

Patent litigation in Turkey: overview

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Country Q&A | **Law stated as at 01-Apr-2018** | Turkey

A Q&A guide to patent litigation in Turkey.

The Q&A gives a high level overview of patent disputes, including sources of law; court systems; substantive law; parties to litigation; enforcement options; competition and anti-trust issues; procedure in civil courts; preliminary relief; final remedies; appeal procedure; litigation costs; and reform.

To compare answers across multiple jurisdictions, visit the patent litigation [Country Q&A tool](#).

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Sources of law

1. What are the principal sources of law and regulation relating to patents and patent litigation?

Turkey is a party to the:

- WIPO Strasbourg Agreement Concerning the International Patent Classification 1971.
- WIPO Paris Convention for the Protection of Industrial Property 1883 (Paris Convention).
- Patent Cooperation Treaty 1970 (PCT).
- European Patent Convention 1973.
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS).

These agreements are directly applicable in Turkey and therefore sources of patent law.

At national level, the main sources of patent law are the:

- Industrial Property Code No. 6769 (IP Code).
- Regulation on the Implementation of the IP Code.

- Regulation on Employee's Invention, Inventions Realised in Higher Education Institutions and Inventions Realised as a Result of Publicly Funded Projects.
- Regulation on the Implementation of the European Patent Convention Regarding the Grant of European Patents in Turkey.

Court system

2. In which courts/government bodies are patents enforced?

A patent can be enforced before specialised IP courts. IP courts are found only in large cities such as Istanbul, Ankara and Izmir. If there is no IP court in a city, a patent can be enforced before the civil courts of first instance in that city.

Under Article 156 of the IP Code, there are three possible competent courts for actions filed by an IP right holder against third parties:

- The court of the domicile of the claimant.
- The court of the place where the infringing act was carried out.
- The court of the place where the act of infringement produced its effects.

However, in actions against an IP right holder by third parties, the competent court is the court of domicile of the defendant.

If the claimant is not domiciled in Turkey, the competent court is the court of the location of the business premises of the claimant's registered agent in Turkey. If the agent's entry in the agency register has been cancelled, the competent court is in Ankara, where the Turkish Patent and Trademark Office is located.

3. Do the courts/government bodies deal with infringement and invalidity simultaneously or must invalidity actions be brought in separate proceedings?

There is no automatic invalidity assessment in an infringement action. The courts only deal with invalidity if there is a submission of invalidity by the other party.

An invalidation action can be brought by the defendant in an infringement action as a counter action within the infringement action or as a separate action. In most cases, the invalidity and infringement actions are consolidated and dealt with by the same court simultaneously.

4. Who can represent parties before the court and/or government body?

Right holders can represent themselves before the courts and the Turkish Patent and Trademark Office. Apart from right holders, only attorneys at law can represent parties before courts. A patent/trade mark attorney must be registered with the Patent and Trademark Office to represent a party before it.

5. What is the language of the proceedings? Is there a choice of language?

The language of the proceedings before the Turkish courts and the Patent and Trademark Office is Turkish and there is no choice of language.

6. To what extent are courts willing to consider, or are bound by, the opinions of other national or foreign courts, or other national or international bodies, that have handed down decisions in similar cases?

The Turkish courts are not bound by the decisions or opinions of the other national courts. However, they are free to consider and/or take as example these decisions/opinions. This is also true for the decisions of foreign courts.

European Patent Office (EPO) decisions/opinions have a strong influence on the Turkish courts. In addition, the decisions of the EPO on European patents are valid and binding for a Turkish validation of that European patent under the European Patent Convention 1973.

Substantive law

7. How is patent infringement assessed?

Article 141 of the IP Code defines infringement of the rights conferred by a patent as the imitation of the invention product/process by producing the same product/process in whole or in part without the consent of the patent holder. If every element of a claim can be found, then the product/process is infringing the claim.

Under the IP Code, in determining the scope of protection conferred by a patent, if, at the date of the infringement allegation, an equivalent element performs substantially the same function and performs that function in a substantially similar manner and gives the same result as the element as expressed in the claim(s), that element should generally be deemed to be equivalent to the element as expressed in the claim(s).

