected. In other words, the registration does not establish any legal rights; rather, it provides evidence in the event of a possible conflict on copyrights and enables the relevant owner of copyrights in a musical or cinematographic work to exercise their rights. Therefore, even though registration does not create any rights, it is advisable to make this record and registration to protect against the possibility of future conflict in relation to copyright. In the event of a failure to register, it would be very difficult for a rights holder to prove their authorship and the related rights to a work, thereby potentially enabling an infringer to benefit from such lack of evidence.

Furthermore, under article 5 of the Regulation on the Principles and Procedure of the Banderol System, it is obligatory to stamp banderols on copies of non-periodicals as well as cinematographic and musical works that are recorded and registered, following their duplication and before their dissemination and delivery. The banderol system also provides easy tracking of the works within the market, as well as providing a tool of evidence in the same way as the recording and registration process.

Under the Law of Literary and Artistic Works, an author owns economic and moral rights to his work. Copyrights on works are comprised of; the right to adapt, the right to duplicate, the right to disseminate, the right to perform to the public, and the right to broadcast or the communication to the public by any means of transmission of signs, sounds or images. Moral rights to works are comprised of the right to make the work available to the public, the right to claim the authorship of a work, and the right to oppose unauthorized changes to the work that could harm the creator's reputation.

§ 47:33 Beneficiaries of rights

Under the Law of Literary and Artistic Works, the initial ownership of economic and moral rights is vested in the author or authors of a work. The initial owner may exploit the rights over the work themselves or transfer/license a part or all the rights to others.

The Law defines the initial work owner as the real person who cre-

ates the work. The principle of creation is accepted for the initial ownership whereby the work ownership is acquired automatically with the creation of the work regardless of having a legal capacity to act. If a work is created by more than one person and the work can be separated into different parts, there will be collective ownership as prescribed under article 10 of the Law. In such cases, the authors will own the parts of the works that they have created. There also will be collective ownership where several independent works are brought together by their owners.

Under article 11 of the Law, there is a rebuttable presumption that is applied to authorship. Thus, if a person uses their name or pseudonym on the published work or on an artistic work, they are regarded as the author of this work. Under article 12, if the name or pseudonym of the author is not mentioned on the work, the publisher, or if the publisher cannot be determined the duplicator can use the rights on the work on their own behalf. Commissioned work is work for which the copyrights are granted to a third party (the commissioning party) by the work owner or creator or by the party who holds the copyrights. The commissioning party pays for the work and thus takes the economic risk. In this sense, the commissioning party takes over all the copyrights that are granted explicitly by the work owner.

According to the article 18 of the Law, the rights in relation to works created by an employee in the course of their employment, regardless of whether it was at the request of the employer, belong to the employee. While this means that they continue to be the owner of the relevant work, it also enables the use of such rights by the employer. Moreover, the wording of article 18 indicates that the parties may override this principle in the relevant employment agreement or it also may be concluded from the nature of the situation that all the rights will be used by the employee rather than the employer.

The Law is vague as to what circumstances may fall within the term “by nature of the situation”; however, the term is likely to depend on the legal nature and features of the specific “employment relationship” between the parties. Moral rights to such works are not explicitly mentioned in the Law, but the prevailing view is that the exercise of moral rights should be included in such “automatic assignment.” However, the employer and employee may agree otherwise.

§ 47:34 Duration

Under article 27 of the Law of Literary and Artistic Works, the ownership of rights to a work begins when the work becomes public without the necessity for notification or registration. The duration of protection for all kinds of rights arising from work ownership subsists for the life of the author, plus 70 years following the death of the author.

The 70-year period starts from January 1 of the year following the

author's death. If there is collective ownership of a work, the 70-year period begins from the date when the last surviving owner dies. As regards to works that become public following the death of the owner, the protection period is 70 years following the author's death.

§ 47:35 Transfer

The author is entitled to assign or transfer their copyrights and the use of their moral rights on the work to any third parties. The copyrights of the author are independent of each other; thus, an author can assign one or some of their copyrights to third parties and can retain the rest. It also is possible for the author to transfer their copyrights partially or entirely, or partially or entirely waive them. However, the transfer or waiver of moral rights is not possible.

The transfer of copyrights or the right to use the moral rights relating to a work or the waiver thereof must be in writing. Under article 52 of the Law of Literary and Artistic Works, such an agreement must state the individual copyrights which are the subject of the transfer or waiver, i.e., the right of adaptation (derivative works), the right of reproduction, the right of distribution, the right of performance, and the right to communicate a work to the public by devices enabling the transmission of signs, sounds, and/or images. An agreement by which the author transfers all copyrights through use of general wording instead of specifying them by stating them one by one is deemed to be void.

Under the Law of Literary and Artistic Works, the rights arising from the work cannot be assigned to third parties unless the work is physically embodied by its owner. In other words, in order to realize the assignment, the work should be physically created. Therefore, if the work has not yet been physically created, an undertaking can be included in an agreement stating that the determined rights will be assigned to specified party when the work is physically embodied. Under the Law, the assignment of copyrights can be examined under two headings; principal acquisition and derivative acquisition.

“Principal acquisition” is the taking over or license of the copyrights from the author directly, or from their heirs. Derivative acquisition occurs where the person who takes over the rights from the author or from the heirs, assigns or licenses such rights to third parties. “Derivative acquisition” allows the person who takes over the rights to exploit such rights as limited to the economic rights that are assigned or licensed by the author or their heirs—as if drawn up by the author under principal acquisition.

