



TRADEMARK LAW IN TÜRKİYE
KEY DEVELOPMENTS AND PREDICTIONS

2024

Trademarks and Designs

We provide wide ranging and comprehensive legal services in relation to trademarks and designs. Our comprehensive services include advisory, prosecution, watch, opposition, appeals, enforcement, litigation and transactional services on all aspects of trademarks and designs including registration and enforcement strategies, IP due diligences as well as availability searches and clearance opinions.

We are authorised to represent clients before civil and criminal courts, and court of cassation as well as all administrative authorities such as Turkish Patent and Trademark Office ("TURKPATENT"), customs, domain name authorities. Some of our lawyers are also qualified as trademark and patent attorneys authorised to act before TURKPATENT.

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

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

Introduction

While the year 2023 did not bring substantial changes to the Turkish Trademark Law practice, it can still be considered an important year in terms of introducing some modifications and innovations in application.

A portion of the year, especially due to the changes in judges at the Intellectual and Industrial Property Rights Courts in Istanbul, passed with uncertainties. However, with the appointment of new judges to these Courts in the last quarter of the year, there has been an improvement in both the workload and the uncertainties in the processes.

During a certain period of the year, uncertainties prevailed, particularly because of the re-composition of the judges residing at the civil IP Courts of Istanbul. Nevertheless, the appointment of new judges to these Courts in the final quarter of the year led to a certain level of improvement in both case management and the clarification of uncertainties within the legal processes.

Consistent with previous years, administrative procedures of the Turkish Patent and Trademark Office ("the Office") maintained their effectiveness. Notably, the Office's approach regarding procedures for applications in bad faith may be considered an example of good practice when compared to the practices in numerous other countries.

In 2023, precedent-setting decisions were rendered both by the Office and the Courts on fundamental principles of trademark law, including the likelihood of confusion, bad faith, acquired/ vested rights, and the use of a trademark in a trade name.

Furthermore, preparations regarding revocation processes based on non-use, which will now be undertaken by the Office, have been eagerly awaited due to the preparations for initiation of these processes in 2023. Indeed, a draft regulation has been prepared and was communicated to stakeholders at the end of 2023. However, although the new system became effective on January 10, 2024, uncertainties continue as the regulation has not yet come into force.

In addition, discussions on the impact of technological advancements with respect to physical and virtual goods and the impact of artificial intelligence on trademark law also continued in Türkiye, echoing worldwide debates. The application of changes made in the Nice Classification by the Office is also expected in this regard.

Moreover, Law No. 7416, amending the E-Commerce Law with respect to trademark infringements in electronic commerce, came into effect on January 1, 2023.

Another development related to trademark law practice occurred in regard to domain names. TRABIS ("tr." network information system), which started operating in 2022, introduced alternative dispute resolution mechanisms for '.tr' domain names and achieved successful results.

Additionally, operations related to drug trafficking and counterfeit drugs gained significance triggered by investigations conducted by international platforms.

This document is a compilation of recent developments in various aspects of trademark law that we believe to be of importance to trademark owners.

Table of Content

04

Overview of Turkish IP Protection: Navigating Challenges

06

It's Time for Administrative Revocation of Trademarks!

09

Trademark Filing History May Result in Finding of Bad Faith Under Turkish Law

11

The Criteria of Use for the Recognition of Vested Right Claim based on a Prior Trademark

13

Can Trade Name Constitute Trademark Infringement?

15

The Relationship Between Virtual and Physical Goods and Services

17

The Impact of Artificial Intelligence on Trademark Law

19

New Legislation on IP Infringement on e-Commerce Platforms

22

Is Alternative Dispute Resolution Effective Enough for ".tr" Domain Names?

24

Combatting Counterfeit and Smuggled Drugs

26

Strategic Battlefield in Combating Counterfeiters: Turkish Riviera, West and South Coast of Türkiye

Overview of Turkish IP Protection: Navigating Challenges

Turkish IP legislation is mainly in compliance with EU legislation. With the adoption of IP Code No. 6769 back in 2017, it is fair to say that the legislation regarding trademarks, designs and patents is in line with international norms and standards. While the legal framework provides a solid foundation for IP rights protection, practical obstacles persist, revealing the need for ongoing improvements.

A significant challenge has been the limited specialized knowledge among judges handling IP cases, resulting in delays, inconsistent decisions, and inefficiencies in both specialized IP Courts and the Regional Courts of Appeal. Prolonged examination periods, exemplified by delays in obtaining preliminary injunctions due to reliance on expert reports, underscore the impact of this issue.

Complications with monetary compensation claims also hinder effective enforcement. While the IP Code has favorable provisions for calculating damages, practical implementation faces complexities, such as difficulties in appointing experts and examining commercial books, extending the process significantly.

Despite these challenges, positive developments suggest progress in Turkish IP protection.

The Turkish Patent and Trademark Office ("the Office") has notably improved its online tools

for administrative processes, streamlining prosecution and opposition proceedings. Guidelines provided by the Office contribute to consistent application of rules, reducing trademark owners' actions against the Office's decisions. Office opposition proceedings have become effective with respect to bad faith trademark applications. Additionally, as of January 10th, 2024, revocation claims for non-use will be processed by the Office, anticipating an acceleration of non-use revocation proceedings.

Furthermore, customs authorities have become more cooperative with trademark owners, aiding in the identification and detention of counterfeit goods. Increased border detentions and improved communication channels show a proactive approach to combating IP infringement.

The expansion and reopening of specialized IP Courts reflect a commitment to enhancing the judiciary's capacity to handle IP cases. Currently there are 14 Civil IP Courts in total (Istanbul (8), Ankara (5) and Izmir (1)); and 9 Criminal IP Courts (Istanbul (6), Ankara (1), Izmir (1) and Antalya (1)), contributing to improved processes.