The IP court judges in Turkey do not have a technical background. Therefore, it is routine in patent-related actions to refer the case to a court-appointed expert panel to have the infringement assessed. The judge heavily relies on the assessment of the expert panel.

8. What defences are available to an alleged infringer?

The most common tactical defence against infringement claims is filing an invalidity action against the patent.

File history estoppel arguments can also be raised under Article 89/6 of the IP Code. A file history estoppel argument is one where declarations by the patent applicant or patent owner are considered in setting out the scope of protection where the patent has been transferred.

A defence relating to prior user rights can be raised under Article 87 of the IP Code. Patent applicants or owners do not have the right to prevent persons who began to use the invention in good faith or have adopted significant and real measures for its use before the application date from continuing or beginning to use the invention.

The "Bolar" exemption under Article 85/3(c) of the IP Code is the most frequently alleged defence in infringement claims for pharmaceutical patents. Article 85/3(c) of the IP Code states that experimental activities, including experiments involving an invention subject to a patent, licensing of pharmaceuticals and all necessary tests and experiments are outside the scope of the rights conferred by a patent.

The exhaustion of the patent rights on a product is another defence. According to the new international exhaustion system, which was recently introduced into Turkish Law by Article 152 of the IP Code, the release of a product bearing an IP right anywhere in the world is sufficient for the exhaustion of the IP right in Turkey.

The farmer's privilege defence is a newly introduced defence under Article 85 of the IP Code. Small farmers can use production material obtained from a product resulting from production performed on land they have themselves cultivated with a patented product sold by the patent owner or used with its permission, or obtained through other commercial means. Farmers can also use for agricultural purposes patented breeding or other animal reproduction materials sold by the patent owner or used with its permission, or obtained through other commercial means.

Procedural defences under the Code of Civil Procedure can also be raised.

9. On what grounds can a patent be invalidated?

Under Article 138 of the IP Code, a patent is declared invalid by the court where the:

- Invention does not meet the patentability requirements.
- 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.
- Patent exceeds the scope of the application or is based on a divisional application and exceeds its scope.
- Holder of a patent does not have the right to a patent.
- Patent exceeds the scope of its protection.

10. Can a court only partially invalidate a patent or transform it into a utility model?

Under Article 138/4 of the IP Code, a court can partially invalidate a patent for some claims. However, a single claim cannot be partially invalidated. Under Article 138/4, for partial invalidation of a patent, the remaining claims of the patent must fulfil the patentability requirements, which are:

- Novelty.
- Inventive step.
- Applicability to industry.

It is possible to transform a patent application into a utility model application. However, that action must be through an application before the Patent and Trademark Office. Therefore, a court cannot decide to convert a patent application into a utility model application on its own authority and the conversion is only possible at the application stage.

11. Is it possible to amend patent claims during proceedings?

A patent owner cannot amend patent claims during infringement or invalidation proceedings. However, under Article 99/4 of the IP Code, a patent holder can make amendments to a patent where there are objections by third parties after the publication of the patent grant decision in the *Official Bulletin*.

Similarly, under Article 103/1 of the IP Code, a patent holder can amend its patent application during the registration proceedings before the Patent and Trademark Office. To be valid, the amendment must not exceed the scope of the initial application.

Any material mistakes in the patent can be corrected at any time by applying to the Patent and Trademark Office under Article 103/3.

In addition, Article 138(3) of the European Patent Convention 1973 (EPC) can be applied by the Turkish courts, as Turkey is a party to the EPC and the EPC has become a national law of Turkey. However, some IP courts have refused to apply Article 138(3), whereas some of them have accepted and allowed the European patent owner to amend claims during revocation proceedings.

12. Are there any grounds on which an otherwise valid patent can be deemed unenforceable?

The main rule is that a patent is valid and enforceable during a protection term of 20 years from application and until a final revocation decision on the patent.

