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A practical cross-border insight into copyright law

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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

The protection of the copyrights is regulated under the Law of Literary and Artistic Works No. 5846 (Law No. 5846).

According to Law No. 5846, an intellectual or artistic creation is qualified as a 'work' subject to copyright protection if:

- it is original, namely if it is the result of independent, creative effort by the author (this is a subjective condition); and
- it falls under one of the four categories mentioned below (this is an objective condition), namely:
  - scientific and literary works;
  - musical works;
  - artistic works; or
  - cinematographic works.

It should be noted that Law No. 5846 recognises moral rights and economic rights separately. The term "copyrights" usually refers to economic rights related to a work.

The economic rights are categorised as (i) right of adaptation, (ii) right of reproduction, (iii) right of distribution, (iv) right of performance and (v) right to communicate the work to the public by devices enabling the transmission of signs, sounds and/or images. The moral rights are (i) the right to disclose the work, (ii) the right to have the work attributed to them, and (iii) the right to the integrity of the work.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Law No. 5846 defines four categories of work (referenced in question 1.1) and these categories are "*numerus clausus*". However the Law also lists many sub-categories under each category and these sub-categories can be expanded by way of legal interpretation depending on the conditions of each individual case and the nature of the creative work.

For instance, computer software normally does not fall within any of the four categories, but the Law lists computer software as one of the sub-categories under "scientific and literary works". Likewise, a database which is based on a selection of materials tailored for a specific purpose is regarded as a work under "adaptations and compilations".

There are no works which are expressly excluded from copyright protection.

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

Under Turkish Law, the registration of copyright is not a legal requirement for the establishment of rights. However, for films and phonograms, registration is compulsory under Law No. 5846 for the purposes of exploitation of rights and facilitating proof of ownership, but not for creating any rights. The Law also sets out "an optional registration" for other types of works for facilitating proof of ownership, though this is not common practice.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

Under Article 27 of Law No. 5846, the protection term begins when the work becomes public, whether or not the right has been registered or notified. The duration of protection for all kinds of rights arising from work ownership subsists for the life of the author, plus 70 years following the death of the author. The 70-year period starts from January 1 of the year following the author's death. If there is collective ownership of a work, then the 70-year period begins from the date when the last-surviving owner dies.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Yes. Under the general principles of Turkish IP Law, cumulative protection is accepted. Therefore, there may be overlaps between copyright and other intellectual property rights. For instance a work protected under copyright may also be registered as a design or a trademark if it meets the criteria for registration.

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

There is no specific provision restricting the protection of a work made by an industrial process but the basic principles of copyright protection, namely the qualification as a "work" and the ownership principles, shall also apply to such works.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

Under Law No. 5846, concerning the "ownership of copyright", the general principle is that the person who actually creates a work is the author of such work. This principle is set forth under Article 8, which states: "The author of a work is the person who has created it."

The principle regarding the ownership of copyright is based on the assumption that the creator is always a real person. The ownership of the work is acquired automatically with the creation of the work regardless of whether the creator has legal capacity to act.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Following the general principles of ownership, the author of a commissioned work is the party who actually created the work. So in such works, the rights of the author should be assigned to the commissioner after the creation of the work.

It should be noted that if the instructions of the commissioning party become overwhelmingly influential during the production process and the author's contribution comprises no more than his labour, then the work may be subject to the collective ownership or joint ownership of the parties as per Articles 9 and 10 of Law No. 5846.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

There is a specific provision in Law No. 5846 for the works created by an employee. According to Article 18(2) of the Law: "Provided that the contrary is not determined by a private contract between the parties or is understood from the nature of the situation, the rights on the works created by officers, servants and employees while they are performing their jobs shall be used by their employers or by the ones who have assigned them to work. The same rule applies in respect of the executive bodies of legal persons."

According to this provision, Law No. 5846 provides a "statutory assignment of economic rights". Here the employee still remains the author of the work but as a part of the employment, the right to exercise copyright (the economic right) is legally assigned to the employer upon the creation of the work.