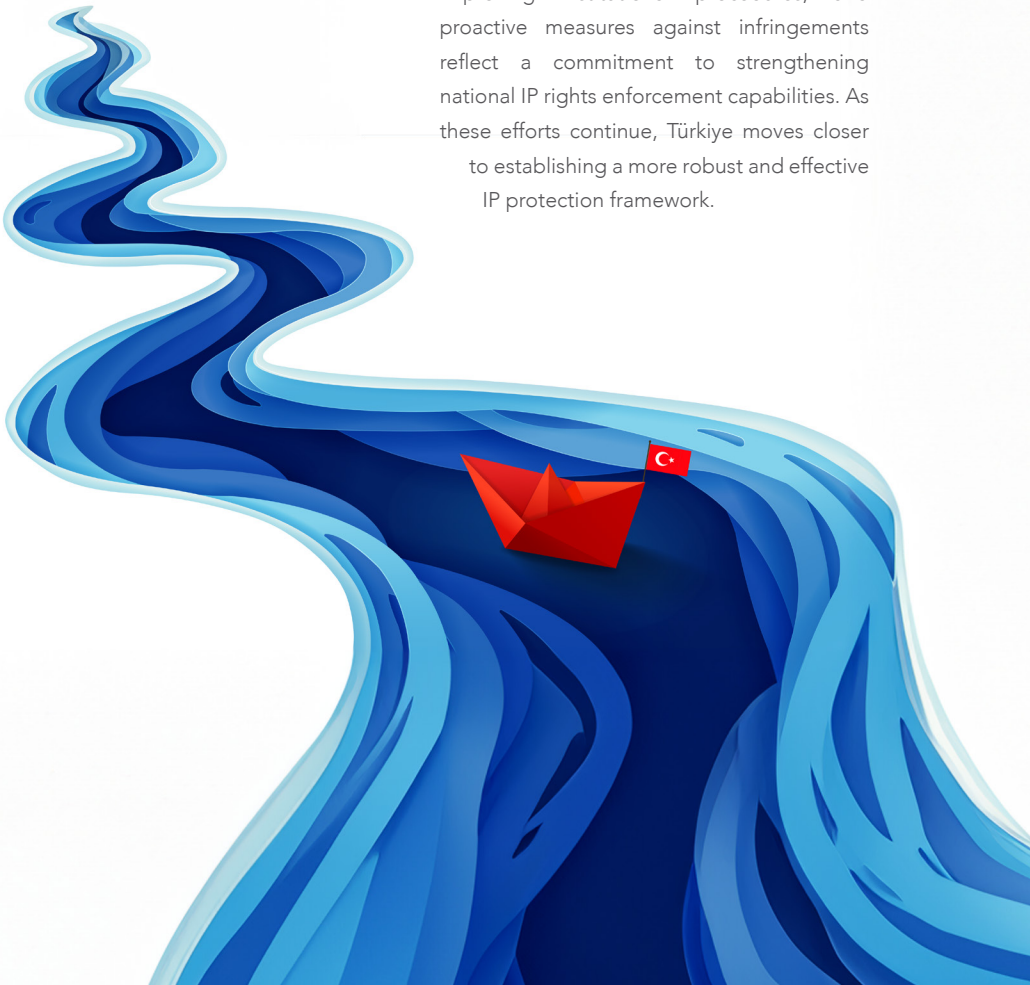
Increasing the number of specialized IP Courts and reopening those which were closed demonstrate a commitment to enhancing the judiciary's ability to handle IP cases. With the new judges appointed to the Istanbul IP Courts, we are experiencing some improvement of the processes.

Efforts by IP non-governmental organizations (NGOs) to engage with the Ministry of Justice, along with the Ministry's initiatives to provide IP training for both IP and criminal judges, indicate a concerted effort to address the lack of IP knowledge among judges and rectify enforcement issues.

While challenges such as difficulty obtaining

search and seizure warrants persist, notable improvements in addressing counterfeit issues include increased court-approved raids on counterfeit producers.

In conclusion; despite challenges, the collaborative efforts of various stakeholders and strategic reforms suggest promising progress in Türkiye's IP protection landscape. Initiatives addressing judicial expertise gaps, improving institutional procedures, and proactive measures against infringements reflect a commitment to strengthening national IP rights enforcement capabilities. As these efforts continue, Türkiye moves closer to establishing a more robust and effective IP protection framework.



It's Time for Administrative Revocation of Trademarks!

Before the Industrial Property Law ("IP Code") no. 6769 entered into force on January 10, 2017, procedures related to trademark rights were governed by the former Decree Law no. 556 on the Protection of Trademarks ("Decree Law"). In cases where the rights on the trademark shall end, while the matter of "revocation" is established in both legislations, the introduction of the IPL brings a major change to Turkish Trademark Law in this regard: the IP Code rules that requests for revocation of trademarks shall be filed before the Turkish Patent and Trademark Office ("the Office").

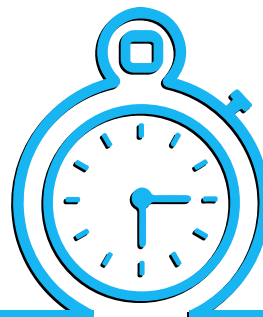
In accordance with Article 26 of the IP Code, interested persons may request the Office to revoke a trademark pursuant to paragraph 2 of Article 26 and the decision for revocation of a trademark can be taken in light of the following conditions:

- Failure to put the trademark into genuine use in Türkiye without a justified reason as of 5 years from the date of its registration or to suspend its use for an uninterrupted period of 5 years.
- The trademark has become a generic name for the goods and/or services for which it is registered.

- The public is misled as a result of the use of the trademark, particularly concerning the nature, quality or geographical origin of the goods or services for which it is registered.
- Use of the guarantee trademark or collective trademark in a manner which is contrary to their technical specifications.

However, this authority granted to the Office had been postponed for 7 years, until January 10, 2024, from the date of publication of the Law pursuant to Article 192/1(a) of the IP Code. Until this date, the authority for revocation has been delegated to the Civil Courts for Intellectual and Industrial Property Rights ("IP Courts") - as had been the case when the Decree Law was in force - by Provisional Article 4 of the IP Code. This regulation is in line with European Union legislation ("EU Directive 2015/2436"), which can be considered as the legislation taken reference for the IP Code.

The Office, by coming to the end of this 7-year period of preparation, has accelerated its



¹ This Draft Regulation has not yet been published as of 10.01.2024, the date on which Article 26 of the IPL entered into force. However, a "Pre-Application Request for Trademark Revocation" tab was added to the Electronic Application System (EPATS) under Third Party Transactions on 10.01.2024. Revocation requests are being filed under this section of the online system as from 10.01.2024.

efforts to undertake its authority. In this scope; on October 20, 2023, the Office published a Draft Regulation for Amendment on the Regulation on the Implementation of the Industrial Property Law¹ ("Draft Regulation") for comments. Provisions concerning requests for revocation in the Draft Regulation are regulated under Section III, under the revised heading titled "Objection, Proof of Use, Revocation and Reconciliation" (previously titled as "Objection, Proof of Use and Reconciliation") and is regulated by Article 30(A) titled "Request for Revocation" which stipulates that the request for revocation may be filed by interested persons against the persons registered before the Office as the trademark proprietors or their legal successors, and the request may be filed by means of the form prescribed by the Office by clearly indicating the trademark or goods and services for which revocation is requested. In addition, as is the case for requests of opposition to publication of trademarks, the provision rules that no power of attorney is sought if the requests of revocation are filed by an agent, and if a submission of application to request a trademark revocation is not in accordance with the required procedure, the Office will not send a letter of notification for remedy of shortcomings, but instead shall not take the application into consideration for processing.

