

14. A NEW ERA IN TURKISH INDUSTRIAL PROPERTY LAW

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ABSTRACT

A need for an up-to-date, effective and competent industrial rights system in harmony with international conventions and EU law has arisen in Turkish Industrial Property Law. On these grounds, Law No. 6769 on Industrial Property was prepared and finally legislated in Turkey and was effective 10 January 2017. The code consists of five books: trademark, geographical indications and traditional specialties, design, patent and utility models, and common provisions. Although the industrial property system is preserved in Law No. 6769, many amendments were made in the new Turkish Industrial Property Law. The significant novelties in industrial property law and the potential challenges regarding the implementation of the Law will be introduced and presented.

Keywords: *Law No. 6769 on Industrial Property, Turkish patent law, Turkish trademark law, Turkish design law, Turkish geographical indications*

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¹ Law No. 6769 on Industrial Property, *Official Gazette* 10 Jan. 2017-29944. For the unofficial translation of the law, see Industrial Property Code <<https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/4D59A7D3-A564-40A1-9C96-DB1E3D157E90.pdf>> accessed on 14 November 2018.

² Ottoman Empire was an imperial power which founded in Anatolia in the late thirteenth century. See, Gábor Ágoston, 'The Ottoman Empire and Europe' in Hamish Scott (ed), *The Oxford*

1. INTRODUCTION

Although Turkey is one of the first countries to have legislation on Industrial Property (IP), the first codification initiatives began in the 1930s and all failed until Law No. 6769 on Industrial Property was enacted on 22 December 2016.¹ Although the general structure of the Turkish industrial property system is preserved in the aforementioned law, there are lots of amendments or novelties to provide an up-to date and effective industrial property law in harmony with the international agreements and EU law. The aim of this paper is to introduce the significant novelties in Turkish industrial property law and to present the doctrinal discussions relating to them with a general overview of the law.

2. HISTORICAL BACKGROUND AND OVERVIEW OF LAW ON TURKISH INDUSTRIAL PROPERTY

A. HISTORICAL BACKGROUND

IP regulations date back to the Ottoman Empire.² The first regulation, the Letter Patent Act, was enacted in 1879³ and the Trade Mark Regulation was enacted in 1888. These regulations were still in force after the Republic of Turkey was founded in 1923 and remained in

Handbook of Early Modern European History, 1350-1750: Volume II: Cultures and Power (Oxford University Press 2015) 612. The Grand National Assembly of Turkey was founded in Ankara in 23 Apr. 1920 and abolished the Sultanate on 1 Nov. 1922. For further information see İrfan Neziroğlu (ed), *The Grand National Assembly of Turkey* (GNAT Press 2015) <https://www.tbmm.gov.tr/yayinlar/prestij_kitap_ingilizce_s.pdf> accessed on 21 August 2019.

³ Letter Patent Act was the sixth patent law adopted in the world. Mustafa Ateş, '6769 Sayılı Sınai Mülkiyet Kanunu'na Genel Bir Bakış (An Overview on Industrial Property Law No.6769)' (2017) 128 *Terazi Hukuk Dergisi* (Terazi L. J) 174; Cahit Suluk, '6769 Sayılı Sınai Mülkiyet Kanununun Getirdiği Yenilikler (The New Turkish Industrial Property Code)' (2018) 4 *Ticaret ve Fikri Mülkiyet Hukuku Dergisi* (J. of Comm'l and Intell. Prop. L.) 91.

force until the 1960s.⁴ Although the Ottoman Empire had IP regulations, the Empire did not sign the Paris Convention.⁵ After the First World War and War of Independence, the Ottoman Empire had ended and political, economic and legal independence of the country was declared in the Lausanne Peace Conference⁶. The Treaty of Lausanne, signed after the Conference, obliged Turkey to adhere to the Paris Convention.⁷ Consequently, Turkey acceded to the Paris Convention (as amended in 1911) in 1930. Due to fulfilment of the accession requirements to the Paris Convention, codification initiatives on industrial property law began in 1930s.⁸ However, these initiatives failed and the Letter Patent Act remained valid until 1995 and the Trade Mark Regulation remained valid until 1965.

Decision No.1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union was adopted on 6 March 1995

⁴ For further information about the valid Ottoman Laws in the Republic of Turkey, see Seda Örsten Esirgen, *Osmanlı Devletinde Kanun Yapma Geleneği ve Cumhuriyet Döneminde Uygulanan Osmanlı Kanunları (Law Making Tradition in Ottoman Empire and the valid Ottoman Laws in the Republic Period)* (Turhan Yayınları 2017).

⁵ Paris Convention for the Protection of Industrial Property, March 20, 1883, as revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, T.I.A.S. No. 6903, 828 U.N.T.S. 305.

⁶ Örsten Esirgen (n 4) 234.

⁷ French and Turkish version of Lausanne Peace Treaty of 1923 <<http://www.ttk.gov.tr/wp-content/uploads/2016/11/3-Lozan13-357.pdf>> accessed 14 November 2018.