But it is also important to point out that this rule is only applicable to works created as a part of the duty and not for the works created independently of the job. The moral rights are still owned by the author.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

If a work is created by more than one person and the work can be separated into different parts, then there will be collective ownership, as prescribed under Article 9 of the Law. In such cases, the authors will own the parts of the works which they have created. There can also be collective ownership where several independent works are brought together by their owners.

In addition to this, if a work created by the participation of more than one person constitutes an indivisible whole, the author of the work is the union of the persons who created it; this is called "joint ownership" as per Article 10 of the Law.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

The moral rights recognised by Law No. 5846 are strictly related to real persons and for this reason whereas economical rights are transferable, moral rights cannot be transferred or waived. We should also note that this is a public order norm, which means that any contradictory agreement or declaration shall be considered void.

Law No. 5846 requires that any agreement for the transfer/assignment of copyrights must be in written form and such an agreement must contain the scope of the right which is the subject of the transfer or waiver (i.e., the right of adaptation [derivative works], the right of reproduction, the right of distribution, the right of performance, the right to communicate a work to the public by devices enabling the transmission of signs, sounds and/or images). An agreement in which the author transfers all economic rights through use of general wording instead of specifying them one by one is deemed to be void.

It should also be noted that such an agreement is invalid is it is signed before the work was created.

3.2 Are there any formalities required for a copyright licence?

The copyright licence agreement must also be in written form and such an agreement must specifically contain the scope of the right(s) which is/are the subject of the licence. The licensed rights and the scope must be expressly stated and separately listed.

Under Article 56, a copyright can be licensed either on an exclusive or non-exclusive basis to a licensee. A licence agreement shall be deemed non-exclusive unless the contrary is understood from the agreement or specified by law.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

There is no specific provision restricting the freedom of contract, except for the general principle that moral rights cannot be transferred or assigned. The author may only assign a third party the right to use moral rights without restricting the core of the right.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

Collective licensing bodies exist for all types of work, including scientific and literary, musical, artistic, or cinematographic works. Currently there are 27 collective bodies in Turkey. The names of the collective licensing bodies are as follows:

Cinematographic Works:

- Association of Documentary Film Makers.
- Turkish Cinematographic Work Owners Professional Association (SESAM).
- Association of Cinema and Television Work Owners.

- Film Producers Professional Association (FİYAB).
- Movie Producers Professional Association (SEYAB).
- Television and Cinema Producers Professional Association (TESİYAP).
- Turkish Actors' Collecting Society (BİROY).
- Anatolian Association of Cinema and Television Work Owners (ASİTEM).
- Cinema and Dialog Writers Association (SenaristBir).

Musical Works:

- Musical Work Owners' Society of Turkey (MESAM).
- Musical Work Owners Group (MSG).
- Musical Performer's Association (MÜYOBİR).
- Neighboring right holder Phonogram Producers' Association (MÜZİKBİR).
- Turkish Phonographic Industry Society (MÜYAP).
- Music Producers Association (MÜYABİR).

Scientific and Literary Works:

- Scientific and Literary Work Owners' Association (BESAM).
- Professional Organization of Authors of Scientific and Literary Works (İLESAM).
- Association of the Information and Software Work Owners (BİYESAM).
- Translators' Professional Association (ÇEVBİR).
- Publishers' Professional Association (YAYBİR).
- Printing and Publishing Professional Association (TBYM).
- Course and Educational Book Publishers Association (DEKMEB).
- Publishers of Educational Works Association (EĞİTİM YAYBİR).

Radio – TV:

- Professional Union of Broadcasting Organizations (RATEM).

Artistic Works:

- Fine Arts Owners' Association (GESAM).

Theatre:

- Theatre Actors' Union.

3.5 Where there are collective licensing bodies, how are they regulated?

Collective licensing bodies are regulated under Law No. 5846. According to Article 42, collective licensing bodies are entitled to manage the economic rights of their members based on a written deed or agreement. The powers and duties of these bodies are "protecting the common interest of its members", "management and tracing of the rights cited under the law" and "payment collection and its distribution among the right owners".