There are a number of issues that are considered to be lacking in the Draft Regulation. For example, although the

revocation procedure is not a court proceeding, it is necessary to shed light on whether significant pleas such as pendency, definitive judgement etc. can be asserted, and whether the courts' established procedures such as expert examination, discovery (on-site examination), merging of related files etc., will be adopted. Although not explicitly stated in the Draft Regulation, we received unofficial information that the Office is preparing to establish a separate department responsible for the examination of revocation requests. In this regard, it is considered a deficiency of the Draft Regulation to not specify which department within the Office shall undertake the examination of revocation requests.

Furthermore, the Draft Regulation states that the final revocation decision of the Office will be recorded in the registry and published in the bulletin. It is understood from the relevant provision that the Office will directly execute its final decision; but this has its pros and cons. Such that; although it would be an advantage to prevent a trademark proprietor (which should actually be revoked) from delaying the execution of the Office decision for several years by filing a court action against the decision of revocation, if the court decides that a trademark, which is revoked upon the Office's decision, should not have been revoked, the trademark proprietor may unfairly lose the protection of the trademark until this court decision becomes final and enforceable, which may take 3 years or more.

Nevertheless, it should be noted that we expect the administrative revocation to be cost and time effective compared to revocation actions held before courts. Indeed, considering that the finalization of a court action may take 3 years or more, where an opposition procedure before the Office is finalized in a period of 4-12 months, it could be said that, by comparison, revocation requests before the Office would be finalized in a similar period. There are several reasons for this, among which the facilitated notification procedure granted to the Office by Articles 160/6 and 160/7 of the IP Code and the absence of many fees and expenses in the administrative procedures are to name a few.

However, since cancellation actions can be filed against the final decisions of the Office before the Ankara IP Courts, it should be noted that although the execution of the Office's decision cannot be postponed, it may still be subject to a litigation process for a final decision. In addition, we predict that Ankara IP Courts' workload, having the mandatory jurisdiction in terms of the cancellation actions against the Office's decisions, will gradually increase. But this increase will also result in the specialization of Ankara IP Courts in trademark revocation matters.

Similarly, we assume that the Office's workload will also become quite heavy with respect to the trademark revocation matters. Indeed, the

applicants can strategically request revocation of the trademark as a counterattack to the oppositions filed against them. The applicants can also strategically request the revocation of the trademarks that constitute obstacle in terms of Article 5/1(ç) of the IP Code. On the other hand, we would like to note that trademark squatters or infringers may target trademarks of the genuine trademark owners by abusing the administrative revocation system.

In light of all such considerations; although we anticipate that the procedures for administrative revocation of trademarks will be much more practical in terms of saving time and cost in comparison to the lengthy and costly litigation processes, and foresee an increase in such cases for this reason, we recommend that trademark proprietors ensure that their trademarks are mentioned on invoices, products, catalogues, etc., and archive these together with any other available evidence such as advertisements, magazine or newspaper articles, etc., in order to avoid problems which may arise in the future in cases of proof of use in concern with revocation requests.

Trademark Filing History May Result in Finding of Bad Faith Under Turkish Law

It is widely accepted in the literature¹ and in the decisions of the Court of Cassation² ("CoC") that an applicant's attempt to create a trademark portfolio by trying to register other well-known trademarks might constitute sufficient proof of bad faith. In this context, first instance courts and regional courts of appeals examine the applicant's other trademark applications and might accept that the disputed trademark was attempted to be registered in bad faith, where these trademark applications, as a whole, establishes a pattern to create a bad faith trademark portfolio.³

These principles have also been adopted in the recent decisions of the 20th Civil Chamber of the Ankara Regional Court of Appeals and the Ankara 2nd Civil IP Court.

- In its decision dated 03.07.2023 and numbered 2021/837 E.(Merits) 2023/771 K.(Decision), the 20th Civil Chamber of the Ankara Regional Court of Appeals considered that the phrase comprising of the essential element of the plaintiff's trademarks registered on textile products in class 25 and the trade name containing the same phrase are distinctive and genuine, that it does not have a special meaning or use in Turkish, and that it is contrary to the ordinary course of events to think that the defendant chose the same phrase by chance to register for foods and

beverages in class 30. In addition, the Court, by taking into account the defendant's obligation to act as a prudent merchant, stated that the examination of the Turkish Patent and Trademark Office registry showed that the applicant has trademark applications for signs of other reputable brands operating in the clothing sector abroad, just as was the case for the plaintiff company of the cited court action. Such evidence led to acceptance of the challenged trademark as being registered in bad faith. The Court evaluated that the applicant did not have a convincing argument as to why the trademark application was made by choosing the same sign of the plaintiff company's genuine trademark, even if in different classes. Therefore, it was concluded that the applicant knew of the earlier trademark of the plaintiff, which has high degree of distinctiveness and was originally created, and it was decided that the challenged trademark was made for the purpose of "*taking unfair advantage of someone else's trademark*", which is one of the circumstances of bad faith described in the decision dated 16.7.2008 and numbered 2008/11-501E.(Merits) 2008/507 K.(Decision)⁴. of the Court of Cassation General Assembly of Civil Chambers ("General Assembly").

¹ Uğur Çolak, Türk Marka Hukuku, 5th Edition, p. 1218

² Court of Cassation 11th H.D. 04.02.2015 T, 2014/15654 E. 2015/1254 K: "It is not possible for the defendant to have registered 28 trademarks on the grounds that it will use all of them, considering the fact that many of these registrations are similar to the logos of world-famous trademarks such as ... in the sector, it reveals the defendant's bad faith..."



- Similarly, in the decision of Ankara 2nd Civil IP Court dated 28.09.2023 and numbered 2022/377 E.(Merits) 2023/320 K.(Decision), invalidation of the challenged trademark was claimed by a world-famous tire company because the challenged trademark was identical to a trademark of the subject tire company. The Court evaluated that the defendant applied for a total number of 127 different trademarks, some of which were identical to well-known trademarks covering same or similar goods, and where one was even identical to another reputed tire brand. The Court considered the whole trademark portfolio of the applicant in scope of bad faith. The Court stated that there is no sufficient argument by the applicant explaining the reason for trademark applications identical to well-known tire brands, that there is no evidence about the applicant's business with the tires. The Court concluded that such circumstances could substantiate the case of "trademark backup" as

stated in the decision of the General Assembly and the Court concluded that the applicant registered the challenged trademark in bad faith and the Court ordered for invalidation of the challenged trademark.

The conduct of the applicants, which can be characterized as creating a portfolio by registering the same or similar trademarks of well-known trademarks, is considered as example of bad faith in the recent decisions of the CoC. Considering the above decisions, it is evident that the courts of first instance and the regional courts of appeal adopted consistent opinion in line with the decisions of the CoC acknowledging the bad faith of the applicants who try to establish a trademark portfolio by copying well-known or highly distinctive trademarks of others. Based on this interpretation, it is possible to argue that the fact that an applicant seeks to register a large number of well-known or highly distinctive trademarks, which are originally belonging to third parties, may be considered sufficient in finding bad faith.