Under article 49(2) of the Law of Literary and Artistic Works, written consent of the author or their heirs is required for derivative acquisition. However, if the author or their heirs explicitly grant permission for further assignments in the assignment agreement, there will be no need for any additional further consent from the author or their heirs.

In the event of an infringement of the copyrights, the assignee is entitled to file all civil and criminal actions that can be filed by the author under the Law on their own behalf. In addition to principal and derivative acquisition, the transfer of rights due to the death of the author also is set out in the Law. Due to their nature, moral rights are not automatically transferred to the heirs of the author.

However, article 19 of the Law stipulates that, should the author die, the moral rights can be used by the persons who were specifically assigned by the author when they were alive. If the author did not assign anybody during their lifetime the moral rights can be used by the following parties, i.e., the testamentary executor, the surviving spouse, children, parents, or brothers and sisters.

If these persons cannot be found, they do not use their rights, or the 70-year protection period has lapsed, the Ministry will be entitled to use the author's moral rights. On the death of the author, the copyrights transfer automatically to the legal heirs. It also is possible for the author to assign copyrights by testamentary dispositions. The author also is entitled to license third persons with regard to the use of economic and moral rights on a work.

§ 47:36 International aspects

Turkey is party to Bern Convention and the Rome Agreement for Protection of Performer artificers, Phonogram Producers, and the Broadcast Institution and the general agreements on intellectual property of the World Organization for Intellectual Property Rights (WIPO). There are no specific provisions regarding the foreign or non-resident applicants, licensors, licensees, and assignees.

§ 47:37 Attacks on ownership

This issue is not relevant under Turkish law.

§ 47:38 Prior authors

According to article 15(3) of the Law of Literary and Artistic Works, if the creator of a work is disputed or a person claims that his is the owner of the work, the original owner may request the establishment of the right from the court.

§ 47:39 Public interest intervention

This issue is not relevant under Turkish law.

§ 47:40 Infringement actions

Under the Law of Literary and Artistic Works, infringement is referred to as the violation by third parties of the copyrights and moral rights of the author. Turkish copyright law does not distinguish

between primary and secondary infringement but treats this area under a single concept of “copyright infringement.” Thus, acts of primary and secondary infringement fall within the scope of copyright infringement and such infringements will be subject to the infringement provisions and the civil, injunctive and criminal remedies set out in the Law.

Attorney fees vary, depending on the experience and seniority of the lawyer and thus it is not possible to give an exact figure. However, court fees are relatively insignificant. Court duties may be in the range of US \$300, while expert fees (if appointed) may be US \$500 to US \$1,000, depending on the qualifications of the expert. For a damages action court fees are 5.6% of the total amount of the claim.

§ 47:41 Nature of infringement

A copyright infringement will occur under the terms of the Law of Literary and Artistic Works, if the work, performance, phonogram, or production is adapted, duplicated, performed, or broadcast through instruments providing transmission of all kinds of images, sounds or signs without the permission of the author and in circumstances where such duplicated copies are circulated.

A person who has been the subject of the actual violation of their moral rights and copyrights may request from the court elimination and prevention of the violation committed.

§ 47:42 Action for damages

According to 68(1) of the Law of Literary and Artistic Works, if a work, performance, phonogram, or production is adapted, duplicated, performed, or broadcast through instruments providing transmission of all kinds of images, sounds, or signs without the permission of the owner of the rights and if the duplicated copies are circulated, the owner of the relevant work is entitled to claim a maximum of three times the amount of profit that would have been made had there been an agreement between the parties, or the fair market value of the work calculated under the Law.

An author may claim compensation from those copying or adapting the relevant work without permission up to the amount mentioned above. The culpability of the violator is not a requirement for claiming copyright compensation. According to article 70 of the Law of Literary and Artistic Works, if the violator is culpable a person whose copyrights have been violated can demand compensation from the violator in line with the provisions of tortuous liability.

In such cases, the author also can demand the income gained by the violator as a result of such illegal usage. In such situation, this amount is deducted from the sum of copyright compensation. It is a requirement of this provision that the culpability of the violator be proved in order to demand material and moral compensation.

§ 47:43 Injunctions

Under article 77 of the Law of Literary and Artistic Works, the court may, at the request of the person whose rights are infringed, order a preliminary injunction ordering the other party to do or not to do something prior to or after bringing the suit at law. The preliminary injunction request could be raised before the court either by an ex parte application, or in the main infringement action.

Article 54 of the Law regulates the issue of knowledge and establishes that, where a person acquires a copyright on a work or a license to use such copyright from a person who is not authorized to transfer the right, such acquisition will not be protected under Law, even where the transferee has acted in good faith. Thus, in the event of any copyright infringement, the good faith of the assignee or licensee is not recognized under the Law.

§ 47:44 Confiscation

If a work is used by way of unauthorized duplication and the duplicated copies have not been marketed, the owner of the work may demand the destruction of the duplicated copies and the films, shapes, and similar devices used for duplication or the delivery of the duplicated copies and the films, shapes, and similar devices used for duplication against a suitable value not to exceed the cost price or three times the amount the rights holder would be entitled to demand under a contract.

§ 47:45 Customs action

See text, above.

