

Applied Art Protection in Turkish Law and Strategies*

I. INTRODUCTION

Intellectual property (IP) owners wish to monopolise on the ideas they develop on the greatest extent and continuously. The rivals fail to develop innovative products tend to imitate. The society wishes to buy these products with a competitive price as soon as possible. The state on the other hand tries to bring regulations balancing these conflicting interests. The matter where this balance begins and ends have been keeping the economists and legists busy for long years¹.

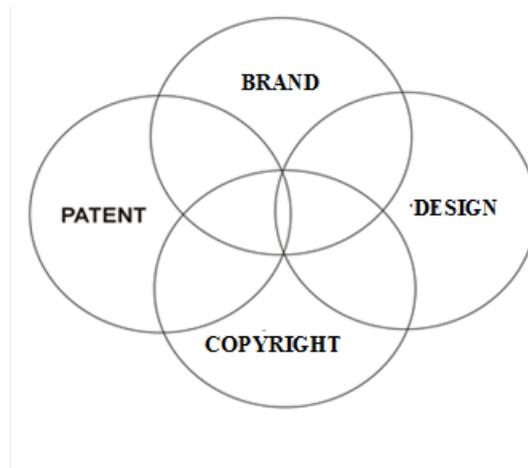
Applied arts have a different importance in this context because industrial design on one aspect and protection of applied art on the other overlaps. The first of these are the ideas developed for the industry and the second is for the art. Just for this reason, legislators adopted different protections models for these two intellectual products. The main differences of design and copyright are given in the table below:

	Industrial Design	Copyrights
Purpose	For industry - designer	For art - artist
Protection procedure	Registration is required as a rule	No registration is required
Protection period	25 years	Life + 70 years (150 years on average)
Moral rights	The only moral right: stating the name	There are more than one moral rights: for instance, changes cannot be made in the artworks
Indemnity types	Material, moral and reputation indemnity	Material, moral and 3 times the actual price
Right owner	Employer is the right owner	Owner of the work is the artist who made it, owner of the material right is the employer
Violation	Violation occurs if resembles	Independently developed work is protected separately, even if it resembles

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¹ There are various studies on this subject. For instance see: Fritz **MACHLUP** and Edith, **PENROSE**: “*The Patent Controversy in the Nineteenth Century*”, Journal of Economic History 10/1950, p. 1 vd.; Fritz **MACHLUP**: “*An Economic Review of the Patent System*” Washington, US Government Printing Office 1958 available online in <http://mises.org/etexts/patentsystem.pdf> (last visited in 05.09.2016); Edmund **KITCH**: “*The Nature and Function of the Patent System*”, Journal of Law and Economics 2/1977, p. 266 vd.; William **LANDES** and Richard **POSNER**: *The Economic Structure of Intellectual Property Law*, Cambridge, MA, Harvard University Press, 2003; Alexander **PEUKERT**: “*Intellectual Property as an End in Itself*”, 2/2011, EIPR, p. 67 vd..

Despite all these differences, these rights can overlap from time to time:



II. SITUATION IN THE TURKISH LAW

Cumulative protection principle is clearly accepted. An intellectual product can benefit from the joint protection of design, copyright, trademark and patent regulations in the conditions apply. For instance, a chandelier benefits from industrial design protection as it is new and having an individual character; copyright protection as it has bearing the characteristic of its author and aesthetic value; patent/utility model protection as it illuminate better compared to previous versions; and trademark protection as a distinctive characteristic is added to the source of the product or service.

On the other hand, it is also accepted in case law that an intellectual product also benefits from provisions of unfair competition². The situation where IP and unfair competition intersect is quite complicated. In practice, provisions of unfair competition can be applied together with IP regulations. However, the criteria on which conditions one can depend on unfair competition protection is not clear³. Despite this mess, the strategies of the lawyers who represent the right owners will establish can affect the concrete conflicts deeply. For instance, when you base your case on a registered design, you will probably face an invalidity counterclaim. If design was registered after the novelty of the design ended because of your client's lack of attention, basing your case to copyright and unfair competition protection instead of such a document will be better for the right owner.

In practice, especially for textile and fashion sectors copyright protection should be the base. Also for furniture, glassware, household goods, illumination, souvenirs, toys and many other sector, copyright protection should be kept in mind. As copyright protection is not an alternative to industrial right protection but it is applied together with it, copyright protection shall be based in almost all cases. Namely, even if the court that deals with the case rejects the copyright claim and accepts only registered design or unfair competition, there is nothing for the right owner to lose. In Turkish law, exceptional cases set aside; it is advisable that the right owner bases its case on copyright protection with logic of "what if it happens" for all cases.