³ Ankara 3rd Civil IP Court decision dated 19.02.2019 numbered 2018/217E. 2019/36 K. : "In addition, when the other trademarks, that the defendant attempted to register on behalf of himself and the company in which he is a partner, copied famous trademarks operating in the AUTOMOTIVE sector, when these circumstances are evaluated as a whole, it cannot be considered that the trademark registration ... whose invalidity is requested ... was filed without being aware of the plaintiff's trademark..."

⁴ "According to the generally accepted understanding in Trademark Law, applications and registrations aimed at taking unfair advantage of someone else's trademark by misusing the trademark protection provided through registration in a manner contrary to its purpose, or applications and registrations that are not actually used but are intended for backup, trademark trading or blackmail are considered to be bad faith."

The Criteria of Use for the Recognition of Vested Right Claim based on a Prior Trademark

In its decision dated 21.12.2022 and numbered 2021/5302 E.(Merits), 2022/9311 K.(Decision), the 11th Civil Chamber of the Court of Cassation upheld the Regional Court of Appeal's decision that the "M..." trademark, for which the plaintiff could not prove the genuine use in class 44, was deemed insufficient to constitute vested right in favor of the plaintiff in relation to the refiled "M..." trademark application subject to the case.

On June 07, 2013, a trademark application was filed for the registration of the trademark "M..." in all classes from 01 to 45.

Following the publication of the trademark application in the Official Trademark Bulletin, the opponent, who is the owner of several trademarks with the "M..." phrase, requested the refusal of the trademark application entirely having relied on these trademarks.

In its decision, the Turkish Patent and Trademark Office ("the Office") Re-examination and Evaluation Board ("REEB") partially refused the trademark application in terms of the *"Medical services. Beauty care services. Veterinary and animal husbandry services. Agriculture, horticulture and forestry services"* in class 44 on the grounds that the trademark application creates a likelihood of confusion with one of the "M..." formative trademarks.

By filing a cancellation action against this decision, the applicant has claimed, among other arguments, that he is the owner of a

prior trademark registration for "M..." which covers the services in class 44, and therefore, this prior trademark registration constitutes a vested right in his favor concerning subject trademark application, and requested the cancellation of the Office's decision.

In its defense, the defendant claimed that the conditions of Article 8/1(b) of the Decree Law No. 556 were met and since the plaintiff has not been using the "M..." trademark, this trademark does not constitute vested right to the plaintiff in terms of the trademark application subject to the case, and requested the dismissal of the court action.

The Court of First Instance determined, amongst others, that the subject "M..." trademark application was a serial trademark in terms of the services in class 44 corresponding to the plaintiff's "M..." trademark which covers the services in class 44, that the plaintiff's earlier trademark incorporated the phrase "M..." in its entirety, and that the plaintiff's latest trademark application included the same services in class 44 covered by the earlier trademark which were also the subject of the case. Therefore, the Court decided to accept the plaintiff's vested rights claim and to cancel the Office's related decision on the grounds that it is no longer appropriate to accept the claims and defenses raised by the defendant regarding that "the plaintiff has not been using the trademark "M..." and therefore registered the trademark subject to the case" following the dismissal of the

court action filed for the cancellation of the “M...” trademark due to non-use upon the annulment of Article 14 of the Decree Law No. 556 by the Constitutional Court.

The attorney of the defendant Office and the attorney of the defendant company filed an appeal against the decision of the Court of First Instance.

Having evaluated that there is a likelihood of confusion between the “M...” trademark application subject to the case and the “M...” formative trademark, which is the grounds of partial refusal in terms of services in class 44, and that the plaintiff could not prove the use of the “M...” trademark for the services in class 44; the Regional Court of Appeal, reversed the decision of the Court of First Instance and dismissed the court action on the grounds that the trademark “M...” does not constitute vested rights for the plaintiff in terms of the trademark application subject to the case. The 11th Civil Chamber of the Court of Cassation upheld this decision with its decision dated 21.12.2022 and numbered 2021/5302 E.(Merits), 2022/9311 K.(Decision).

The decision of the Court of Cassation shows that one of the elements to be taken into account in the assessment of the vested right should be the use of the trademark on which the vested right is grounded, and sheds light on the importance of not only having a trademark registration but also the use of the trademark shown as the basis of the vested right for trademark owners.

This decision provides guidance for trademark owners in assessing as to which trademark(s) could serve as a basis for vested rights arguments to avoid adverse consequences in opposition or litigation proceedings.

Can Trade Name Constitute Trademark Infringement?

There are criticisms concerning whether a trade name or business name can constitute trademark infringement and unfair competition, particularly in cases where the trade name is not used as a trademark. This criticism has been subject to numerous disputes both under the Decree Law No. 556 Pertaining to Protection of Trademarks and the Industrial Property Code ("IP Code")¹. The Courts, by considering the applicable provisions of the legislation in force, as well as the specific facts of each dispute, have rendered decisions regarding this topic.



The issue has been thoroughly discussed in the decision dated 08 February 2023 and numbered 2021/446 E.(Merits) - 2023/61 K.(Decision) issued by the Court of Cassation General Assembly of Civil Chambers, ("General Assembly") which is the highest board of the civil chambers in the Court of Cassation ("CoC") and its decisions are final. Its decisions are considered as precedents and are taken into serious account by the lower instance courts and these decisions are seen as unifying the decisions. It has been concluded that trademark infringement may occur if there is a possibility of damage to the functions of the trademark, and the use of trade name as trademark is not a mandatory requirement for trademark infringement.

In the court action subject to the cited General Assembly decision, an evaluation was made as to whether the use of the earlier trademark "MESA" in the trade name of the defendant company constitutes trademark infringement and unfair competition against the plaintiff's registered trademarks. The fact is that the defendant conducts business in scope of the same and similar services covered by the registered trademarks of the plaintiff. The First Instance Court decided to partially accept the court action on the grounds that the use of the plaintiff's "MESA" trademark in the trade name of the defendant did not constitute trademark infringement, but such act constituted unfair competition pursuant to the Turkish Commercial Code. It was reasoned that the defendant did not use "MESA" as a trademark but only registered it within its trade name. The appeal, filed by the plaintiff against the First Instance Court's decision, was accepted by the Regional Court of Appeals ("Regional Court"). It was decided for determination and revocation of the trademark infringement and unfair competition, as well as for deletion of the core part i.e., "MESA" from the defendant's trade name. Upon the defendant's appeal, the 11th Civil Chamber of the CoC reversed the decision of the Regional Court by stating

¹ Decree Law No. 556 Pertaining to Protection of Trademarks was abolished by the Industrial Property Law ("IP Code") which entered into force on 10 January 2017.