There are no fixed legal situations in which a patent becomes unenforceable. However, it is possible for an IP court to grant a precautionary injunction decision, ruling that the patent cannot be enforced against a particular person.

Parties to litigation

13. Who can sue for patent infringement?

Patent holder

A person recorded at the Patent and Trademark Office registry as the owner of a patent can initiate a patent infringement action (*Article 149, IP Code*).

If the patent is co-owned by multiple bodies/persons, each co-owner can independently bring actions to protect the patent application or patent.

Exclusive licensee

Under Article 158 of the IP Code, unless the licence agreement includes a provision to the contrary, an exclusive licensee can file the same actions against third parties that the patent owner can file, in its own name.

Non-exclusive licensee

Under Article 158 of the IP Code, a non-exclusive licensee with the right to bring actions for patent infringement that is not explicitly limited in the licence agreement can request the patent owner to file an action against a patent infringement. If the patent owner does not file the requested action within three months or declines the request, the non-exclusive licensee can file the action.

Distributor

Distributors cannot file patent infringement actions under the IP Code if they are not licensees of the patent holder.

Other

No other parties are entitled to file patent infringement actions.

14. Under what conditions, if any, can an alleged infringer bring proceedings to obtain a declaratory judgment on non-infringement?

There is no list of specific conditions for bringing a declaration of non-infringement action. Any interested party can file such an action and demand the court determine that its acts or goods or services are not infringing the patent rights of a patent holder. It is necessary to show that the claimant has the required legal interest for filing an action

for a non-infringement declaration. However, a simple statement of the claimant that it plans to bring an action or has a good or service that may be related to the patent is deemed sufficient by the IP courts to establish a legal interest for filing the action.

15. Who can be sued for patent infringement?

Under Article 141 of the IP Code, a patent infringement action can be filed against the direct or indirect infringers of a patent. The direct infringer of a patent is the person who:

- Produces the patented product wholly or partially.
- Knows or should have known that the product is a complete or partial imitation of a patented product and sells, distributes, carries or trades in the infringing product.
- Without permission or assignment of rights grants a licence to a third party, or usurps patent rights.
- Uses a patented method or commercialises a product that is directly produced as a result of the patented method.
- Seizes the patent rights.

A third party can be liable for infringement as a secondary (indirect) infringer if it hands over to unauthorised persons elements and means related to an essential part of the invention and subject matter of the patent, and renders possible the implementation of the patented invention (*Article 86, IP Code*). For this provision to be applicable, the third party must know that such elements and means are sufficient for putting the invention to use, and will be used for that purpose, or this must be sufficiently evident.

16. Is it possible to add or remove parties during litigation?

Under Article 124 of the Code of Civil Procedure, the parties to litigation can be changed with the explicit consent of the counterparty. However, if there is a clear material mistake, the change can be made without consent of the counterparty.

However, under Article 125 of the Code of Civil Procedure, if the subject matter of the action (that is, the patent right) is assigned to another party during an ongoing action, the claimant can choose to continue with the action against the new right holder or can continue its action as a compensation action against the previous right holder.

A third party can intervene in the action once notified under Articles 61 *et seq* of the Code of Civil Procedure. A third party can also intervene in the action without being notified of the action before the examination stage of the litigation is completed, under Articles 66 *et seq* of the IP Code. In this scenario, the third party is not a party to the action but a secondary intervener, who has limited rights and whose main duty is to help the relevant party to the action to prove its arguments.

Enforcement options

17. What options are open to a patent holder when seeking to enforce its rights in your jurisdiction?

Civil proceedings

A patent holder can file a patent infringement action against alleged infringers before the competent IP courts, where it can request determination and termination of the infringing acts.

Under Article 159 of the IP Code, persons who have commenced, or will commence, legal proceedings under the IP Code, can request a preliminary injunction to ensure the effectiveness of the infringement action, on condition that they bring evidence as to the existence of actual use of the patent in Turkey or serious and effective preparations to use the patent in question. See *Questions 31 to 34*.

Criminal proceedings

There is no criminal enforcement of patent rights under Turkish Law.

