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Overview of IPR Policy, Legislation and Enforcement

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Policy

Turkey is fully aware of the fact that an effective IPR system is the fundamental of a productive welfare society and a vital factor in enhancing Turkey's competitive powers in the international trade. With this objective awareness and effective protection of IP rights has become one of the substantial policies of Turkey.

IPR Legislations

Finalised in June 1995 with the coming into force of the various decree laws regulating IP rights Turkey aligned its domestic laws with the standards of international treaties.

Turkey's IP reform in 1995 and the constitution giving the international treaties the force of law prevailing to domestic law thus acceding to TRIPS brought Turkey's legislation to the international standards set by TRIPs. Meeting IP infringements with serious criminal sanctions in addition to civil sanctions afforded much stronger IP protection than those jurisdictions affording only civil remedies. Establishing specialised IP courts in addition to formation of the Turkish Patent Institute improved the IP rights enforcement considerably.

However speed in making rules and, at times, lack of wisdom in enacting the IP laws and regulations resulted in serious set-backs and retreats in IP enforcement.

Turkey's accession to EPC while the domestic patent law had a different regime has resulted in double standards in patents area and discrepancies between EPC and Turkish patent law caused to invalidation actions which could have been avoided if Turkish patent law was swiftly amended according to EPC.

Regulating the substantial areas of laws with temporary decree laws of the government and not replacing them with acts enacted by the parliament caused to several other setbacks.

Constitutional Court's invalidated important provisions of the decree laws and resulted in the release of seized infringing goods. Scope of infringements have been narrowed. Applicability of unfair competition provisions became uncertain. Conflicting decisions have been made as to whether the TRIPs is directly applicable or not.

Enforcement

It is fair to say that the Turkish Copyrights Law 5846 is the most advance among IPR laws of Turkey as it was enacted by parliament and amended several times in accordance with the industries comments.

Standards for registration and protection of trademarks, industrial designs, geographical indications, patents and utility models are level with international standards, while there may benefit from further improvements in a few areas.

While it is encouraging for the Turkish system to encourage registrations as an effective means for protection and prevention of infringements of IPR rights, the established but inaccurate precedent of the Turkish court of appeals that is basically holding that “use of an illegitimately registered right cannot be considered illegitimate” needs to be articulated and

corrected because it also incentivises infringers to obtain illegitimate registrations in order to obtain temporary shelter for their illegitimate activities. In those cases legitimate right holders are prevented from full legal recourse against their infringers unless they undertake lengthy and costly nullity actions.

Establishing specialised intellectual property courts, dedicated enforcement units within the police force and eagerness in implementation of IPR provisions are concrete developments in the enforcement of IPR in Turkey. While the shortages and systematic problems that the Turkish Judiciary faces also effect the enforcement activities in the IPR courts, IPR courts are in considerably better position compared with the rest of the Turkish judiciary. The most important difference is the expertise that the IPR Courts accumulate as they are specialising only in IP matters. However, such expertise is not available in all parts of Turkey and in patent related areas as the IPR judges are only jurists and they are obliged to refer to experts in technical issues.

Centralisation of the border enforcement applications to customs is a major improvement, however, the effects of this improvement has yet to demonstrate its effectiveness in customs seizures.

Lack of full disclosure and civil seizure orders (search and seizure orders in the UK and Saisie Contrefaçon in France) in infringement cases and the difficulties in obtaining preliminary injunctions forces Turkish enforcers to resort to criminal remedies for searches and seizures of infringing materials duplicating the legal avenues resorted and thus the related costs, also the burden of work for courts. It also considerably hinders obtaining meaningful and substantial damages from infringers. In one case a Turkish infringer has been able to defeat the Court in not disclosing information and evidence related for the calculation of damages. Although the Trademark Decree law Art. 65 requires him to disclose all relevant information for the calculation of damages the fact that non-compliance with this provision is not met with any serious consequences.

The Turkish Court of Cassation, more often in IP cases than other types of cases of appeal, came up sound and substantial precedents that guided the IPR enforcers. However there are a large number of appeals that do not receive the same level of attention and there are enough number of cases to complain that substantial appeal arguments are not dealt with and appeal court refuses appeals without justifying reasons. In one case on a simple issue

that the first instance court erred, i.e. by not applying the basic principles of onus of proof and the well-known concept of reversal of burden of proof in IP matters was not detected by the Court of Cassation and the erroneous decision of the first instance IP court was upheld.

It would be fair to say that the Turkish IPR enforcement works very well in simple and straight forward infringement and enforcement issues, however, when it comes to large and complicated, highly technical issues both the trial and the appeal are likely to be defective and unpredictable.

An Example From the Pharmaceutical Industry

IPR environment is not as much encouraging as it was in 1995 for the creativity and innovation. In some areas improper wording of provisions have led sector participants into disputes while the intention was to avoid them. In some areas inadequate regulation created imbalance against innovators.

Relating to pharma industry in two particular areas Turkish interpretation and implementation of IPR provision went wrong way: prevention of IPR infringements prior to its commencement and protection of pharmaceutical data against unfair commercial use according to Paris Convention Article 10 (bis) regarding protection against unfair competition.

Inclusion a Bolar type provision in Turkish Patent law in 2004 in Article 75(f) where licensing activities were made exempt from patent infringement was taken to the extent as if this provision repealed the TRIPs Article 50(1)(a) which provides for prevention of an infringement of any IP right from occurring. TRIPs Article 50(1)(a) is reflected in several Turkish IP laws and prevention of imminent violation is a generally recognised concept in Turkish law, however, some IP court rulings approved by the Court of Appeal deprive pharmaceutical patent owners from obtaining effective protection of their inventions before their generics are marketed.

The so called Turkish Bolar provision in Article 75(f) of the Patent Decree law has also been relied upon in denying owners of pharmaceutical data from unfair competition protection while it is not relevant to data protection at all.

Also, interpretation and implementation of Article 39 of TRIPs have been reduced to only regulatory data protection in paragraph (3) of Article 39 of TRIPs, ignoring that the essence of Article 39 of TRIPs is protection of data against unfair competition and Paragraph (3) is for regulatory data protection only. It would be fair to say that what the court judgements so far in data protection unfair competition cases come to is that data protection under Article 39 of TRIPs is subject to and limited to what the Turkish Ministry of Health allows.

Turkish Ministry of Health Licensing Regulation provides regulatory data protection for

new entities (molecules) by means of data exclusivity for a period of six years from the first licencing of the product within the Turkey – EU Customs Union Area.

While they are inaccurate and contradicts with the previous precedents some court judgements say that TRIPs is not directly applicable as a domestic law in Turkey contrary to Article 90 of the Turkish Constitution.