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KEY DEVELOPMENTS AND PREDICTIONS FOR TRADEMARK LAW IN TURKEY - 2019

FIRM OVERVIEW

We are one of the oldest and largest business law firms in Turkey and are ranked among the top tier legal service providers. We are widely regarded as one of the world's leading IP law firms.

Based in Istanbul, we also have working and correspondent offices in Ankara, Izmir and all other major commercial centers in Turkey.

We advise a large portfolio of clients across diverse fields including life sciences, energy, construction & real estate, logistics, technology media and telecom, automotive, FMCG, chemicals and the defence industries.

We provide legal services mainly in Turkish and English and also work in German and French.

We invest to accumulate industry specific knowledge, closely monitor business sector developments and share our insight with our clients and the community. We actively participate in various professional and business organisations.

Key Developments and Predictions for Trademark Law in Turkey

It has now been over two years since the Industrial Property Code No. 6769 (“the IP Code”) came into force. While the interpretation and implementation of most of the issues in relation to the key changes introduced by the IP Code have been addressed by the Turkish Patent and Trademark Office (“TÜRKPATENT” or “the Office”), there are still some outstanding issues requiring interpretation by the Court of Appeals.

The primary legislative development in trademark law in 2018 concerns mediation, which is becoming a compulsory pre-condition for bringing commercial monetary claims before the Courts. The impact of this new regulation on monetary claims on trademark issues will become more evident as time progresses.

Last year, the Court of Appeals rendered two important decisions regarding liability due to seizure of original goods and the role of agreements between parties regarding the ownership of trademarks.

This paper discusses the issues surrounding the interpretation and implementation of the key changes introduced by the IP Code, the compulsory mediation for trademark cases, important precedents of the Court of Appeals shedding light on trademark practice and a high level assessment of some of the key issues for trademark protection.

This paper provides an overview of the following topics:

- Mandatory Mediation for IP Related Monetary Claims
- Tips for Non-Use Defence
- Liability due to Seizure of Originals in Criminal Actions
- The Effect of Agreements on Trademark Ownership
- Do Repetitive Trademark Applications Show Bad Faith?
- Similarity of Goods/Services Concept for Likelihood of Confusion
- Damages Awards in IP Right Infringement Cases
- The Importance of Evidence for Criminal Cases

Mandatory Mediation for IP Related Monetary Claims

Following the publication of the Code of Commencement of Execution Proceedings in Monetary Receivables Arising from Subscription Agreements ("the Code") in the Official Gazette dated 19 December 2018, mediation has now become a compulsory pre-condition to bringing commercial monetary claims before the Courts. According to Article 20 of the Code, Article 5/A has been incorporated into the Turkish Commercial Code ("TCC") stipulating the "mediation" process for commercial receivables claims, where compensation or payment of a certain amount has been requested. This recent development came into force on 01 January 2019.

While Article 5/A of the TCC does not explicitly refer to IP related disputes, civil suits arising from IP related codes are also regarded as "commercial" disputes. The new provisions, therefore, also affect IP related monetary claims, such as disputes arising from the amount of license agreements or transfer of IP rights, compensation due to IP right infringements, etc.

In line with these new provisions, if monetary and non-monetary claims are requested together (e.g. requests of preliminary injunction ("PI") for prevention of infringement and compensation due to such infringement), all of the claims (the whole case) will be subject to mandatory mediation

proceedings. In such cases, the Court will deliver the case to the mediator as it includes monetary issues and the counterparty may be notified of the case before a PI decision is granted. Therefore, the counterparty will be informed of the case/PI request during the mediation proceedings, which may cause problems for the effectiveness of the PI. In light of this, it will be beneficial to file separate cases for monetary requests and other related requests, such as PIs.

It is also worth highlighting that trademark and patent attorneys will take an active role during such proceedings since they will be able to attend negotiations as specialists/experts. According to the update published by the Department of Mediation, mediators should inform the respective parties that it is beneficial to bring experts or their reports to the first meeting. According to Article 5/A of the TCC, the mediator will finalise mediation proceedings six weeks from the date of appointment. Where necessary, the mediator may extend this period for a maximum of two weeks. Therefore, mediation proceedings will take eight weeks at most.