V. TRADE AND SERVICE MARKS**§ 47:46 Nature**

The principles, rules, and conditions relating to the protection of trade marks are encompassed in Book 1 of the Industrial Property Code.

§ 47:47 Creation of rights

Trade mark registrations can be acquired either through a direct application to the Patent and Trade Mark Office or through an international application in accordance with the provisions of the Madrid Protocol. If the Patent and Trade Mark Office is the filing office for Madrid Protocol applications, the applicant must make a protocol application and indicate the protocol countries for which he wishes to obtain registration.

Applicants filing through a Madrid Protocol country also may do the same for Turkey if they wish to obtain registration in Turkey. Once

an application is received by the Patent and Trade Mark Office, directly or through Madrid Protocol, the process of examination is the same.

After the trade mark application is filed with the Patent and Trade Mark Office, it is examined on absolute grounds within one to four months of the application date. If the application is found to be eligible for registration in terms of absolute grounds, it is published in the Official Trade Mark Bulletin, pending opposition, for two months. If there is no opposition lodged within this period, the application is granted registration and the registration fee must then be paid by the applicant. The registration certificate is received within two to three months after the payment of the registration fee.

The “co-existence principle” has been introduced into the Trade Mark Law with the Industrial Property Code. Accordingly, letters of consent will be accepted in overcoming senior identical or indistinguishably similar trade marks being an absolute ground of refusal by the Patent and Trade Mark Office *ex officio*. Natural or legal persons who are nationals of a state party to the Paris Convention or those who are domiciled or have an active business in such states will enjoy a right of priority of six months for the purpose of filing an application for obtaining a registration certificate in Turkey in respect of the same trade mark from the date of filing a valid application for registration of a trade mark at the authorized bodies of such states. Priority rights not exercised within this period are considered to be void.

If priority is claimed in the application, the Patent and Trade Mark Office examines the application to determine whether the applicant has right to claim the priority. When a priority is claimed in terms stated above, all applications filed and registration certificates obtained by third parties are required to be declared invalid as from the date recognized as giving rise to a right of priority right for the trade marks falling within the scope of protection.

If a natural or a legal person who is a national of a state party to the Paris Convention files a valid application in a state that is not party to the Paris Convention, he will enjoy a right of priority in respect of the filing. Under article 4 of the Industrial Property Code a trade mark is a sign that is capable of distinguishing the goods and services of one undertaking from the goods and services of other undertakings. A trade mark may consist of all kinds of signs such as words (including personal names), designs, letters, numerals, sounds, and shape of the goods or their packaging, capable of being shown in the Registry, ensuring that the subject of the protection provided to the trade mark owner is clearly and explicitly understandable.

According to the definition of the trade mark given in article 4 of the Industrial Property Code, a trade mark should have two main characteristics. It must be capable of being represented on the register in a manner which enables the competent authorities and the pub-

lic to determine the clear and precise subject matter of the protection afforded to its proprietor, and it must be distinctive. Article 5 of the Industrial Property Code, pertaining to the absolute grounds for refusal, sets out a number of grounds where a sign cannot be registered as a trade mark. These are:

1. Signs that do not conform with the provisions of article 4;
2. Signs that are not distinctive;
3. Signs that consist exclusively of signs or indications which serve in trade to indicate the kind, characteristics, quality, intended purpose, value, geographical origin, or designate the time of production of the goods or of rendering of the service or other characteristics of goods or services;
4. Signs that identical or confusingly similar to a trade mark registered earlier or with an earlier filing date of registration in respect of an identical or same type of product or service;
5. Signs that consist exclusively of signs and names used to distinguish specific groups of craftsmen, professionals or tradesmen or have become customary in the current and established practices of the trade;
6. Signs containing the shape of the product that results from the nature of the good, which is necessary to obtain a technical result or which gives substantial value to the goods;
7. Signs that are of such a nature as to deceive the public, in relation to areas such as the nature, quality, place of production, or geographical origin of the goods and services;
8. Signs that have not been authorized by competent authorities and are to be refused pursuant to article 6 *bis* of the Paris Convention;
9. Signs containing badges, emblems or escutcheons other than those covered by article 6bis of the Paris Convention which have not been authorized by the competent authorities and are of particular historical and cultural public interest;
10. Signs that contain religious symbols;
11. Signs that are contrary to public policy and to accepted principles of morality; and
12. Signs that containing registered geographical indications.

Furthermore, article 6 of the Industrial Property Code pertaining to the relative grounds for refusal, sets out a number of grounds where a sign cannot be registered as a trade mark. If, because of its identical nature to or similarity to a trade mark that has an earlier application date or a registered trade mark and due to this identical nature or similarity of the goods and services covered by the trade marks, there is a likelihood of confusion on the part of the public and the likelihood of confusion includes the likelihood of association with the registered trade mark or with the trade mark that has an earlier application date.

Upon opposition by the proprietor of a trade mark, a trade mark may not be registered where an agent or representative of the proprietor of the trade mark has applied for registration under his own name without the consent of the proprietor or without a valid justification. Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade, the trade mark applied for may not be registered provided that:

1. The rights to the sign were acquired prior to the date of application for registration of the trade mark or the date of priority claimed for the application for registration; and
2. The sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.

Upon opposition, a trade mark application which is identical or similar to a well-known trade mark as per article 6bis of Paris Convention may not be registered for the identical and similar goods. This provision had been cancelled by the Constitutional Court before it was reintroduced by the new Industrial Property Code.