Border measures

Turkey has a customs IP rights protection system that is in line with EU regulations and the international agreements to which Turkey is a party.

Under Article 159/2 of the IP Code, a patent owner or the other party entitled to file actions can apply to the competent IP courts and request the customs authorities to withhold the infringing products during exportation and importation as an interim measure.

Other

There are no further options.

18. Is it compulsory to send a cease and desist letter to an alleged infringer before commencing patent proceedings?

It is not compulsory to send a cease and desist letter to an alleged infringer before commencing patent proceedings.

19. To what extent are courts willing to grant cross-border or extra-territorial injunctions (preliminary or permanent)?

The Turkish courts do not have jurisdiction over other countries. Therefore cross-border or extra-territorial injunctions are not available.

20. To what extent do courts recognise the blocking effect of "torpedo" actions abroad?

The invalidation of a patent has a retroactive effect. Once invalidated, a patent is deemed to have never existed. Therefore, ongoing national invalidity proceedings will have an impact on a preliminary injunction request or infringement action. The IP courts tend to either consolidate these actions or delay the enforcement proceedings until the outcome of invalidity proceedings.

Similarly, for European patents validated in Turkey, ongoing European Patent Office (EPO) opposition or appeal proceedings (and negative decisions about the validity of the patent in such proceedings) have a significant impact on national enforcement proceedings, as the outcome of EPO proceedings are binding on the national validation of the patent in Turkey.

However, invalidity proceedings running in different countries do not affect national enforcement proceedings.

21. To what extent are arbitration, and alternative dispute resolution (ADR) methods (such as mediation), available to resolve patent disputes?

Arbitration

The suitability of arbitration or ADR for patent disputes is a controversial topic in Turkish Law. In principle, it is accepted that patent disputes, other than those relating to the invalidity of the patent, can be resolved by arbitration, as the patent holder can exercise all rights arising from its patents, and selection of the dispute resolution route is one of them. However, some scholars argue that patent-related disputes should be handled by IP courts, which have special expertise.

It is widely accepted by scholars that patent invalidity disputes cannot be solved by arbitration or ADR, as the decisions rendered as a result of these routes are only binding for the parties, whereas the invalidation of a patent affects the rights and legal status of third parties and imposes duties on the Patent and Trademark Office to record the patent as invalid. It is also argued that registration of a patent is established by the state and these rights cannot be abolished by an arbitration decision to which the state is not a party.

ADR

See above, [Arbitration](#).

Competition and anti-trust

22. Can a patent holder bring proceedings claiming both patent infringement and unfair competition for the same set of facts?

A patent infringement act can cause unfair competition. Therefore, a patent holder can bring proceedings claiming both patent infringement and unfair competition for the same set of facts. However, the conditions for patent infringement and unfair competition are different, and the court must evaluate them separately.

23. To what extent can enforcement of a patent expose the patent holder to liability for an anti-trust violation?

In principle, enforcement of a patent does not expose the patent holder to liability for an anti-trust violation, as using a legal right cannot be deemed to be against the law. However, there can be liability in the case of an abuse of a legal right causing an anti-trust violation. In such a case, the anti-trust issues should be separately examined and evaluated. The pure use of a legal right cannot expose the patent holder to liability for an anti-trust violation.

The Turkish Competition Authority (TCA) does not have any precedent on the enforcement of patent rights and its relationship with anti-trust law. The TCA has published a pharmaceutical sector inquiry report evaluating the enforcement of patent rights from an anti-trust perspective, but there have been no clear findings or conclusion nor any precedent of the TCA in this regard.

Procedure in civil courts

24. What is the format of patent infringement proceedings?

Patent infringement proceedings are mainly written format proceedings. All arguments must be submitted to the court in written petitions.

The IP courts consist of one judge, who has no technical knowledge but has a good understanding of IP law.