Considering that mediation was first incorporated into the Turkish Legal system as a discretionary alternative dispute resolution method in 2013, it might be said that it is a relatively new concept for dispute resolution

in Turkey. In the forthcoming period, it is expected that mediation will become mandatory for other types of IP disputes. With the expectation that mandatory mediation will decrease the IP Courts' workload, the impact of this new regulation cannot clearly be foreseen, since mediation is a rather new concept for Turkey where we can say that the litigious culture is dominant. It will be interesting to see what this change will bring to Turkish IP law.

Tips for Non-Use Defence

One of the major changes in the new IP Code, which came into force on 10 January 2017, is the “*non-use defence*” in opposition proceedings. According to the Code, if a trademark which is claimed to be similar to the application, is registered for more than 5 years as of the application date (or priority date) of the opposed application, upon request by the applicant, the Turkish Patent and Trademark Office (the Office) will request that the opponent prove the genuine use of the trademark in Turkey for the relevant goods and/or services covered by the trademark on which the opposition is based. Based on our experience so far with respect to the application of the non-use defence during the opposition proceedings, the following points must be considered:

Firstly, proof of use requests are usually not filed properly; i.e. nearly all applicants request the proof of use from the opponents, without taking into account if the opponent’s trademark has been registered for more than 5 years or not. Furthermore, although the applicant’s request must be clear, unconditional and explicit and include the trademark numbers of which their proof of use is requested, the required form for such request is often not properly filed. In addition, in some cases, the applicant fails to list the goods/services covered by the opponent’s trademark, that they are requesting the proof

of use and instead list their own goods/services covered by their application. The Office takes into account even the improper proof of use requests and also sends them to the opponents. However, when the opponents file responses to the Office and object that the proof of use request does not fulfill the requirements, the Office rejects the request. Therefore, even in cases where the applicant fails to request the proof of use correctly, it is important for the opponents to file responses to the Office in order to protect their rights.

On the other hand, with regards to the evaluation of the submitted evidence by the opponents, although the Office’s practice has not been yet sufficiently settled, we are seeing that the most important evidence includes invoices (either issued by the trademark owner or its authorised company) and promotional materials. Other documents such as price lists, catalogues, packaging, signboard visuals, and marketing surveys are also accepted and considered during the Office’s evaluation. All submitted evidence must contain sufficient information on the nature, location, time, scope and use of the trademark in relation to the goods and/or services covered by its registration.

It should also be noted that if the invoices and other documents proving the use of the trademark are issued by another entity, even

if this entity is affiliated to the trademark owner and the trademark is a well-known trademark, we are also seeing that the Office does not directly accept such evidence and seeks license or sublicense agreements as well as franchise and merchandising agreements or any kind of permission in order to demonstrate the relationship between the companies and the use of the trademark.

Considering the Office's practise regarding the non-use defence so far, it is advisable to review the proof of use request carefully and object if it was not filed properly. If the request is filed correctly, then it is important to submit proper evidence as listed above. Otherwise, if the party filing the opposition fails to prove use of their trademark or the evidence submitted is unrelated to the relevant goods, the Office refuses the opposition unless there are other opposition grounds, i.e. well-known trademark argument, bad faith argument etc. as specified by the IP Code.

For detailed analysis, please see:

<https://gun.av.tr/what-are-the-rules-around-the-non-use-defence-in-oppositions>

<https://gun.av.tr/new-tools-for-tms>

<https://gun.av.tr/turkish-patent-and-trademark-office-issues-guidelines-for-proof-of-use-in-opposition-proceedings>

Liability due to Seizure of Originals in Criminal Actions

The enforcement of trademark infringement crimes is not ex-officio in Turkey, in other words, the trademark owners must file a criminal complaint to start criminal IP proceedings for each and every case. Thus, the trademark owners have to take into consideration beforehand, all possible risks that might occur in worst case scenarios, especially counter-claims which could include claims for damages by the infringers if no fake products could be seized during the actual raid or even worse, if original products were seized during the raid instead of fakes.

A strategic approach to get prepared for such circumstances would be to collate all available concrete pieces of evidence as to the criminal activity during the investigation phase, especially official ones such as notarised undercover test purchases, etc., if it would not be possible to conduct a purchase with an invoice or a receipt which include a clear definition of the fake products.

However, the 11th Civil Chamber's decision numbered E. 2016/ 10014 K. 2018/3948, dated 24 May 2018, which points out that "a person, criminal IP case of whom was found groundless, would himself be considered to have created unfair competition", is a clearer message for the brand owners to take such incidents more seriously than ever.