Supervision and auditing of licensing bodies, corporate governance, membership regulations, relationship between the bodies and the legal/real persons and economic relationship between the bodies and their members are regulated by the By-law on the Work Owners and Related Right Owners Collective Bodies and Federations published on April 1, 1999 ("By-law on the Collective Bodies").

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

Article 40 *ff.* of the By-law states that a collective licensing body's power of representation is limited to the framework of rights assigned by its members. The body shall take into account the following when concluding an agreement with third parties regarding the use of the works, performances, records and publications:

- the regularity/continuity of use of the work;
- whether the fees are reasonable in consideration of local and international practice;
- whether the agreement violates competition in the market;
- the publishers' respective area and the audience of the work;
- the frequency of the use of the work;
- the fee to be charged for each work that is used; and
- the fee based on seconds/minutes of use.

Accordingly, the terms of the licence offered by a collective body may be challenged if the terms exceed the limits of their representation power or if the terms are not proportional.

Therefore the member may rely on the provisions of the Code of Obligations numbered 6098 with respect to non-fulfilment of duties or excessive use of powers.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

Under Law No. 5846, the right holder can restrict any act infringing his/her moral and/or economic rights. Accordingly the right holder can prevent the third parties from:

- adapting the work;
- duplicating the work;
- distributing the work (in any medium);
- performing the work to the public;
- broadcasting or communicating the work to the public by any means of transmission of signs, sounds or images;
- disclosing the work to the public; or
- modifying the work.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

As explained in question 1.1, the author also has moral rights. Moral rights are protected under the same terms of economic rights (copyrights). However, unlike copyrights, the transfer, restriction or waiver of moral rights is not possible and is strictly prohibited. Thus any provision for transfer, restriction or waiver of moral rights in an agreement or deed would be deemed null and void as this rule is seen as a public norm.

In addition, Law No. 5846 also set out rules regarding neighbouring rights, i.e. the rights owned by performers of a work who interpret, introduce and recite a work, phonogram producers and radio-television organisations. Article 80 of the Law No. 5846 contains specific regulations for the protection of neighbouring rights.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

According to Article 23/2 of Law No. 5846 the author cannot prohibit the re-sale of the authorised copies of the work once these are put on the market.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

There is an administrative body founded within the Ministry of Culture and the local representatives of the Ministry are located in each city. The role of these local administrative bodies is to carry out inspections to see if the cinematographic/musical and literature work sold in public conforms to the relevant standards. These bodies do have the power to conduct *ex officio* inspections and they are also entitled to work with the local police to conduct raid actions for the pirate works which do not conform to the relevant standards.

These administrative bodies do not deal with the copyright infringement from an author's perspective and so they cannot be used as an alternative to civil actions.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Exclusive licensees are entitled to claim indemnity if their economic rights are infringed. Non-exclusive licensees are also entitled to claim infringement actions if they are expressly authorised in this regard.

According to the By-law on the Collective Bodies, collective licensing bodies are also entitled to bring a claim on behalf of the members.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Turkish copyright law does not distinguish between primary and secondary infringement, but treats this area under a single concept of 'copyright infringement'. Thus, acts of primary and secondary infringement fall within the scope of copyright infringement, and such infringements will be subject to the infringement provisions and the civil, injunctive and criminal remedies set out in the Law.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

Defences are defined in the Law under the title 'Fair Usages'. These fall under the following categories:

Public order

Under Article 30 of the Law, the reproduction and publication of officially published texts, as well as official speeches given in assemblies, congresses, courts or public meetings is allowed for the purpose of public information and declaration.

Public interest

Reasons of information, education and/or scientific/cultural purposes are the main defences to infringement; this is because public interest is seen to be grounded in the freedom of information, news, education and science.

Private (Personal) Use

Private interest is classified into three groups: (i) personal use; (ii) copy and display; and (iii) usage of the work in public places.