² For a broader information see Cahit Suluk: "A Comparative Law Perspective of the Protection of Unregistered Industrial Products under Turkish Unfair Competition Law", IIC, 7/2012, p. 825 etc.

³ For a comprehensive assessment in this matter, see Suluk, IIC, p. 835 etc.

III. SOME EXAMPLES FROM TURKISH LAW APPLICATION

i) The Decision that Unregistered AKER Scarf Design can be Protected by Copyright and Unfair Competition

AKER, which is the leading scarf manufacturer of Turkey, publishes catalogues proving the designs belong to itself instead of making registration application for scarf designs, tens of which are designed seasonally. In the lawsuit that is brought upon the imitation of the scarf design below which was in 2011 catalogue, the court decided that unregistered scarf design is of a beautiful artistic quality and can benefit from copyright protection and decided also that the imitation company's activity constitutes unfair competition violation.⁴



AKER brand unregistered scarf design⁵

ii) The Decision that the Tea Table Design whose Registration Application is Made after its Novelty Ended can Benefit from Copyright Protection

Upon the below shown tea table design which was first designed in 2007 by Deniz Tunç, an ambiance designer from İstanbul, but the design application of which was made in 2011, was imitated, firstly a design offence claim was filed. Our office, which undertook the litigation of the case a few months after filing the lawsuit, predicted that the defendant imitator company can, as a defence, apply for an invalidity counterclaim with the justification that the design in question was not registered in time and can succeed to invalidate the design. We amended the design offence claim thinking it might be rejected and we first invalidated the registry of the design in question before Turkish Patent Institute. Later we claimed that the mentioned unregistered design shall be protected within copyrights context as artistic work and that it can benefit from unfair competition protection as it was imitated. In the case which is still being proceeded, our claims was found righteous with the expert report and that the mentioned design falls within copyright protection and the actions of the defendant falls within both copyright and unfair competition violation⁶.

⁴ İstanbul 3. IP Court, Date 28.10.2014, File No: 2011/122, Decision No: 2014/244.

⁵ Aker Catalogue No: 04796 dated February 21, 2011 5th edition Spring/Summer 2011.

⁶ İstanbul 2. IP Court File No: 2015/99.



Design named Döngü Sehpa by Deniz Tunç⁷

iii) The Decision that Turkcell Logo was made an Applied Art by Engraving

Fatoş İnhan, who is a toy designer from İstanbul, is known for her talent on *soft sculpture*. She has reinterpreted the logo involving a snail as shown below, belonging to Turkcell, the biggest GSM companies of Turkey, and made a three dimensional toy of it both with fabric and plastic materials and has brought a new vision to the company. Turkcell has laid claim to this 3 dimensional toy mascot and both registered on its name and claimed that its material rights belong to Turkcell as it was made of its logo. In the suit filed by Fatoş upon this, 3D mascots were made by Fatoş using Turkcell logo and the designer of these is Fatoş. The court also determined that these 3D mascots are deemed to be applied art. This decision of the first degree court was also accepted by Supreme Court.⁸



Logo of Turkcell Company⁹

⁷ <http://deniztunc.com/product/small-loop/> (accessed on October 5, 2017).

⁸ Supreme Court, 11. Law Circle, Date: 11.2.2016, File No: 2015/3115, Decision No: 2016/133.

⁹ Turkish Patent and Trademark Office Application Number: 2001/06686.



3 Dimensional Mascots made by Toy Designer Fatoş İnhan using both Fabric and Plastic Materials

IV. RESULT

Cumulative protection principle in IP law provides a big opportunity of movement to the right owners. The principle has a special importance in terms of applied arts because as it will also be understood from the table above, on the intersection of industry and art the scope and especially the period of the protection are quite different. In the case that an intellectual product is also protected by copyrights besides industrial rights provides a big advantage to the right owner.

Protection criteria are different in terms of each right category. The weakest link of the cumulative protection principle is these defective detections in the determination of these criteria in the application. Especially in Turkish law application, unreasonable mistakes can be made in this respect. This makes law unpredictable.

Keeping these evaluations in mind, copyright protection should be based in cases together with industrial rights, exceptions set aside. Sometimes, instead of basing on registration document of a design, basing on copyright and unfair competition protection can even be a better method. At this point, lawyers representing the right owners play a big role. The representative shall predict whether s/he should base its case on all of the protection models or on only some of them, depending on the concrete face, and proceed from there.