In that specific case, the brand owner had filed a criminal complaint and had a seizure conducted at a suspect's address whereas the court-appointed expert determined that the seized products were originals. Upon his acquittal, the suspect started civil proceedings against the brand owner requesting determination of unfair competition as well as a claim for damages. Even though the local Court found the brand owner was simply exercising their legal rights and dismissed all claims, the Court of Appeals overturned that decision pointing out that the criminal complaint was not filed in good faith and its filing would constitute excessive use of rights and thus, should be construed contrary to the rule of honesty. The Court of Appeals added that the brand owner could have taken alternative ways (e.g. filing a civil case) without putting the plaintiff under the stress of possible criminal consequences and decided to overturn the dismissal decision which was rendered by the local Court.

This recent precedent emphasises the importance of having all available concrete pieces of evidence at hand prior to starting criminal proceedings as well as how crucial the expert's examinations could be in criminal proceedings.

Moreover, brand owners could expect more compensation claims to be filed by suspects with whom they had similar experiences and this decision may also affect pending cases started after unsuccessful criminal raids, as the local Courts might be more inclined to accept this type of claim in favour of the suspects in the future.

Thus, brand owners should not only collect all available concrete pieces of evidence concerning the criminal activities prior to filing criminal complaints (such as notarised test purchases), they should also try their best to conduct raids with the assistance of an expert to help reduce such risks and ensure that fake products would be seized during the raid. For instance, even if no fake products could be found during the raid, a recent notarised test purchase proving that the infringer had sold a fake product which was also sealed and attached to that purchase's minutes by the notary, would surely justify the raid conducted by the brand owner and block a counter claim to be filed by the suspect.

Last but not least, it has become more advisable to use criminal IP litigation against identical infringements whereas civil IP litigation is more preferential for matters that include a simpler level of similarity.

The Effect of Agreements on Trademark Ownership

In its landmark decision of 14 February 2018 ((E. 2017/11/85 K.2018/209, publication date July 2018), the General Assembly of Civil Court of Appeals (GACoA) recognised the value of agreements signed between parties with respect to the ownership claims on a trademark.

In this case, the conflict relates to the “Sultans of the Dance” trademark, which was created by one of the parties but has been used and introduced by the other party as the name of a dance show for a number of years on the basis of an Agreement signed by both parties. The Agreement restricts the parties’ right to use the trademark as well as the right for filing trademark applications.

When the majority shareholder of one of the parties of the agreement filed a trademark application for “Sultans of the Dance”, the Turkish Patent and Trademark Office (‘the Office’) rejected the trademark application following opposition from the other side, on the basis that both parties signed an agreement at their free will restricting themselves on the use of “Sultans of the Dance”.

Following lengthy litigation proceedings, the GACoA approved the Office decision and decided that the name “Sultans of the Dance” has been the common property of both parties and the trademark cannot be

registered as a trademark by either party individually due to the provisions of the agreement signed between them. Thereby, the GACoA gave priority to the parties’ will regarding ownership of the trademark. The GACoA also stated that the contrary of what was agreed between the parties, could only be proven with evidence of the same kind, such as another agreement between the parties.

The decision of GACoA is important as it underlines that the existence of an agreement which provides for joint ownership of a name and which restricts use of the relevant name by one of the parties, constitutes a justified ground and evidence to prevent registration of that trademark by one party. This decision demonstrates that agreements concerning joint ownership of a name are binding in case one of the parties subsequently wishes to register that name as a trademark and. Such consequences should be considered before executing an agreement to that effect.

On the other hand, the decision should serve as a precedent in the longstanding debate surrounding the possibility of an opposition to be filed after having given a letter of consent. A letter of consent granted by a senior trademark owner allows a trademark application owner to pass the absolute grounds of refusal but there is no ban for the senior trademark owner to file an opposition

based on confusing similarity later when the trademark application is published for oppositions. Based on the guideline of the GACoA decision giving the priority to the agreement signed between the parties, there should be no doubt that if the parties sign a co-existence agreement along with a letter of consent, then the co-existence agreement should be sufficient for the refusal of a potential opposition to be filed by the senior trademark owner who previously agreed to grant the letter of consent and signed the co-existence agreement.

For detailed analysis, please see:
<https://gun.av.tr/tr/court-of-appeals-recognises-evidential-value-of-agreement-restricting-parties-rights-to-trademark>

Do Repetitive Trademark Applications Show Bad Faith?

