

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 plaint 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.