The format of patent infringement proceedings is governed by the Turkish Code of Civil Procedure, which is valid for all other civil courts. The format of the proceedings does not differ from the proceedings of the other civil courts. After filing the action petition and the notification of the action petition to the defendant, the defendant can file its defence petition. Once both parties have filed two petitions in response to each other's statements, the court holds a preliminary examination hearing and determines the allegations and demands of each party, as well as the subject matter of the dispute. At this stage the court also evaluates if there is any procedural deficiency.

In patent enforcement proceedings, a court-appointed expert panel is appointed after completion of the pleadings phase, due to the judge's lack of technical knowledge. The expert examination can be repeated as many times as necessary to overcome the objections of the parties. In most cases, the IP court judge will find a conclusion after the third examination at most. Therefore, patent enforcement proceedings are highly dependent on the outcome of the court-appointed expert examination.

25. What are the rules and practice concerning evidence in patent infringement proceedings in your jurisdiction?

Documents

Contested points must be proven with evidence. In principle, any kind of evidence can be submitted to the court. However, evidence that is acquired through illegal methods will not be considered by the courts (*Article 187, Code of Civil Procedure*).

The burden of proof lies on the party that will benefit from the fact to be proven, except in certain circumstances (*Article 190, Code of Civil Procedure*).

The parties must submit the documents that they, or the opposing party, have cited as evidence, if they are in possession of the documents. If they fail or refuse to submit such documents, and they cannot give a plausible excuse for the situation, the court may accept the statements of the other party to be true as a sanction (*Articles 219 and 220, Code of Civil Procedure*).

The Turkish legal system does not recognise affidavits as concrete evidence, but these can be considered as discretionary evidence.

Witness evidence

In principle, any kind of evidence can be submitted to the court as evidence and witness evidence also serves as evidence for proving the claims of the parties.

The parties' attorneys can ask questions to the witness directly. The parties can direct their questions through the judge (*Article 152, Code of Civil Procedure*).

However, in practice, witness evidence is not frequently used in patent infringement actions

Expert evidence

The IP court judges in Turkey do not have a technical background. Therefore, almost every dispute regarding patent rights is referred to an expert panel.

Under Article 281/2 of the Code of Civil Procedure, parties to the action can file an objection against the expert report and request the court to obtain a new report from a new panel, an additional report from the same panel or invite the expert panel to a hearing to explain their opinion orally.

In practice, the experts have an important effect on the course of actions, especially in patent actions that have a highly technical nature. It is very rare for a court to render a decision that is contrary to the determinations found in the expert report.

Under Article 293 of the Code of Civil Procedure, the parties can also submit private expert reports on the technical aspects of the dispute. Although neither the court nor the court-appointed expert is bound by this report, a report taken from a reputable academic from a reputable university may have a significant impact on the court and the panel.

The Code of Civil Procedure also allows cross-examination of the court-appointed expert panel.

26. Is evidence obtained in criminal proceedings admissible in civil proceedings and vice versa?

As there is no criminal enforcement of patent rights under Turkish Law, this is not possible.

27. Is evidence obtained in civil proceedings admissible in other civil proceedings?

If a civil court has collected and/or determined evidence itself, this evidence is admissible in other civil proceedings. However, if a party filed evidence in a civil court proceeding and the evidence is taken into consideration by the civil court, that does not mean that the court has officially collected evidence. Therefore, such evidence does not have to be considered or accepted by another civil court.

28. To what extent is pre-trial disclosure permitted and what other mechanisms are available for obtaining evidence from an adverse party or third parties?

Pre-trial discovery

If there is a risk that evidence may change or be destroyed, the claimant can apply for discovery to secure the evidence under Article 400 of the Code of Civil Procedure. The determination of the evidence application can be before or during the substantive action.

Under Article 402 of the Code of Civil Procedure, the determination of evidence application must be made with a petition including the necessary information on the facts and the need for the determination.

The court then appoints an expert to examine the evidence and prepare a report. The expert examination does not examine the dispute on its merits, but assesses and determines the evidence provided. This procedure can secure any kind of evidence, including printed materials, websites and domain name details.

The court renders its decision determining the evidence in line with the expert report obtained.