² Uğur Çolak, Türk Marka Hukuku, 4. Baskı, 2018, s. 555)

that the use of the trade name as a trademark is mandatory for trademark infringement, but the Regional Court resisted against the reversal decision of the CoC. The resisting decision was appealed by the defendant. In the final decision rendered by the General Assembly, the resisting decision of the Regional Court of Appeal was found to be appropriate and was upheld. It was concluded that it is not mandatory condition for the trade name to be used as a trademark for the infringement of the trademark rights. The decision was grounded on Article 7/3(e) and Article 29/1(a) of the IP Code, clearly ruling that using the sign as a trade or company name shall be considered as infringement of trademark rights. It was also held that infringement of trademark rights may also occur if there is possibility of damage to the functions of the trademarks. Therefore, it was determined that the use of the registered trademark of the plaintiff i.e., "MESA" in the trade name of the defendant company - which conducts business in scope of the same and similar services covered by the plaintiff's trademarks - constitutes trademark infringement against the plaintiff's registered trademarks.

The Bakırköy 2nd Civil IP Court, in its recent decision dated 12 July 2023 and numbered 2023/18 E.(Merits) - 2023/210 K.(Decision), followed the ruling of the General Assembly in its decision 08 February 2023 and numbered 2021/446 E.(Mertis) - 2023/61 K.(Decision) as precedent and adopted the same principles.

Before the enactment of the IP Code, it was accepted that the mere use of a prior dated trademark in a trade name does not constitute trademark infringement. The trademark infringement was acknowledged if the trade name is used as a trademark. Indeed, intellectual property law scholars, academics, authors have stated that mere use of a prior dated trademark in a trade name does not constitute trademark infringement within the meaning of Decree Law No. 556 and it is required trademark use of the trade name². Article 7/3(e) and Article 29/1(a) of the IP Code explicitly stipulates that using the sign as a trade or company name shall be considered as infringement. Therefore, the use of a trademark in a trade name will constitute trademark infringement, not only when the trade name is used as a trademark, but also in cases where the use poses risk to the functions of the trademark. Taking into account the above referenced decisions, it is evident that the courts and scholars have adopted a consistent perspective that the use of a registered trademark in a trade name will constitute trademark infringement, even if the trade name is not also used as a trademark.

The Relationship Between Virtual and Physical Goods and Services

It is observed that with the development of NFTs, artificial intelligence, and the metaverse, many individuals and legal entities have started to include virtual goods and services within the scope of their trademarks. Discussions were widely held about whether virtual goods and services are similar to physical goods and services and under which class these goods and services should be included in the Nice Classification, and the following developments have taken place in this regard.

In a decision issued on March 31, 2023, which was subsequently finalized, following an opposition based on an earlier trademark owned by a client company based in the United States, the Trademarks Department of the Turkish Patent and Trademark Office ("the Office") has determined that virtual and online goods/services were similar to physical goods/services, and rejected the trademark

application pursuant to Article 6/1 of the Industrial Property Code No. 6769 ("IP Code").

The trademark application had been filed for the clothes under scope of class 25 and retail services allocated to clothes under class 35, among others.

The opponent filed an opposition against the application insofar as it sought registration for clothes and retail services allocated to clothes, as it was identical to its earlier trademark covering the *"Downloadable virtual goods in the field of fashion for use in virtual environments and worlds; downloadable virtual goods in the nature of clothing, jewellery, watches, bags..."* in class 9, *"Retail store and online retail store services featuring virtual goods - namely, clothing, jewellery, watches, bags.. eyewear and other retail items"* in class 35; and *"Entertainment services - namely, providing online, non-downloadable virtual clothing, jewellery, watches, bags... and other retail items"* in class 41, among others.

Upon examination of the opposition, the Office determined that the trademarks were similar, and that the virtual and online goods/services covered by the opponent's trademark were similar to the physical goods/services covered by the opposed trademark. As a result, the trademark application was rejected in accordance with Article 6/1 of the IP Code.

Likewise, in the United States, a trademark application filed by a third party containing the word element “Gucci”, covering *“downloadable virtual goods - namely, computer programs featuring footwear, clothing, headwear, eyewear ... and charms for use in online virtual worlds”* in class 9 and *“retail store services featuring virtual goods - namely, footwear, clothing, headwear... and charms for use in online virtual worlds”* in class 35 was rejected by the US Patent and Trademark Office (“USPTO”) after a preliminary examination, on August 30, 2022. The USPTO found that, due to the close association between virtual and physical goods/services, consumers encountering the parties’ goods and services would presume that they originated from the same source¹. Therefore, the decision of the Turkish Office is consistent with the approach of the USPTO. It thus seems that trademark offices across the world are acknowledging that virtual and physical goods/services are similar or related.

In addition, during the webinar entitled “Trademarks and designs in the metaverse: legal aspects/EUIPO practice” organized by the European Union Intellectual Property Office (“EUIPO”) on September 13, 2022, it was stated that the key aspect of virtual goods is to emulate core concepts of real-world goods and that the consumer perception criteria used for real-world goods can also be applied to virtual goods².

In parallel with all such developments worldwide, it is seen that virtual goods and services and NFTs have been included under certain goods and services in the 12th edition of the Nice Classification published by the World Intellectual Property Organization (“WIPO”), which entered into force as of January 01, 2024³. For example, under class 09 “Downloadable digital music files authenticated by NFTs, downloadable digital image files authenticated by NFTs, downloadable application software for virtual environments”, under class 25 “clothing authenticated by NFTs” and under class 41 “simulated travel services provided in virtual environments for entertainment purposes, entertainment services provided in virtual environments” have been included.

To conclude, it can be considered that trademark offices around the world and in Türkiye have acknowledged that virtual and physical goods and services are similar or related and that virtual goods and services will be included in detail in the Nice Classification in the upcoming years.

¹ <https://tsdr.uspto.gov/documentviewer?caselid=sn97112038&docId=NFIN20220830103820#docIndex=2&page=1>

² <https://euipo.europa.eu/knowledge/course/view.php?id=4763>

³ <https://www.wipo.int/classifications/nice/nclpub/en/fr/?gors=en&lang=en&menulangen&mode=flat¬ion=modifications&version=20240101>

The Impact of Artificial Intelligence on Trademark Law



The impact and changes as a consequence of the spread of artificial intelligence (“AI”) technologies are seen in many areas, including the trademark law. As a result of the rapid development of AI technologies, the need to re-evaluate some of the basic practices and concepts of trademark law has arisen.

The first aspect of these developments is the use of AI in trademark application, registration and other related administrative procedures. As can be seen from the Index¹ published by the World Intellectual Property Office (“WIPO”), Offices around the world are using these technologies to increase time/cost efficiency, improve accuracy of the transactions and their internal productivity. Examples of the use of AI in trademark application and registration processes include performing comparative similarity assessments, scanning the database to detect prior dated similar trademarks for trademark clearance purposes and automating some of the procedures of the Office.

Similarly, AI is being used to detect and monitor trademark infringement and unauthorized use, particularly on online platforms, are detected by making use of AI algorithms.

