

APPLIED ARTS UNDER IP LAW

THE UNCERTAIN BORDER
BETWEEN BEAUTY AND USEFULNESS

PROCEEDINGS OF THE INTERNATIONAL CONGRESS
OF THE ASSOCIATION LITTÉRAIRE
ET ARTISTIQUE INTERNATIONALE (ALAI)
ROME, 15-16 SEPTEMBER 2016

LES ARTS APPLIQUÉS DANS LA LÉGISLATION SUR LA PROPRIÉTÉ INTELLECTUELLE

LA FRONTIÈRE INCERTAINE
ENTRE BEAUTÉ ET UTILITÉ

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Applied Art Protection in Turkish Law and Strategies

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Introduction

Intellectual property (IP) owners wish to monopolise the ideas they develop on the greatest extent and continuously. The rivals fail to develop innovative products and 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 has been keeping the economists and legislators busy for long years¹.

Applied arts have an outstanding importance in this context because industrial design on the one hand, and protection of applied art, on the other, overlap. 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 1.

Despite all these differences, these rights can overlap from time to time (Table 1).

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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.

Table 1.

| | 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 (100 years on average) |
| Moral rights | The only moral right: stating the name | There are more than one moral right: for instance, right to integrity |
| 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 economic right is the employer |
| Violation | Violation occurs if resembles | Independently developed work is protected separately, even if it resembles |

1. 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 if the conditions apply. For instance, a chandelier benefits from industrial design protection when it is new and has an individual character; copyright protection when it reflects the personality of its author and has aesthetic value; patent/utility model protection when it illuminates better compared to previous versions; and trademark protection when a distinctive characteristic is added to the source of the product or service.

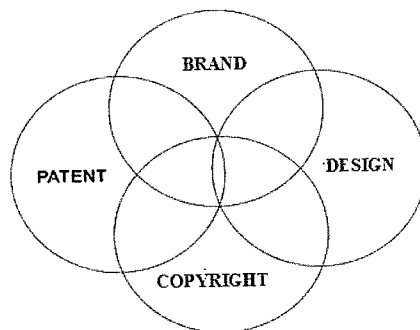


Figure 1.

On the other hand, it is also accepted in case law that an intellectual product also benefits from provisions on unfair competition². The situation where IP and unfair competition intersect is quite complicated. In practice, provisions on unfair competition can be applied together with IP regulations. However, the criteria according to which one can depend on unfair competition protection are not clear³. Despite this mess, the strategies of the lawyers who represent the right owners 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 on copyright and unfair competition protection instead than on such a document will be better for the right owner.

In practice, especially for textile and fashion sectors, copyright protection should be the basis. Also for furniture, glassware, household goods, illumination, souvenirs, toys and many other sectors, 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 justified 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. Some examples from Turkish law application

2.1. 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 (fig. 2) 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 violation⁴.

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.

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



Figure 2. AKER brand unregistered scarf design⁵.

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

The tea table design (figure 3) was first created in 2007 by Deniz Tunç, an ambiance designer from İstanbul, but the design application was made in 2011; it was imitated and a design offence claim was filed. Our Law firm, which undertook the litigation of the case a few months after filing the lawsuit, predicted that the defendant imitator company could, as a defence, apply for an invalidity counterclaim with the justification that the design in question was not registered in time and could succeed to invalidate the design. We amended the design offence claim thinking it might be rejected and we first canceled the registration of the design in question before Turkish Patent Institute. Later we claimed that the mentioned unregistered design is protected within the copyrights context as artistic work and that it can benefit from unfair competition protection in the event that it is imitated. In the case which is still being proceeded, our claims was found righteous in the expert report according to which the mentioned design falls within copyright protection and the actions of the defendant fall within both copyright violation and unfair competition⁶.



Figure 3. Design named Döngü Sehpa by Deniz Tunç.

5. Aker Catalogue n. 04796, Feb. 21, 2011; 5th edition.

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

2.3. 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, belonging to Turkcell⁷, the biggest GSM companies of Turkey, and made a three-dimensional toy with fabric and plastic materials (figure 4), bringing a new vision to the company. Turkcell has laid claim to this 3-dimensional toy mascot and both registered it on its name and claimed that its economic rights belong to Turkcell as it was made of its logo. In the suit filed by Fatoş, 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 works of applied art. This decision of the first instance court was accepted by the Supreme Court⁸.



Figure 4. 3 Dimensional Mascots made by Toy Designer Fatoş İnhan using both Fabric and Plastic Materials.

3. 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 is also clear from the table 1 at page 196, on the intersection of industry and art, the scope and especially the period of the protection are quite different. When an intellectual product is also protected by copyright, besides industrial rights, this 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 application of these criteria. Especially in Turkish law application,

7. Turkish Patent and Trademark Office Application number 2001/06686.

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

unreasonable mistakes can be made in this respect. This makes the law unpredictable.

Keeping these evaluations in mind, copyright protection should be invoked together with industrial rights, exceptions set aside. Sometimes, instead of basing on the registration of a design, invoking 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 the case on all of the protection options or on only some of them, depending on the concrete fact, and proceed from there.