A trade mark that is identical or similar to a registered trade mark or to a trade mark with an earlier date of application may be used for different goods and services. However, if a registered trade mark or trade mark that has an earlier date of application for registration where the trade mark has a reputation and where the use of the trade mark applied for without due cause would take unfair advantage of or be detrimental to the distinctive character or the reputation of the registered trade mark or of the trade mark with an earlier application date, upon the opposition of the proprietor of the earlier trade mark, the trade mark applied for may not be registered, even for use for goods and services that are not covered by the earlier trade mark.

Upon opposition by the holder of the relevant right, the trade mark applied for may not be registered if it contains the name, tradename, photograph, copyright, or any industrial property rights of the third parties. Upon opposition, the trade mark that is identical or similar to a collective or a guarantee mark may not be registered within three years from the date of expiry of the collective or the guarantee mark.

If the trade mark that is identical or similar and that is to be registered for identical or similar goods and services under the scope of a trade mark that has not been renewed, upon opposition, the application may not be registered within two years of the expiry date of the trade mark that has not yet been renewed. The Industrial Property Code also set forth bad faith as a ground for opposition. Upon opposition, a trade mark application made with bad faith may not be registered.

§ 47:48 Beneficiaries of rights

The protection of trade marks is available to both natural and legal

persons who are domiciled or who have industrial or commercial establishments within Turkey and or to persons who have application rights resulting from the terms of the Paris or Bern Conventions or the Agreement Establishing World Trade Organization. Natural or legal persons other than those referred to above, but who are nationals of states that accord legal and de facto protection to the nationals of Turkey will enjoy trade mark protection in Turkey according to the reciprocity principle.

§ 47:49 Maintenance

Protection for a trade mark under the Industrial Property Code is obtained through registration. The term of protection for the Trade mark is for a period of 10 years from the date of filing of the application. Registration may be renewed for further periods of 10 years.

Registration of the registered trade mark may be renewed, upon payment of the renewal fee at the request of the rights holder or of the person authorized by him. The renewal fees are determined by the Patent and Trade Mark Office.¹ Application to renew a trade mark registration should be made within the six-month period prior to expiry of the 10-year registration period.

There is a grace period of six months following the lapse of the 10-year registration period during which renewal applications can be filed subject to an additional fee. For the maintenance of the trade mark, there is no use requirement. But, according to article 26 of the Industrial Property Code, it is possible to request the revocation of the trade marks which are not for more than five years.

§ 47:50 Transfer

A registered trade mark may be transferred in part or for all of the goods or services for which it is registered. A transfer of the whole of an undertaking with its assets and liabilities, unless provided otherwise, will include the rights over the trade marks of the undertaking.

Except when it is a result of a court decision, the assignment of a registered trade mark must be made in writing and signed by the parties to the contract. Where the nature of the transfer is intended to mislead the public concerning the nature, quality, geographical origin of the goods and services in respect to which it is registered, the Patent and Trade Mark Office may not register the transfer unless the successors agree to limit registration of the trade mark to goods or services of which are not likely to have misleading effect.

[Section 47:49]

¹See <http://www.turkpatent.gov.tr>.

Upon the request of one of the parties, a transfer will be entered in the register and published. As long as the transfer has not been entered in the register, the parties cannot invoke the rights arising from the registration of the trade mark against the third parties acting in good faith. The proprietor of the trade mark the right to demand the assignment of a trade mark that is registered in the name of an agent or representative of the proprietor without the consent of the proprietor of the trade mark. This type of transfer is only possible if the agent or representative cannot justify their actions.

Rights over a registered trade mark may be licensed for part or all of the goods and services for which it is registered. A license may be exclusive or non-exclusive. Unless otherwise provided in the contract, the license will be understood to be non-exclusive. The licensor may use the trade mark himself, and he may grant licenses to third parties on the same trade mark.

In the case of an exclusive license, the licensor may not grant licenses to other parties and cannot make use of the trade mark unless such use is specifically provided for by the contract. Unless it is specifically provided for by the contract, the licensee cannot transfer the rights arising from the license or cannot grant a sublicense. Additionally, the licensee will have exclusive rights with respect to the use of the trade mark during the period of protection.

The proprietor of the trade mark must undertake the necessary measures to ensure the quality of the products produced or services rendered by the licensee. Where the provisions of the licensing contract have been breached by the licensee, rights arising from a registered trade mark may be claimed against the licensee by instituting proceedings. Registration of the license is not obligatory. However, a license cannot have effect against third parties act in good faith until it is registered. Legal procedures related with the transfer and licensing also will have effect with regard for a trade mark application.

§ 47:51 Cancellation

A trade mark will be cancelled upon the expiration of the protection period and non-renewal within the prescribed period, a court decision for the cancellation or revocation of the trade mark and the request for cancellation by the proprietor of the trade mark. A trade mark may be cancelled in respect of some or all of the goods and services for which it is registered.

The cancellation request of the proprietor will be declared in writing to the Turkish patent and Trade Mark Office. The cancellation will take effect as of the date of entry in the Trade Mark Register. The proprietor of a trade mark cannot apply for cancellation without receiving the consent of the licensees or holders of rights recorded in the Trade Mark Register. Where there is a claim by a third party for the rights, cancellation of the rights cannot be requested without the consent of the referred third party.