Another point is the consideration of AI technologies in terms of the general principles of current trademark law. One of the fundamental functions of a trademark is to determine the source of goods and services in the eyes of consumers and to differentiate one business enterprise from another, where the average consumer, defined as “a consumer who is reasonably well-informed and reasonably observant and circumspect²”, is taken into account in the relevant assessment. Considering the speed in which consumers shop today, this fictitious “average consumer” has little to no time or opportunity to compare goods/services side by side and it is assumed that the consumer acts on the memory of an image or perception. It is upon this assumption of imperfect recollection in human beings that an assessment of similarity or likelihood of confusion and infringement is conducted.

However, with the rise of AI technologies, the structure of how we traditionally shop has also changed; AI assistants, search engines, chat bots and online marketplaces have begun to play a significant role in consumers’ purchasing preferences³. In this context, we have started to encounter situations where,

either these preferences are determined according to the results presented by AI, the shopping action itself is directly and automatically carried out by AI itself, or with the consumer's voice commands or perhaps even without any command at all.

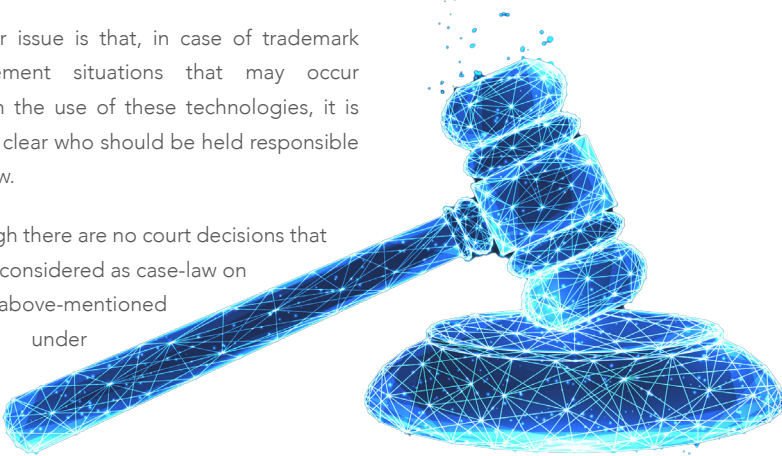
These developments are transforming shopping processes from making purchase decisions based on physically encountering the products on shelves and the emotional, cultural, social and other similar type of bonds between the brand and the consumer, to a process where the choices are guided directly by AI. In some cases, the shopping itself is directly carried out by AI. In this context, in the face of AI's ability to analyze complex data without error, the necessity arises to reconsider concepts developed in trademark law, such as the "average consumer" and the "likelihood of confusion", which is shaped according to the imperfect recollection of a human being⁴.

Another issue is that, in case of trademark infringement situations that may occur through the use of these technologies, it is not yet clear who should be held responsible and how.

Although there are no court decisions that can be considered as case-law on the above-mentioned points under

discussion, in the decision of "Cosmetic Warriors and Lush v Amazon.co.uk and Amazon EU", it was considered as trademark infringement when, on Amazon's website, a search for the word "Lush" related to cosmetic products resulted in similar items being presented to users in a manner that could lead to confusion, even though these products were not sold on the site. In this context, it is evident that the level of involvement of AI providers in relevant purchasing processes and their contribution to direct the consumer preferences will be crucial in determining their responsibility on a case-by-case basis.

In light of the above, it is of great importance for trademark owners to closely monitor the opportunities that this increasingly prevalent technology can offer while determining their commercial strategies and taking preventive measures to avoid situations that may lead to infringement.



¹ https://www.wipo.int/about-ip/en/artificial_intelligence/search.jsp

² Turkish Trademark Law, Colak Uğur, Oniki Levha Publications, 4th Edition, p.238

³ WIPO Conversation on IP and AI, Second Session, Revised Issues Paper on IP Policy and AI, p. 12.

⁴ Kalyan Revalla, Intelligent Trademarks, p.16

⁵ Cosmetic Warriors and Lush v Amazon.co.uk and Amazon EU [2014] EWHC 181 (Ch)

New Legislation on IP Infringement on e-Commerce Platforms



Law No. 7416, amending E-Commerce Law came into effect as of January 01, 2023. This law obliges e-commerce platforms to take down a product if they receive a legitimate complaint alleging that a violation of intellectual and industrial property rights has occurred on their platform.

According to Law No. 7416, the general principle is that the intermediary service provider (i.e., the platform) is not responsible for the illegality of the content offered by the service provider. Nevertheless, it is obliged to take down a product upon a complaint by the right owner based on information and documents regarding the violation of IP rights.

If the illegal content is not removed upon complaint, or if the content is republished despite being proved illegal, the intermediary service provider will be subject to an administrative fine from TRY 10,000 to TRY 100,000 for each violation.

A regulation complementing Law No. 7416 also came into effect as of January 01, 2023. According to this regulation:

- The complaints alleging IP rights infringement shall be made to the platforms through their internal communication system – which the platforms will establish- or Notary Public or Registered Electronic Mail, and shall include:
 - a registration certificate demonstrating the complainant's ownership of that IP right;
 - the identification and communication information of the complainant;
 - a power of attorney (if the complaint is filed by proxy);
 - explanations and evidence to prove that the product complained of infringes the complainant's rights;
 - the internet address hosting the product complained of; and
 - a statement that the complainant will be responsible for any damages that may arise if the information and documents submitted within the complaint are incorrect.

- If the complaint does not meet the above conditions, the intermediary service provider shall not process the complaint and shall inform the complainant of the deficiencies.
- The intermediary service provider shall remove the product complained of within 48 hours of receiving the complaint and shall inform the complainant, as well as the service provider.
- An objection against the complaint shall be made to the intermediary service provider through its internal communication system, or via a notary public or registered electronic mail, and shall include:
 - the identification and communication information of the objecting party;
 - a power of attorney (if the objection is filed by proxy);
 - explanations and evidence to prove that the product complained of does not infringe the complainant's rights;
 - documents, such as invoices and license agreements, demonstrating that the products complained of is an original and/or has been placed on the market with the authorization of the IP rights holder; and
 - a statement that the objecting party would be responsible for any damages that may arise if

the information and documents submitted within the objection are incorrect.

- If an objection does not meet the above conditions, the intermediary service provider shall not process the objection and shall inform the objecting party of the deficiencies.
- If it is clear that the objection is rightful based on the information and evidence provided, the intermediary service provider shall republish the product complained of within 24 hours of receiving the objection and shall inform the objecting party, as well as the IP rights holder. The intermediary service provider shall not process repeat complaints regarding the same product, unless new documents proving the infringement are submitted by the complainant.

The regulation clarifies how IP rights holders may file complaints with e-commerce platforms, as well as how objections to such complaints may be filed in return. It aims to provide a balanced, predictable and speedy procedure to protect IP rights against infringement on e-commerce platforms.

However, ambiguities regarding the procedure may still create problems in practice. For instance, while the internal communication system to be established by intermediary service providers would create a simple and functional tool to file complaints and objections, it remains to be seen whether such a system would fulfil the burden of proof.