When a revocation action due to non-use against an older trademark is still pending, if the trademark holder files an identical – repetitive – application to avoid the possible negative consequences of non-use and the judgment of the Court to be issued, such application is now deemed as filed in bad-faith.

It is common and seen as general practice to “renew” a trademark by making a fresh application when the older trademark becomes vulnerable to the non-use defence, after the 5 years grace period expires. Such trademarks are generally named repetitive marks. However, if such application is filed with the aim of abolishing the consequences of a possible revocation decision of an earlier trademark, then the latter is considered as not constituting an acquired right for the new application. Therefore, with the implementation and principle set forth by a recent decision of the Re-examination and Evaluation Board (“REEB”) of the Office, such application may be deemed as filed in bad-faith.

Here, it is worth looking at the dispute to establish the reason behind the principle. A revocation action due to non-use - the proceedings lasted longer than usual since Article 14 of the Decree no. 556 was annulled by the decision of Constitutional Court while the action was pending - was filed against a trademark older than 5 years.

In the meantime, the new IP Code entered into force on 10 January 2017 when it became possible for applicants to allege the non-use defence in opposition cases based on similarity, if the five years period from the actual registration date of the trademark had passed. With this development, the defendant of the revocation action filed a new trademark application identical to its earlier trademark subject to the action – on the date of entry into force of the Code. An opposition was filed against this application by the counterparty of the dispute (plaintiff of the pending non-use action, of which several applications were blocked) by claiming that the application was filed in bad faith, while there was an ongoing revocation action filed against the applicant’s senior identical trademark due to non-use and thus the application should be rejected as a result of this bad faith.

Although the Office rejected the opposition in the first instance, the Higher Board – REEB - concluded that by filing a new application, the applicant aimed to abolish the consequences of a possible revocation decision of its trademark and, therefore, acted in bad faith by applying for a new identical trademark application covering the same goods and accordingly, rejected the opponent’s new application since it was found to be filed in bad faith.

The Office usually evaluates bad-faith very strictly and rarely, and accepts it without any evidence if only logos are identical/indistinguishably similar. Therefore, proving bad-faith filing is challenging since adequate evidence is necessary and its evaluation is rather strict. However, in the relevant precedent establishing this principle, the Office evaluated bad-faith filing and the dispute more broadly than usual even if no additional evidence was submitted other than the allegation that the repetitive application was filed for eliminating any possible negative consequence of the pending non-use revocation action. With this decision, which can be challenged by the applicant before the IP Court, the Office established an important principle by attaching greater importance to the whole picture of the ongoing dispute between the parties and protected a more important purpose than conducting a procedural review of the matter.

For detailed analysis, please see:
<https://gun.av.tr/hope-for-microsoft-opponent-which-led-new-application-for-unused-mark-found-to-have-acted-in-bad-faith>

Similarity of Goods/Services Concept for Likelihood of Confusion

Similarity between goods and services covered by trademarks carries great importance for the evaluation of a possible likelihood of confusion between trademarks. Unless there is a well-known trademark in question, if the trademarks subject to a dispute cover different types of goods and/or services, discussing any confusion between them will be out of the question.

The likelihood of confusion can be evaluated depending on diverse factors, such as identity or similarity of trademarks, identity or similarity of goods and services, distinctive feature of the elements covered by the trademarks, conditions specific to the related sector and the level of attention from average consumers. To evaluate the likelihood of confusion, all these factors must be considered collectively and in combination with each other, while one or the other may become more prominent depending on the authority handling the case.

For instance, the European Court of Justice firstly reviews the goods and/or services covered by trademarks subject to a conflict and proceeds to the next stages if they are found to be similar. On the other hand, the Turkish Patent and Trademark Office (the Office") and Court of Appeals firstly review the similarity of trademarks and then the goods and/or services, if the trademarks are found to be similar.

However, the interdependence principle finds a global acceptance and rules that a low degree of similarity between goods and services may be balanced and offset by a high degree of similarity between trademarks, or vice versa.

For determining whether there is a similarity – which will lead to likelihood of confusion – between goods and/or services covered by trademarks subject to a conflict, the Nice Classification or the classification system of the countries or regions should not be considered as these systems serve only for the registration of the trademarks. Article 2/1 of the Nice Agreement rules that *"...the Classification shall not bind the countries of the Special Union in respect of either the evaluation of the extent of the protection afforded to any given mark or the recognition of service marks"*.