§ 47:52 International aspects

As noted above, trade mark registrations can be acquired through a direct application to the Patent and Trade Mark Office or through an international application in accordance with the provisions of Madrid Protocol.

Natural or legal persons who are nationals of any state party to the Paris Convention or if not nationals who are domiciled or have an active business in such states will enjoy a right of priority of six months from the date of filing a valid application for registration of a trade mark. Foreign natural or legal persons can only be represented by trade mark agents who are authorized to act before the Patent and Trade Mark Office.

§ 47:53 Attacks on ownership

A trade mark will be declared invalid by the court where:

1. It is in breach of article 5 of the Industrial Property Code (absolute grounds for refusal, see text above);
2. It is in breach of article 6 of the Industrial Property Code (relative grounds for refusal, see text above);

If the owner of the mark has remained silent for five consecutive years in such a state that he knows or should have known that a later mark is being used, then the later dated trade mark may not request invalidity unless the later mark was registered in bad faith.

A request to prove genuine use may also be used as a defense against the invalidity action. Furthermore, a trade mark will be revoked, if:

1. Within a period of five years following the publication of registration, trade mark has not been put to use without a justifiable reason on the registered goods/services or if the use has been suspended during an uninterrupted period of five years;
2. It has become generic in respect of the goods or services through the acts of the proprietor of the trade mark;
3. As result of the use made by the proprietor or by the person authorized by them, there is a likelihood of confusion on the part of the public as to the nature, quality, place of production, and geographical origin in respect of the goods or services it is registered; or
4. The proprietor of a mark disregards a use of a collective or a guarantee mark that constitutes a violation of the technical regulation and neglects to remedy the infraction within the time determined by the court in respect of an action brought by one of the parties.

The period of three months before the cancellation request based on the use obligation is filed, may not be taken into account while

examining the use. The cancellation actions due to non-use will be dealt by Patent and Trade Mark Office. However, the enforcement date of this provision has been postponed for seven years with an additional provision. Therefore, until 2023, the revocation actions due to non-use need to be filed before the intellectual property Courts.

§ 47:54 **Prior users**

A person who has suffered a wrong may appeal for invalidity.

§ 47:55 **Public interest intervention**

The state Prosecutor or related official authorities may appeal for invalidity. However, such appeals are rarely seen in practice.

§ 47:56 **Infringement actions**

The Industrial Property Code provides a wide range of civil and criminal remedies to rights holders for the effective protection of their rights. Rights holders have the discretion to resort to all or some of the remedies made available to them. Civil and criminal rights may be simultaneously applied against infringers. Cumulative remedies are regarded as beneficial incentives for rights holders and are effective in forcing infringers to come quicker amicable settlements.

Attorney fees vary, depending on the experience and seniority of the lawyer and thus it is not possible to give an exact figure. However, Court fees are relatively insignificant. Court duties may be in the range of US \$300, while expert fees (if appointed) may be US \$600 to US \$1,200, depending on the qualifications of the expert.

§ 47:57 **Nature of infringement**

Under article 29 of the Industrial Property Code, violations under article 7, use of the same or confusingly similar trade mark without the consent of the proprietor of the trade mark where the infringer is aware or should be aware that a mark is infringing, the sale, distribution, or putting to commercial use or importing or keeping in possession the goods carrying the infringing trade mark for these purposes, transferring to third parties, or expanding rights acquired by a licensing contract will be considered infringement of a trade mark.

Article 7 of the Industrial Property Code prohibits the use of any sign that is identical to the registered trade mark in relation to goods and services that are identical with those for which the trade mark is registered, the use of any sign where, because of its identical nature to or similarity to the registered trade mark and the identical nature or similarity of the goods and services covered by the registered trade mark and sign, there is a likelihood of confusion on the part of the public including likelihood of association between the sign and the trade mark and the use of any sign which is identical with or similar

to the registered trade mark in relation to goods or services that are not similar to those for which the trade mark is registered, where the use of that sign without due cause takes unfair advantage of or is detrimental to the distinctive character or the repute of the registered trade mark.

Accordingly, affixing the design to the goods or to the packaging thereof, offering the goods, putting them on the market or stocking them for these purposes under that sign, or offering or supplying services hereunder, entering to the customs area or being the subject of a transaction or use that approved by customs of the goods under that sign, using the sign on business, papers and in advertising, using identical or similar signs to a trade mark as a domain name, keyword, or meta tag on the Internet that would cause commercial effect may be prohibited.

The rights holder may apply for determination of the infringement, cessation and prevention the infringement acts, restoration of the results of the infringement acts and may apply for damages. The rights holder also may demand from the court civil seizure of the counterfeit products, the establishment of proprietorship over the infringing products, civil destruction of the counterfeit products and publication of the court's judgment. Furthermore, it is possible for third parties to apply to the court for a declaratory judgment for a determination that their intended activities do not infringe the registered intellectual property rights.

§ 47:58 Action for damages

See discussion at § 47:15 above.

§ 47:59 Injunctions

See discussion at § 47:16 above.

§ 47:60 Confiscation

The owner of the trade mark whose rights have been infringed may request from the court, the confiscation of the products and the equipment and machinery used to produce these products which use has infringed the trade mark right, and of which the production and use which is felony.

The owner also may appeal for the proprietorship over the confiscated products and, if this request is granted, the value of the products will be deducted from final the compensation awarded.