On the other hand, intermediary service providers have a very limited period of time to take action upon receiving complaints and objections. Although these limits seek to ensure that complaints and objections are examined quickly, they will probably prove to be very challenging for intermediary service providers, and may call into question the depth and accuracy of the platforms' analysis on the merits of issues.

Also, it should be noted that this procedure does not prevent parties from resorting to administrative and judicial bodies. Nevertheless, it seems that the complaint procedure would enable fast solutions and help rights holders to take down infringing products very quickly.

In fact, this fast-track complaint procedure for IP rights infringements is only a small part of a substantial change in the e-commerce legislation, which can be also referred to as a set of preventive and conservative rules in general; and therefore the new legislation is challenged at administrative stages. Upon request of a well-known e-commerce platform, the Council of State issued a stay of order and administrative proceedings are currently pending. But that it is still possible to request removal of content infringing IP rights based on the basic regulation concerning the responsibilities of e-commerce sites regarding the content that they host was included in Law No. 5651 on the Regulation of Internet Broadcasts and Prevention of Crimes

Committed Through These Broadcasts (Internet law).

Is Alternative Dispute Resolution Effective Enough for “.tr” Domain Names?

This article discusses the alternative dispute resolution mechanism for “.tr” domain names in Türkiye. It highlights the efficiency of the alternative dispute resolution mechanism and addresses some concerns over the transparency of proceeding.

TRABIS (“.tr” Network Information System), established by the Turkish Information and Communication Technologies Authority (“BTK”), became operational on September 14, 2022 and undertook the management of “.tr” domain names. Upon the introduction of TRABIS, the “first come, first served” principle started to be implemented for allocation of domain names such as ‘com.tr’, ‘org.tr’, ‘net.tr’, ‘gen.tr’, ‘biz.tr’, ‘tv.tr’, ‘web.tr’, ‘info.tr’, ‘bbs.tr’, ‘tel.tr’, or ‘name.tr’. The obligation for submitting any documents to prove the rights of the applicant was abolished. Introduction of the “first come, first served” principle necessitates an effective dispute resolution mechanism for domain name disputes.

Dispute Resolution Service Providers, which are accredited by TRABIS, have started to handle the alternative dispute resolution process regarding “.tr” domain names. It can be said that the regulatory rules and proceeding are quite parallel to the Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) system. Yet, there are subtle nuances compared to the UDRP rules in terms of criteria for the examination of the complaints.

The Dispute Resolution Service Providers shall decide to cancel the disputed domain name and/or transfer it to the complainant if the following conditions are cumulatively met:

- i. The subject domain name is similar or identical to the trademark, trade name, business name or other identifying signs owned or used by the Complainant in trade;
- ii. The registrant of the domain name has no legitimate interests in respect of the domain name, and
- iii. The domain name is registered or used in bad faith by the registrant.



Unlike UDRP rules; not only is the trademark right taken into account when examining the priority rights of the complainant, but the complainant’s tradename, business name or any other identifying marks used in the commercial life are also taken into account. Another important point is related to the bad faith examination. According to UDRP rules, the contested domain name must be both registered and used in bad faith. However, in

the Turkish Regulation, the presence of one of either of these conditions is considered sufficient for the third condition to be met due to the use of the word “or” in the legislation concerning the relevant condition.

In the period of over a year since the new legislation came into force, an applicable case-law has started to develop with decisions rendered by the Dispute Resolution Service Providers. There is a broad and comprehensive perspective in the examination of the conditions mentioned above.

On the other hand, there is an essential difference in terms of disclosure of the registrant, having the disputed domain name, during proceedings for alternative dispute resolution. This may affect the complainant’s interests and effective exercise of their right to legal remedies.

In contrast to the UDRP, registrant information is not disclosed by Dispute Resolution Service Providers under any circumstances, even after filing the domain name complaint or during the alternative dispute resolution proceeding. As a result, domain name complaints are typically submitted by the complainant without any knowledge about the registrant’s identity. Dispute Resolution Service Providers do not disclose registrant information during the proceeding, so the complainant is not given the right to modify the complaint based on registrant information. Disclosure

of the registrant information is, in principle, a very effective process in terms of proper enforcement of the complainant’s right to legal remedies. Because the complainant, having access to the registrant information, is granted the opportunity to provide more satisfactory additional information and evidence about the use or registration of the domain name in bad faith by the domain name owner. Such practice also allows the complainant to effectively evaluate whether the registrant has legitimate rights or interest in the relevant domain name.

The short periods for notification of complaint, submission of response, as well as the rapid decision-making process provided by the Dispute Resolution Service Provider make the alternative dispute resolution mechanism efficient and preferable by the right owners. It is also possible to file a court action before the competent authorized courts for infringement of domain names. However, these court actions are not only rather costly, but also lengthy.

In conclusion, it is evident that the alternative dispute resolution mechanism, allowing the litigation-free resolution of domain name disputes, operates in an effective and beneficial manner. It is expected that the deficiencies will be completed so that the new process in “.tr” extended domain names will be integrated in a wider scope.

Combating Counterfeit and Smuggled Drugs

Foreign pharmaceutical trademarks are, in principle, registered in the name of the companies in the countries where they are established, and trademark protection procedures are managed by those companies. Although their affiliates in Türkiye are not a party to trademark protection proceedings, since the affiliates become the marketing authorization holders of the drug, they are considered the relevant addressee of the Ministry of Health ("MoH") in all transactions related to the product.

The Turkish Medicines and Medical Devices Agency ("Agency") is responsible for regulating and supervising drugs and other healthcare products. The Drug Tracking System ("DTS") has been developed to combat drug smuggling and counterfeiting; all drugs are registered with a unit based QR code and every transaction is tracked from the moment it enters the market until it reaches the patient. Marketing authorization holders in Türkiye shall notify the Agency of any counterfeiting and smuggling activities of which they become aware and are also obliged to notify under Article 278, "Crime of Failure to Report a Crime", of the Turkish Penal Code ("TPC").

How to get informed?

Since pharmaceutical companies do not sell medicines directly to patients and drugs are delivered through pharmaceutical warehouses and pharmacies, there are many actors in the

supply of drugs. Therefore, information on counterfeit drugs can be obtained through reports made to the company by physicians, warehouses, or pharmacists other than the patient. Upon such reports, it is possible to act based on the individuals identified and the detailed information, evidence and samples obtained through general field and/or address-based investigations conducted by lawyers or investigation companies.

What are the legal remedies?

Depending on the evidence obtained, complaints can be filed under Articles 186 and 187 of TPC, under "Manufacturing Counterfeit Drugs" and "Infringement of Trademark Rights and Unfair Competition". In the case that counterfeit or original drugs enter the country without being subjected to the required customs regime (in other words, if they are smuggled), legal action pursuant to the Anti-Smuggling Law can also be taken separately or with the complaints mentioned above.