Other mechanisms

Under Articles 219 and 220 of the Code of Civil Procedure, the required evidence is available to the defendant only if the claimant requests the court to order the defendant party to submit this evidence to the court. If the defendant fails to submit the requested evidence, the arguments of the claimant are deemed to have been proven.

29. What level of proof is required for establishing infringement or invalidity?

In infringement actions, the law accepts reasonable doubt of infringement, especially if the infringing act is kept confidential and/or all evidence is only from the alleged infringer. There is no level of proof requirement to file an infringement action but it is necessary to prove a legal interest in filing the action, which is an obligatory condition.

In invalidation proceedings, there is no level of proof requirement to file the action. Any party who has a legal interest can file the invalidation action.

However, both parties must prove their arguments with concrete documents and evidence. Although there is no pre-determined level of proof, as infringement and invalidity actions are main actions on the merits, the level of proof is not low and strong and concrete evidence should be submitted. The courts have full discretion to evaluate whether the evidence submitted to the file is sufficient to prove the claims of the parties (*Article 198, Code of Civil Procedure*).

30. How long do patent infringement proceedings typically last?

A judgment generally takes one and a half years before the first instance courts, about six to eight months before the district courts and about one to two years before the court of appeal.

A new appeal system entered into force on 20 July 2016 introducing a three-tier court system. As the district courts began their activities approximately one year ago, there is so far no settled implementation. However, recent experience shows that it takes three to six months for the District Court to assess the merits of the case. This period may be longer if the District Court decides for a court-appointed expert examination.

The court of appeal is the third and final judicial authority and the decisions of courts of appeal are expected within one to two years, depending on the workload of the courts.

Fast-track procedures

There is no fast-track procedure for patent infringement actions.

Timetable

All the procedural aspects relating to civil litigations are governed by the Turkish Code of Civil Procedure. The court and the parties must comply with the timelines set out in the Code.

Under the Code of Civil Procedure, once an action is filed by the claimant, the defendant must file its first response petition within two weeks of the notification of the claimant's petition. It is also possible to demand a time extension within the same two-week period. After the parties exchange two sets of petitions and submit the relevant evidence on which they base their petitions and allegations, the court reviews the file and sets a hearing date for the first hearing called the "initial examination hearing". After this point, it is not possible for the parties to agree on a binding timetable for the proceedings and expect the court to abide by it.

Delay

Under Article 165 of the Code of Civil Procedure, the court can deem another pending action as a prejudicial question and wait for the decision in that action if it deems the current action is dependent on that decision.

The most frequent route for a defendant seeking to delay proceedings is filing a counter invalidation action against the patents. As an invalidation action has retroactive effect, the local courts stay the proceedings until resolution of the invalidity dispute.

The defendant of an invalidation action can employ counter delaying tactics according to the particular characteristics of the action.

Preliminary relief

31. Is preliminary relief available, and if so what measures are available and under what conditions?

Search and preservation orders

Under Articles 288 *et seq* of the Code of Civil Procedure, the court, on request of the parties or on its own authority can decide to carry out an inspection to gather information on the dispute. The inspection can be with or without the presence of the parties and the court may appoint an expert to accompany the judge and evaluate technical matters. Parties can apply for determination of the evidence pre-trial (*see Question 28*).

Injunctions

Under Article 159 of the IP Code, persons who have commenced, or will commence, legal proceedings under the IP Code, can request a preliminary injunction to ensure the effectiveness of the infringement action, on condition that they have evidence showing the actual use of the patent in Turkey or serious and effective preparations to use the patent.

Under Article 390/2 of the Turkish Code of Civil Procedure, the court can render a decision on a preliminary injunction request if it deems that there is urgency and need for an *ex parte* evaluation. If a preliminary injunction decision is granted *ex parte*, the party against whom the injunction decision is rendered can file an opposition against the decision.

Most preliminary injunctions are granted in *inter partes* proceedings, where the court appoints a hearing date for the evaluation of the preliminary injunction request and decides to confer the file to an expert panel for preparation of a report or to decide on the request. The counterparty does not have the right to file an opposition against the decision of the court on the preliminary injunction request. However, it can appeal the decision of the court before the district court.