If the value of the products is higher than the final compensation value awarded the proprietor of the trade mark must repay the balance to the infringing party. The proprietor can appeal for enforcement measures for the prevention of continued infringement of rights, the erasing of the trade mark from the products and vehicles or, if it

is essential for the preclusion of the acts of infringement, the destruction of the products and vehicles confiscated, the disclosure of the court judgment by means of publication to the public and to those related parties, the costs of which to be met by the offending party.

VI. TRADE AND SERVICE NAMES

§ 47:61 In general

A trade name, as defined by the Commercial Code, is the name that is used on the act and the documents concerning the merchant's business. Accordingly, the aim of the trade name is to distinguish the traders from each other. Therefore, it is important to distinguish trade marks from the trade names. Based on their different aims, a trade name used by a trader may be a registered trade mark of another person and may even be used by this person for display within the same sector.

The protection of the trade names is regulated under the Commercial Code, articles 39–53. Accordingly, every merchant must register his trade name with the Commercial Register within 15 days from the opening of the business concern. The right to use a registered trade name belongs to the owner of the name.

According to article 52 of the Commercial Code, a merchant whose trade name is being used by third parties is entitled to demand the prohibition of the third-party use of the trade name or, if the offending trade name is registered, the owner may demand the change or the cancellation of the trade name from the register. In addition, a person whose trade name is used unduly may claim the damages.

VII. DESIGNS

§ 47:62 Nature

The principles, rules, and conditions for the protection of designs by granting certificates to those designs are regulated under Book 3 of the Industrial Property Code. The name of the chapter was “Industrial Designs” in former Decree Law Number 554, regulating designs.

However, the name of the chapter was changed to “designs” with the new Industrial Property Code and all designs will be protected regardless of being industrial or not. According to the Industrial Property Code, design means the entirety of the various features such as lines, color, texture, shape, material or other characteristics of the appearance of the whole or part of a product or its ornamentation.

§ 47:63 Creation of rights

According to article 56 of the Industrial Property Code, a design that is new and has a distinctive character may be protected by a registration certificate. With the new Industrial Property Code,

unregistered designs can also be protected if they become available to the public first in Turkey.

The distinctive character of the design will be determined according to the general impression that it will create on an informed consumer of the product. Designs of products that are parts of complex items will be protected, provided that the design of the part itself is new and distinctive. However, unseen parts or devices of complex items, e.g., parts of an engine, cannot be registered as designs. In order to register a part of a complex item, the part should be visible during the normal use of the complex item. Normal use means the use by the end user, excluding maintenance, servicing or repair work.

A design will be considered new if no identical design has been made available to the public in the world before the date of reference. The criterion for the distinctiveness was changed from “significant difference” to “difference” with the new Code. If a design for which protection is claimed has been made available to the public during the 12-month period preceding the date of the filing of the application or if a priority is claimed by the designer or his successor in title or by a third person having their approval in the 12-month period preceding the date of priority, such disclosure will not affect the novelty and individual character of the design.

Natural or legal persons or their legal successors in title who are nationals of a state that is party to the Paris Convention or who are domiciled or have an active business in such member state will enjoy a right of priority of six months for the purpose of filing an application for obtaining a registration certificate in Turkey in respect of the same design from the date of filing a valid application at the authorized bodies of such state.

With the new Industrial Property Code, novelty examination has been introduced for design applications, which will be made ex officio by The Patent and Trade Mark Office. After a design application is filed with the Patent and Trade Mark Office, it is examined on absolute grounds including the ground of novelty within two to six months as of the application date. If the application is found to be eligible for registration in terms of formal examination, it is published in the Official *Design* Bulletin, pending opposition, for three months. If there is no opposition lodged within this period, the application is granted with registration.

§ 47:64 Beneficiaries of rights

In principle, the designer is the person entitled to the application. Where designs are developed by employees in the execution of their duties, unless otherwise specified by the contract or understood from the nature of the work, the design right will vest with their employers.

However, if the design is developed within the framework of service contracts other than that of employment contracts, unless otherwise

specified by the contract, the design right will vest with the client. If the designs are developed by teaching staff undertaking scientific work at the faculties and schools of universities, the design right will vest with the member of the teaching staff.

§ 47:65 Maintenance

The term of protection of the registered design is five years from the date of filing of the application. The term of protection is renewable for periods of five years each, up to a total term of 25 years. Unregistered designs are protected for three years as of becoming publicly available.

§ 47:66 Extension

Registration of the registered design will be renewed upon the request of the rights holder and the payment notification of the renewal fee in due time. The request for renewal must be submitted and the renewal fee paid within six months as of the date which the protection ends.

If this deadline has passed, the request may be submitted within a further grace period of six months upon payment of an additional fee. The request for renewal must be filed along with a petition and the original receipt for the payment of renewal fee. Renewal fees are determined by the Patent and Trade Mark Office.¹

§ 47:67 Transfer

The rights deriving from a design application and from a registered design right may be transferred to third parties and can be subject to inheritance.

The inheritance or transfer of an application or a design right will be recorded in the Register and published upon payment of the fee which will be prescribed in the Implementing Regulation. The effects will enter into force vis-à-vis third parties as of the publication date. The design application or registration may be licensed to be effective within the total or part Turkey.

§ 47:68 Cancellation

The design will be cancelled upon the expiration of the protection period, a court decision ruling for the cancellation or the request for cancellation made by the proprietor of the trade mark.