Since the crimes of Trademark Infringement and Unfair Competition are crimes prosecuted upon complaints, the trademark or marketing authorization holders must decide whether or not to file a complaint, depending on the evidence obtained. As the principle of ex officio prosecution applies to crimes that violate Article 186 and 187 of TPC and the Anti-Smuggling Law, investigations and raids can be initiated by the Security Forces on their

own or following criminal complaints filed by pharmaceutical companies.

When to notify?

In criminal investigations related to drugs, the contribution of local affiliates can be done by filing a complaint with the MoH or the Agency. Even if the trademark owner is a foreign company, the involvement of the local affiliate may be necessary in some cases to ensure ease of notification and follow-up.

When it comes to counterfeit or smuggled drugs, as they cannot be tracked via the DTS, it is essential to investigate the manufacturer, production sites and distributors of counterfeit drugs to take legal action. Filing a complaint before all the information is obtained, or only based on hearsay/suspicion, may prevent the process from proceeding efficiently and quickly. It is advised that the most effective option is to investigate allegations and file complaints with the competent authorities after sufficient evidence has been collected. Otherwise, perpetrators may become aware of the situation and destroy the evidence.

When a criminal complaint is filed with the prosecutor's office based on the trademark right, it is beneficial to wait for the conclusion of the process and then file a complaint with the Agency about the relevant product. This is because the issues to be examined by the Agency are not trademark disputes, but issues concerning public health. Especially in cases where a pharmacist or a physician is a

suspect, it is important to file a complaint with hard evidence. The timing of the complaint is an important strategic factor, as criminal complaints against these persons may be withdrawn at a later stage.

In cases where the process is initiated ex officio by law enforcement officers, it is equally important to follow up by getting involved in the process. Complaints to the Agency or the MoH should also be considered after raids and the main stages of the process should be completed.

In recent years, operations related to smuggled and counterfeit drugs can be initiated not only by data obtained from domestic sources, but also by investigations conducted by international platforms. Last year, a significant number of counterfeit or smuggled drugs were seized in the Pangea XVI operation, which was conducted in coordination with the Interpol-Europol Department and the Anti-Smuggling and Organized Crime Directorate. In 2024, it is expected that similar operations will be conducted. It is advised that trademark owners conduct investigations to obtain as much information as possible to support the related processes.

Strategic Battlefield in Combating Counterfeiters: Turkish Riviera, West and South Coast of Türkiye



With a coastline of almost 9,000 kilometers and over 550 blue flag beaches, Türkiye welcomes millions of domestic and foreign tourists during the summer season each year. The most popular area for summer vacations are known as the Turkish Riviera, comprising the cities of Antalya and Muğla in particular, and also some parts of Aydın and İzmir, encompassing the main districts of Alanya, Antalya, Kemer, Fethiye, Marmaris, Bodrum, Kuşadası and Çeşme from the south to the west coast of Türkiye.

Even though the total number of tourists had decreased due to the pandemic back in 2020, a move from larger cities to small towns, and especially to districts in the Turkish Riviera, was observed following the impact of the pandemic on our lifestyles and one which changed our way of working, with a shift to working from home.

Additionally, due to consequences of the massive earthquake disasters in Türkiye, the effects of Russia-Ukraine war and migration

from the Middle East, a large number of people moved to districts in the Turkish Riviera. Furthermore, with tourism being diversified in the last years, these districts have become more and more popular, providing resorts for golf and football training camps, etc.

With the increase of population, infringers took this as an opportunity and expanded their activities. Some of the infringers have moved their production sites and warehouses to these areas and most of them continue with sales of counterfeit products not only in the summer months, but throughout the whole year. The increase in the number of visitors coming with the purpose of counterfeit product shopping has also encouraged the infringers in this sense. Lately, it has been observed that there are many counterfeits of famous brands in almost all sectors from textile to electronics, sometimes even more than available in the capital cities.

Therefore, it is particularly important to understand the sectoral factors and to take

action against the infringers at the early stage. For instance, in terms of textile products that will enter market in the summer season, it is advisable for brand owners to take aim at the production sites and warehouses first without waiting for the summer season, to prevent distribution and sales of counterfeit products to the domestic market, as well as to other countries. Similarly, in terms of winter shoes, the brand owners are advised to focus the aim at production sites and warehouses during summer season. In terms of retail stores, on the other hand, it is advised to continue with the actions during the whole year in order to give a strong message of active combating in the domestic market and to decrease the visibility of counterfeit products.

While combating counterfeit in the west and south coasts of Türkiye, it should be noted that the legal practice in the districts of the Turkish Riviera can also vary from the regular practice in large cities. While some of the prosecutors find the invoices or other substantial evidence in the complaint showing production/sales of the counterfeit products sufficient to request for a search and seizure warrant from the judge, others may decide to obtain a police investigation report about the target subject to the complaint. Another significant point is that not all judges issue search and seizure warrants. In some cases, despite all evidence showing production/sales of the counterfeits, judges may simply reject the search and seizure requests and although an

objection can be filed against the rejection decision, it can take several months for the higher court to examine the objection and render a decision, depending on its workload. Thus, the timing of complaint submissions is also very important, and each case should be evaluated separately based on the region, sector and business capacity of the infringers to create a strong strategy specific to the west and south coast of Türkiye.

We have a special project aiming at the infringers on the west and south coasts of Türkiye, which has been carried out for many years. By taking into consideration the needs of a significant number of clients, we regularly perform raids in the regions of the Turkish Riviera. In fact, based on our recent experience, we are of the opinion that the raids should continue to be performed throughout the year.

To summarize; due to the reasons explained above, it is advisable to perform raids in the area of Turkish Riviera not only in summer season but during the whole year, to actively combat counterfeiters and to decrease the visibility of counterfeit products.

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Firm Overview

We are one of the oldest and largest law firms in Turkey and are considered internationally to be among the top-tier of legal services providers.

We are a full-service law firm leading the intellectual property field among others, providing dispute management, advisory, transactional, prosecution, investigation, and regulatory markets law services to domestic and multinational corporations.

We are based in Istanbul, with working and correspondent offices in Ankara, Izmir and the major commercial centres in Turkey.

We operate mainly in Turkish and English and also work fluently in German and French.

We advise a large portfolio of clients in numerous fields of activity including life sciences, insurance and reinsurance, energy, construction & real estate, logistics, technology, media and telecoms, automotive, FMCG, chemicals and the defense industries.

Our vision is to be the leader in the services we provide, sensitive to wider society, the environment, and our employees as an innovative and sustainable institution.

Our clients' success is at the heart of our own success. We closely monitor developments in the business sectors in which our clients operate and invest in accumulating industry specific knowledge to understand their changing needs. We actively participate in professional, trade and business organisations in Turkey and internationally.

We are committed to adapt to our clients' changing business needs by delivering innovative, high quality and commercially prudent legal solutions.