Preliminary injunctions can be requested and granted before or during substantive proceedings. If the injunction is filed before filing the action on the merits and is granted, the claimant must file the main action within two weeks of the request for the preliminary injunction.

As the Turkish courts do not have jurisdiction over other countries, extra-territorial preliminary injunctions are not an option.

Other

The main preliminary relief applicable for IP rights is a preliminary injunction.

32. Can a protective writ be filed at the court at which an ex parte application may be filed against that defendant?

Protective writs are not available under Turkish law.

33. What is the format/procedure of preliminary injunction proceedings?

General

The general provisions of the Turkish Code of Civil Procedure (Articles 389 to 400) apply to preliminary injunction requests regarding IP rights, in addition to the special provisions on preliminary injunctions in the IP Code.

A preliminary injunction demand must be made with a petition including information on the facts and the need for the determination. The preliminary injunction must be requested from the court that is competent to hear the main action.

Ex parte preliminary injunctions are available but are rarely granted by the courts. The courts prefer to hear the defence of the other party before dealing with a preliminary injunction demand.

As IP court judges in Turkey do not have a technical background, they usually resort to a panel of experts, where the number of experts depends on the nature and the complexity of the dispute. The courts usually decide on the preliminary injunction request in line with the expert report.

Under Article 392 of the Turkish Code of Civil Procedure, a reasonable deposit amount may be required to secure the rights of the defendant and third parties whose rights and positions may be prejudiced by the preliminary injunction.

The preliminary injunction is automatically lifted if the bond amount is not deposited within one week. The claimant must also request the implementation of the injunction within one week of the date of the granting decision.

If the preliminary injunction is demanded before filing the action on the merits, the main action must be filed within two weeks, failing which the preliminary injunction is automatically lifted.

Level of proof

Under the Code of Civil Procedure, a party requesting a preliminary injunction must at least prove its case on the merits on an approximate basis.

Evidence

Success in a preliminary injunction request depends entirely on the quality of evidence that delay might cause irreparable and significant damage. All the kinds of evidence that can be submitted in an action on the merits (*see Question 25*) can also be filed in a preliminary injunction request.

However, the courts widely refer to court-appointed expert panels for technical evaluations, as they do not have a technical background. Private expert reports can also be submitted by the parties to explain the technical aspects of the matter to the court and the panel, if it is deemed necessary.

Patent validity

The most common defence submitted by counterparties faced with preliminary injunction demands is the invalidity of the patent. If there is ambiguity as to the validity of the patent as a result of an ongoing invalidation action, Turkish IP courts generally take those actions into consideration and refrain from granting a preliminary injunction by taking the retroactive effect of the invalidation decision into consideration.

Length of proceedings

A preliminary injunction proceeding usually takes one to four months, but can last up to eight months depending on the submission speed of the expert report, if requested.

34. If a preliminary injunction is granted and the main infringement action is finally lost, can the defendant claim damages for the unjustified preliminary injunction?

Under the Code of Civil Procedure, an enjoined party can demand damages in a compensation action if at the end of the action on the merits there is found to be no justification for the preliminary injunction.

A preliminary injunction is granted in return for a guarantee bond. The decision on the guarantee bond is at the discretion of the judge. However, it is quite rare for a preliminary injunction to be granted without a bond.

The guarantee bond is kept by the court for a month from finalisation of the action on the merits or decision on lifting of the preliminary injunction as a guarantee for damages. After expiry of the one-month term, the guarantee bond

is returned to the party who deposited the guarantee amount. That does not mean that the enjoined party cannot file a compensation action. The one-month term is only for keeping or returning the guarantee bond. However, the compensation action must be filed within one year of finalisation of the action on the merits or decision on lifting the preliminary injunction. The action must be filed before the court that decided on the preliminary injunction.

Final remedies

35. What remedies are available against a patent infringer?

Permanent injunction

There is no permanent injunction remedy. Only a preliminary injunction before an action on the merits is available. A permanent injunction may be the outcome of an infringement action where the court acknowledges that the acts of the defendant are infringing and decides to have them ceased entirely.