§ 47:69 International aspects

Design registrations can be acquired either through a direct ap-

[Section 47:66]

¹See <http://www.turkpatent.gov.tr>.

plication to the Patent and Trade Mark Office or through an international application in accordance with the provisions of Madrid Protocol. Foreign natural or legal persons can only be represented by trade mark agents who are authorized to act before the Patent and Trade Mark Office.

§ 47:70 Attacks on ownership

A registered design will be declared invalid by the court if:

1. It is not new and does not have individual character;
2. It is contrary to the principles of public order and general morality;
3. It results from a technical function;
4. The entitlement to the design right actually belongs to another person or persons;
5. There is a conflicting design which has been made available to the public at a later date but having an earlier date of filing;
6. It was registered in bad faith; or
7. It contains unauthorized use of an intellectual property right.

A declaration of invalidity may be requested during the period of protection or within five years following the termination of the right. A final decision for the declaration of invalidity will have retroactive effect.

§ 47:71 Prior users

Any person with interest may request invalidity, however the holders of the design right can only request the invalidation claim based on the entitlement to the design right actually belonging to another person or persons.

§ 47:72 Public interest intervention

There are no specific provisions regarding the public interest.

§ 47:73 Infringement actions

The Industrial Property Code provides a wide range of civil remedies to rights holders for the effective protection of their rights. Criminal remedies are not applicable for the design infringement cases.

Attorney fees vary, depending on the experience and seniority of the lawyer and thus it is not possible to give an exact figure. However, Court fees are relatively insignificant. Court duties may be in the range of US \$300, while expert fees (if appointed) may be US \$600 to US \$1,200, depending on the qualifications of the expert.

§ 47:74 Nature of infringement

An infringement of a design right arises by the making producing,

putting on the market, offering, selling, putting to use, importing, or keeping in stock for these purposes the identical or significantly similar design without the consent of the design rights holder, transferring to third parties or expanding rights acquired by a licensing contract, participating or assisting or encouraging or facilitating in whatever form the acts referred above, abstaining from explaining where and how an illegally produced and marketed product has been obtained when found in possession, and seizing of entitlement of others.

§ 47:75 Action for damages

See discussion at § 47:15 above.

§ 47:76 Injunctions

See discussion at § 47:16 above.

§ 47:77 Confiscation

See discussion at § 47:17 above.

§ 47:78 Customs action

See discussion at § 47:18 above.

VIII. LICENSING

§ 47:79 In general

The licensing procedure is regulated within the scope of each section of the Industrial Property Code pertaining to the protection of the various intellectual property rights, including patents, trade marks, and industrial designs. However, if necessary, license agreements also can be evaluated within the scope of Code of Obligations in the context of a private debt relation.

§ 47:80 Licensing of trade marks

Under the Industrial Property Code, the rights over a trade mark may be licensed for all or some of the goods and services for which the trade mark is registered. The Industrial Property Code regulates two types of license, i.e., exclusive and non-exclusive licenses. Unless otherwise provided in the contract, a license will be understood to be non-exclusive. If a non-exclusive license is granted, the licensor can only use the trade mark himself and cannot grant licenses for the same trade mark to third parties.

In the case of an exclusive license, a licensor is not entitled to grant licenses to other parties and/or to make use of the trade mark unless it is provided specifically in the contract. Unless otherwise provided in the contract, in the situation of an infringement of trade mark rights,

the holder of an exclusive license can institute in his own name all legal proceedings which have been available to the proprietor of the trade mark.

Holders of non-exclusive licenses do not have the right to institute legal proceedings. However, in the event of infringement, the owner of a non-exclusive license may notify the licensor through a notary public, requesting the licensor to institute such proceedings as required. If the licensor refuses to initiate or fails to institute proceedings within three months of receipt of the notice, the non-exclusive license holder will have the right to initiate proceedings. The licensee may, in cases of serious damage where a delay in proceedings cannot be remedied, request the court to issue an injunction for precautionary measures. A licensee who has instituted proceedings may notify the licensor that the proceedings have been instituted.

Unless it is specifically provided in the contract, a licensee cannot transfer the rights arising from the license or cannot grant a sublicense. Where a licensing contract has been breached by the licensee, rights arising from a registered intellectual property right may be claimed against the licensee by instituting proceedings.

§ 47:81 Licensing of patents

Articles 125-137 of the Industrial Property Code regulate license agreements. Accordingly, the right to use an application for patent or a patent may be the subject of a license agreement to have effect within the entirety of the national boundaries or in a part thereof.

The explanations concerning the exclusive and non-exclusive license made above also are valid for patent licenses. Article 129 of the Industrial Property Code regulates compulsory licenses and lists six circumstances where a compulsory license may be granted. These are as follows:

1. Failure to put to use the patented invention
2. Dependency of subject matter of patent
3. Public interest
4. Export of the pharmaceutical products in case of the public health problems in other countries
5. Impossibility of creation of a plant variety without infringing a patent
6. Engagement of the patent holder in anti-competitive behavior when making use of its patent rights.

Non-use of the patented invention was present in the decree law, but was limited to circumstances where the patent holder refrained from using the patent for three consecutive years. However, article 130 of the Industrial Property Code extends the use criteria to hold that even if a patent has been used to some degree, if the use of the patent is not at a level that satisfies national market needs, a

compulsory license may be requested and granted. “Public interest” is not a pre-condition for granting a compulsory license under article 130 of the Code, as a compulsory license in case of public interest is included in article 132 of the Code as a separate situation for a compulsory license.