Intellectual and artistic works can be used for private purposes, provided that there is no commercial expectation of profit. For computer programs there are some specific rules. If there are no contractual provisions to the contrary, a person who has legally acquired a licence for a computer program may duplicate the computer program if this is necessary for its intended purpose and efficient usage. The downloading, running or correction of the computer program by the person who has legally acquired the work cannot be prohibited in any contract and the person who is entitled to use the computer program will also be entitled to make a back-up copy.

5.5 Are interim or permanent injunctions available?

The general principles with respect to interim injunctions are set forth under the Code of Civil Procedures, but Law No. 5846 also contains specific provisions. According to Law No. 5846, the court may, at the request of the person whose rights are infringed, order a preliminary injunction ordering the other party to do or not to do something prior to or after bringing the law suit. The preliminary injunction request could be raised before the court either by an *ex parte* application, or in the main infringement action.

5.6 On what basis are damages or an account of profits calculated?

According to Article 68(1) of Law No. 5846, the owner of the relevant work is entitled to claim a maximum of three times the amount of profit that would have been made had there been an agreement between the parties, or the fair market value of the work, as calculated in line with the Law.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The basic procedure for an infringement action usually takes around 1.5-2 years.

The cost of attorney fees vary greatly depending on the experience and seniority of the lawyer and the law firm and thus it is not possible to give an exact figure. But the costs generally vary between €15,000 and €50,000 and even more if it is a particularly complex case.

The court fees are relatively insignificant. Court duties are in the range of €300, while expert fees (if appointed) may be around €750 to €2,000 depending on the qualifications of the expert. For damages actions, court fees are 5.6% of the total amount of the claim.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

It is possible to appeal every first instance decision based on the "general" ground that the first instance decision was not proper and based on a misevaluation of the facts and/or law. The court of first instance conducts a preliminary examination for the appeals but this examination is limited to procedural grounds, such as to confirm that the appeal was filed within the deadline, etc. The appeal examination takes around 1.5-2 years.

5.9 What is the period in which an action must be commenced?

Infringement actions shall be commenced within two years of learning about the infringing activity and who is responsible for

the infringement. In any event, the maximum period is 10 years as of the infringing act. In addition, in case the act is also subject to criminal responsibility and if the statutory time limitation for criminal responsibility is longer, the longer period shall apply.

However, as long as the infringement is ongoing, the limitation period does not begin.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes. Article 71 of the Law rules the criminal liability for the infringement of rights deriving from the ownership of a work and related rights. Article 72 rules the criminal liability specifically for those who create, offer, sell or possess, for any purpose other than private use, software or technical hardware that would circumvent the protective programs preventing illegal duplication.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

Any act of infringement can also be subject to criminal liability as the law does not set any specific threshold. The sanctions foreseen for different types of criminal liability can be listed as follows:

Any person who exploits the economic rights on a copyrighted work without the permission of the owner may be sentenced to imprisonment from one year to five years or be subject to a judicial fine.

Any person who makes an adaptation without any reference to the original work and any person who renames a work without referring to the actual owner may be subject to imprisonment from six months to two years or be subject to a judicial fine. If the renamed work is put on the market, the imprisonment may increase up to five years.

If a person uses another person's name on the work, performance, phonogram, etc. – and that person is known by the public – the offender may be sentenced to imprisonment for between three months and one year or be subject to a judicial fine.

Any person who discloses a work to the public without the permission of the owner may be sentenced to imprisonment for up to six months.

In addition to this, there are some other criminal liabilities for persons who distort a work.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

There is a draft bill before the Parliament pending for the last two years. The draft bill does not contain any substantial changes with respect to the general principles. There are, however, some amendments with respect to digital infringement of copyrights, as well as the organisation of the collective societies.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

Additionally Article 4 of Law. No. 5846 contains a specific process for copyright infringements in a digital environment. According to this provision, the copyright owner shall first contact the content provider and request that the violation be ceased within three days. Should the violation continue, a request shall next be made to the public prosecutor requiring that the service being provided to the content provider persisting in the violation be suspended within three days by the relevant service provider.

This provision provides a very effective tool against the online or digital infringement cases as it is possible to directly ask the service provider to block the content, meaning it is not necessary first to identify the real content provider, which may take a very long time.

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