Monetary remedies

If a patent infringement is accepted by the court, the patent holder can demand compensation for damages. There is no other monetary remedy apart from compensation of damages. Under Article 151 of the IP Code, damages are calculated as any of the following:

- Income that the patent owner might have possibly generated if the competition of the infringing party did not exist. The court-appointed expert panel then examines the patent holder and infringer's commercial books and records to determine the loss of profit.
- Income generated by the infringing party from the use of the patent. Under this option, an expert examination is conducted on the infringer's commercial records.
- Licence fee that would have been paid if the party infringing the patent had lawfully utilised the patent under a licensing contract.

Delivery up or destruction of infringing goods

Under Article 149 of the IP Code, the owner of a patent whose rights have been infringed can ask the court to order the destruction of the infringing products. However, the new IP Code (*see Question 38*) has also introduced a fast destruction process for infringing products under Article 163.

The patent holder can also request the court to impound products whose manufacture and use are affected by penalties because of the violation of rights, as well as devices, machines and other instruments, provided that the production of other products that do not violate any rights is not obstructed.

Publication of the decision

Under Article 149/1(g) of the IP Code, a patent holder can request the court to publish the final ruling fully or as an abstract in a daily newspaper or similar medium, and to notify the final ruling to the interested parties, if he/she has a justified reason or interest in that being done.

Recall order

A recall order can be issued for goods that constitute a danger to public health or that are not in good order. There is no recall order mechanism for patent infringement.

Declaration of infringement and validity

There are no declaration of infringement or validity mechanisms against a patent infringer under Turkish Law.

Others

Under Article 149 of the IP Code, the patent holder can request the court to assign the property rights of seized infringing materials.

Appeal procedure

36. What avenues of appeal are available for a defeated party and under what conditions?

A new appeal system entered into force on 20 July 2016 introducing a three-tier court system. All final decisions of the courts of first instance can now be appealed before the district courts, and the decisions of the district courts can be appealed before the courts of appeal. Although some disputes are excluded from district court examination, none of these are related to IP-related matters. District court decisions on preliminary injunction decisions of the court of first instance are final and cannot be appealed before the court of appeal.

Litigation costs

37. What level of cost should a party expect to incur to take a case through to a first instance decision, preliminary injunction proceedings and appeal proceedings?

The main costs arising in a typical patent case including both infringement and validity are judicial costs (expert fees) and fixed attorney fees. The courts typically set up an expert panel composed of three experts. The fee for each

expert examination is around TRY3,000. Attorney fees are determined in line with the annual tariff declared by Turkish Bar Union of TL2,600.

Further costs incurred in the district court are related to judicial costs (approximately EUR100) and expert fees (EUR900). If the district court decides to conduct an expert examination, that will be around EUR1,000.

Under Article 326 of the Code of Civil Procedure, the losing party must bear the costs incurred during the litigation. However, if the winning party has unreasonably lengthened the litigation and caused unnecessary litigation costs, the court may order them to pay a part or all of the litigation costs.

Reform

38. What are the important developing and emerging trends in your country's patent law?

The Industrial Property Code entered into force on 10 January 2017, replacing the Patent Decree Law numbered 551. This introduced relatively new provisions on patents in line with the European Patent Convention 1973, such as the:

- Post-grant opposition system.
- Abolishment of unexamined patent registration.
- Revision of the compulsory licensing system.

As the new IP Code and systems introduced with it are fairly new, there are ambiguities with regard to their implementation, which will become clearer in light of developing practice and court decisions over the next few years.

Online resources

Turkish legislation

W www.mevzuat.gov.tr

Description. This is the official website of the government that provides access to current legislation, rules and case law.

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- *Invalidity Attack Blocks Precautionary Injunction Demand, IAM - International Report, Author, 20 March 2018.*
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- *Examining the Implications of EPO Opposition Proceedings, Managing IP - Turkey Focus 2018 13 March 2018.*

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Publications

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