Further, even if the Office has established sub-groups under each class in order to lead the way for reviewing the similarity of the goods and services, especially for the absolute ground examination where being identical or same type is sought, it is stated in its communiqué as to the classification of goods and services of trademark applications that *"... the Office might evaluate these groups either to a narrower extent for determining the same type of goods or services or to a broader extent to be covering*

different good or service groups while reviewing the trademark applications or opposition”.

In order to decide on the similarity between goods and/or services, a much more extensive evaluation should be made. There are globally accepted factors for this evaluation, namely market perception, target consumers, satisfying similar needs, possibilities of replacing and competing with each other, purpose of use, complementing each other, common distribution channels and methods of use and overlap of some of these factors might constitute good and/or services similarity that will lead to likelihood of confusion. As for the generally accepted view for the evaluation of any likelihood of confusion in respect of the goods and/or services, it should be considered whether one or more of the above factors may let the consumers associate the source of origins of trademarks, rather than their similarity. If the consumers think that goods and/or services are presented by the same undertaking, then it should be evaluated that there would be the likelihood of confusion.

The Court of Appeals and other IP Courts in Turkey generally consider the above factors when evaluating the similarity of goods and/or services to determine the likelihood of confusion, not limiting its examination to the Nice Classification or the subgroup system of

the Office. However, the Office sometimes still takes into account the subgroups of classes for the evaluation of similarity of goods and/or services in the case of oppositions, especially during the first examination of the oppositions by examiners. On the other hand, the Higher Board of the Office, namely the Re-examination and Evaluation Board makes a much more extensive examination, especially in recent years, and it is encouraging to encounter decisions where the above factors are considered for the evaluation of a likelihood of confusion and the goods and/or services under a same subgroup are not evaluated to be similar or those under different classes to be similar.

Damages Awards in IP Right Infringement Cases

IP right owners suffer huge damages in some IP rights infringement cases as they invest substantial amounts in their IP rights. Therefore, compensation claims are of vital importance for them in order to recover their damages, to protect their reputation and create a deterrent impact on the infringing party.

In parallel with the previous regulations, the Industrial Property Code no. 6769 ("IP Code") also provides highly advantageous provisions for compensation actions.

In particular, the IP Code allows rights owners to request recovery of their loss of profit caused by the infringing party as compensation, even if there have not been actual damages resulting from the infringement. The Code grants them alternative calculation methods to calculate the loss of potential profit. In addition, they are also entitled to apply to the Court for determination of evidence to provide the relevant information and documents to be used when calculating the damages before filing the compensation action. Having said that, in practice, compensation actions, requiring the examination of the commercial books of the adverse party especially through expert discovery are generally lengthy and complicated procedures.

According to the IP Code, above all, the imbursement of actual damages of the IP rights owners can also be requested from the infringing party. Within the scope of actual damages, the infringing party can be requested to recover the expenses incurred by the owner for the prevention and elimination of the infringement/confusion created in the market as well as the expenses for filing the legal action.

To calculate the loss of profit, Article 151/2 of the IP Code grants the owner alternative rights and upon their choice, the loss of profit will be calculated according to one of the following methods – each method has advantages or disadvantages in the circumstances of a dispute:

- **Potential income of the right owner, if there had been no competition of the infringing party:** This method, although fully corresponding to the concept of "the loss of profit", is the least chosen by rights owners since the calculation of damages does not always give a practical and healthy result, considering that in most cases, the rights owner does not need to lose income or profit because of the infringement. Therefore, except for the cases where there is strong evidence proving the potential income of the rights owner, if there had

been no competition by the infringing party, can be filed at the Court. The calculation of damages according to this method is often accepted as risky in compensation actions.

- **Net profit of the infringing party:** With this method, an examination of the commercial books and records (domestic and foreign sales invoices, etc.) of the infringing party is required. However, due to the possibility that the commercial books and records of the infringing parties may not be properly kept, there is a risk that the right owners can be faced with unreliable calculations and extensive examinations.
- **License fee that would have been paid if the infringing party had made use of the IP right under a license agreement:** This method, also referred to as “hypothetical license fee”, is considered as the most efficient of all. If the rights holder can submit a sample license agreement to the case file, the license fee in the sample agreement is mostly taken into account by the Court. However, if the rights holder cannot submit a sample license agreement, then the Court will take the conditions of the dispute and the economic value

of the IP rights into consideration and assess a reasonable fee according to the business capacity of the infringing party.