Furthermore, in regard to compulsory licensing on grounds of non-use, article 136 of the Code provides that if the patent holder later grants a commercial contractual license to another in more favorable conditions than those present in the compulsorily granted license, the compulsory license holder may ask for an alteration of the terms and conditions of the license.

In terms of procedure, article 129(2) provides that the patent holder has one month to file submissions on its position from the date of application of the prospective license holder to the court. Following this, article 129(3) provides that the court will render a decision on whether to grant the license within one month immediately following the filing of submissions. Furthermore, article 129(2) provides that where compulsory licensing is applied for due to a “distortion of competition,” it will not be the intellectual and industrial property courts which decide on whether to grant leave for licensing, but rather the Turkish Competition Authority.

§ 47:82 Licensing of industrial designs

An application right or the design right may be licensed to be effective within the whole or part of Turkey. Unless otherwise specified in the contract, the license must be understood to be non-exclusive. Accordingly, the licensor may make use of his design rights personally and may grant licenses to third parties on the same design right.

However, if an exclusive license is granted, the licensor cannot grant licenses to other parties and cannot make use of the design right unless it is provided specifically by the contract. Additionally, in the case of an infringement of the design rights, unless provided otherwise by the contract, the holder of an exclusive license may institute all legal proceedings that have been made available to the proprietor of the design right by the Industrial Property Code in his own name.

The owner of a non-exclusive license does not have the right to institute legal proceedings in their own name in the case of infringement of the design rights. However, in case of an infringement, the holder of a non-exclusive license should notify the proprietor of the design rights holder through a notary public and request the proprietor of the design rights holder to institute such proceedings as required. If the proprietor of the design refuses to initiate or fails to institute proceedings within three months of receipt of the notice, the non-exclusive license holder can institute proceedings. In this respect, he may notify the proprietor of the design right that the proceedings have been instituted.

§ 47:83 Licensing of literary and artistic works

An author is entitled to license third persons with regard to the use of economic and moral rights of a work. In such cases, the author retains the copyrights and only the usage rights of such copyrights are passed to the licensee. This is where licensing differs from the full transfer of rights. While the full transfer operates as a complete transfer of rights, licensing only grants the use of such specified rights to third parties. The right itself is not transferred and the third party only has the right to use and benefit from the right within the scope designated by the author or licensor.

Agreements concerning the grant of a license must be in writing and the scope of the rights subject to the license must be stated individually. Licenses can be granted exclusively or non-exclusively, and they are deemed to be non-exclusive, unless the Law or the relevant license agreement indicates otherwise.

The scope of licensed rights can be restricted in terms of time, place, number, and content. Licenses also may be royalty free or granted in return for a royalty. Given that the four types of copyrights are independent of each other, they can be assigned or licensed to third parties. Under article 56 of Law Number 5846, licenses can be a simple license or a full license. A simple license is one by which the author is entitled to grant other simple licenses to third parties. A full license is one by which the author cannot give other licenses to third parties after having granted the initial license.

If the licensee wishes to grant further licenses to third parties, the written consent of the licensor will be required. As noted above for assignment, if the author explicitly grants permission for further licenses in the license agreement then there will be no need for any additional permission. Under the Law, in the event of an infringement of the copyrights, a full license owner will be entitled to file civil or criminal actions on his own behalf in the same way as the author.

§ 47:84 Restriction on licensing**Regional Restriction**

A license is usually granted concerning a specific region or regions. In this respect the licensor undertakes not to make claims based on their exclusive rights arising from their intellectual property rights against the licensee within the borders of the restricted region.

If, in the scope of the license agreement, no regional restriction is stated, the licensee has the right to use the license rights within the national borders of the country where the agreement is signed. If the license is restricted through a regional determination, the licensor must produce the licensed products within the borders of this region and sell the products within the borders of the determined region.

Restriction on Field of Use

The subject matter of a license agreement may relate to many dif-

ferent markets. In this respect, a licensor has the right to determine a specific field of use and separate the sectors the products will be used in. Accordingly, the owner of a pharmaceutical patent can grant a license to a pharmaceutical company and at the same time also grant a license to a company producing veterinary pharmaceuticals.

With this type of license, it is provided that the licensees use the license only in the specified field. In this respect, the licensor can grant many other license rights to other licensees in other fields. Restricting the field of use provide the licensor the easy protection of the collecting the royalty.

§ 47:85 Royalties

There are no restrictions regarding the royalties arising from a license. However, royalties are among the most important elements of a license agreement. Payment of royalties may be in the form of a one-off payment or determined according to sales.

According to the one-off payment system, the parties of the license agreement determine a specific price at the beginning of the agreement. However, this system will not benefit the licensor when the subject matter of the license achieves great success in the future. Therefore, in practice, royalties are determined according to the amount of the products sold under the license. The licensor obtains a specific percentage from the total amount of the net selling price of the licensee.

§ 47:86 Approval by government

A license agreement falls under the scope of private law and is classified as a type of a private law agreement. Consequently, the conditions of the license agreement can be determined by the parties and, in this respect, there is no need for the license agreement to be approved by the government. However, in some cases, such as “compulsory license,” the Court or Competition Authority may decide on compulsory license.