When filing the action for compensation, the IP rights owners are obliged to choose one of the methods for calculation of their loss of profit in the plaintiff petition. On the other hand, under Turkish Law, a certain amount must be asked when filing the action. However, as it is not possible to determine the exact amount at the beginning, it is possible to keep the amount “reasonably” minimum and then have it increased later.

Lastly, as it is mentioned under the article titled “*Mandatory Mediation for Commercial Receivables*”, it is mandatory to apply for mediation prior to taking action for compensation of damages.

The Importance of Evidence for Criminal Cases

In Turkey, the prosecution of criminal offences in Trademark Law depends on a proper complaint filed by a trademark owner and a successful raid action mainly based on the strength of the evidence prepared. Once the complaint and the evidence have been submitted to the local prosecutor's offices, the files are brought before the local Criminal Courts of first instance, which are the sole authority for search and seizure decisions. The Criminal Courts on the other hand, are becoming more and more reluctant to issue these decisions. Hence, it is vital that the trademark owners get fully prepared before filing the complaint and gather all evidence for the Criminal Court's review.

The preparation of the complaint starts with investigations, and on-site investigations are particularly important to obtain the very basic evidence, such as the target's true address, photos, samples with receipts, etc. These steps should be handled by trusted expert investigators and the supervision and intervention of legal professionals should be sought at all times, as in Turkey, the activities of private investigators are not regulated by law.

Undercover notarised test purchases are the strongest evidence in criminal actions, especially where it is not possible to conduct a test purchase and obtaining a receipt, prior to applying to the public prosecutor for a search and seizure warrant.

With this notarised purchase, it becomes undisputable that the target deals with counterfeit goods, and it provides evidence in the trademark owner's favour where no products can eventually be seized at the raid – which theoretically gives the counterfeiter an option to request compensation from the owner due to an unlawful raid.

Depending on the matter, we can also support our complaint with a simple technical report comparing original and counterfeit items to facilitate the examination process for the public prosecutor and the criminal judge. Witness statements are also available, despite not being as strong as the other sorts of evidence.

Recently, the public prosecutor also started assigning the police to conduct an undercover investigation as per Articles 160 and 161 of Criminal Procedural Law, where the police visit the target's address and confirm whether or not there is counterfeiting activity. It is again highly important to be in close contact with the police to support their undercover investigation.

In this context, we advise that our clients give priority to gathering the evidence before filing criminal complaints, not only to increase the chances of obtaining a search and seizure order but also to protect themselves from counter claims from counterfeiters.

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TRADEMARKS AND DESIGNS ANTI-COUNTERFEITING IP PROSECUTION

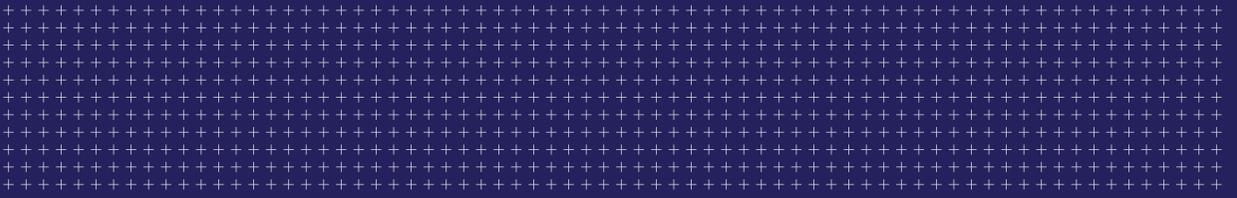
We provide a comprehensive and wide range of legal services across all aspects of trademark law through our dedicated practice groups: Trademarks and Designs, Anti-counterfeiting and IP prosecution.

Our services include registration and enforcement strategies, due diligence, availability searches and clearance opinions, prosecution, watch, oppositions, appeals, domain names, designs, enforcement, litigation and transactional services.

We represent clients before civil and criminal courts, District Courts and Court of Appeals as well as all administrative authorities including TÜRKPATENT, customs, domain name authorities. Most of our lawyers are qualified as trademark attorneys authorised to act before TÜRKPATENT.

We regularly handle infringements, invalidity, revocation, well-known trademark protection, anti-dilution, passing off, unfair competition and trade dress infringement actions and large scale damages claims before civil courts as well as customs seizures and criminal searches and seizures.

Combining our litigation, transaction and industry knowledge, we draft, negotiate trademark related agreements and transactions including, manufacturing, co-existence, settlement and licensing agreements.



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