⁸ The Ministry of Justice sent the Industry Property Law Project to the İstanbul University Faculty of Law to analyze and prepare an opinion on it in 1937. Prof. Ernst Hirsch, who worked at İstanbul University Faculty of Law, in those times was assigned to work on this issue. The proposal was prepared in 1938, however, it was never adopted. See Ernst Hirsch, *Hukuki Bakımdan Fikri Sâ-y (Intellectual Labor in respect of Law)*, vol 1 (V. Çernis tr, Kenan Basımevi ve Kılış Fabrikası 1942) 1-2.

⁹ Decision No 1/95 Of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the

(Customs Union Decision).⁹ Turkey undertook to accede and implement the international agreements¹⁰ which EU or its members were already parties to them. Additionally, Turkey had an obligation to harmonize its domestic IP laws with the European IP Law before enforcement of the Decision.¹¹ Turkey fulfilled this obligation in a short period of time, therefore 1995 was a milestone year for Turkish IP law.¹² Decree-laws on patent and utility models, trademark, industrial design and geographical indications were all enacted in the same year. The Government followed a different path regarding the integrated circuit topographies and new plant varieties and regulated these rights under a law. The Law on the Protection of Integrated Circuit Topographies was enacted in 2004 and the Law on Breeder's right regarding the New Plant Varieties was enacted in 2007.

Customs Union (96/142/EC), 1996 O.J. (L 035) 1. This decision is based on the Agreement establishing an Association between the European Economic Community and Turkey was signed at Ankara 12 September 1963. See Council Decision, of 23 December 1963, on conclusion of the agreement creating an association between the European Economic Community and Turkey, 1964 O.J. (L217), 3687. Association shall comprise three stages; a preparatory stage, a transitional stage and a final stage (Art. 2 of Agreement) and the final stage shall be based on customs union (Art. 5 of Agreement).

¹⁰ See Custom Unions Decision, Annex 8, Art. 2 and Art. 3.

¹¹ *ibid*, Art. 4. Customs Unions is an economic integration between members which involves basically removing the customs tariffs and adopting common customs tariff towards third countries. The final aim is to be a member of EU in Turkey's example. See Emrah Eray Akça, Harun Bal and Mirza Halit Çağlayan, 'The Effects of the Customs Union on Trade Between Turkey and European Union' (2017), 8 LAÜ Sosyal Bilimler Dergisi (LAÜ S.S.J.), 4-6. Because of these reasons Turkey was obliged to approximate its national law to EU law especially in intellectual property and anti-trust law.

¹² Ateş (n 2) 174; Suluk (n 2) 91.

The regulations on patent and utility models, trademark, industrial design and geographical indications were made through decree-laws instead of law.¹³ Decree-Laws had been submitted to the Parliament; however, the ratification process was not completed, meaning the decree-laws have never become a parliamentary act. It should be mentioned that the industrial property decree-laws and many other decree-laws were never ratified during this time.¹⁴ The non-ratification by the Parliament led to the cancellation of some articles of decree-laws by the Constitutional Court of Turkey. Decree-Laws on trademark, patent and utility models and industrial designs provided for criminal sanctions for infringement of these rights. Constitutional Court cancelled these provisions on the ground that crimes and penalties should be regulated by laws and that proportionality principles in criminal law were not observed.¹⁵ Additionally, fundamental rights and freedoms cannot be restricted by the decree-law and IP rights such as trade mark or patent rights are part of property rights. Therefore, the Constitutional Court has started to cancel the articles of the aforementioned decree-laws.¹⁶ Cancellation decisions accelerated the period of the codification.¹⁷ In the end, the new Law on Industrial Property No. 6769 was enacted by the Turkish Parliament on 12 December 2016 and most of the provisions enacted on 01 October 2017.

¹³ Decree-law was a rule of law issued by Council of Ministers was regulated under Art. 91 of Turkish Constitution which was repealed by the Law on Amendments on Turkish Constitution. Decree-Laws came into effect on the day of its publication in the Official Gazette and should be submitted to the Parliament for ratification on the same day according to the repealed Art. 91.

¹⁴ Ünal Tekinalp, 'Significant innovations in Turkey's Industrial Properties Act' (2018) *Gewerblicher Rechtsschutz und Urheberrecht (GRUR) Int'l.* 297.

¹⁵ Constitutional Court Decision, E. 2005/12, K.2008/2, 3 Jan. 2008, Official Gazette 5 July 2008, 26927 and Constitutional Court Decision E.2005/57, K.2009/9, 5 February 2009, Official Gazette 5 October 2009, 27254.

¹⁶ The last cancellation decision is the cancellation of Art. 14 of Decree-Law on Trade Mark. See Constitutional Court Decision, E.

B. OVERVIEW OF THE LAW ON INDUSTRIAL PROPERTY

In addition to the difficulties arising from the cancellation decisions of Constitutional Court, a need for an up-to-date, effective and competent industrial rights system in harmony with international conventions and EU law arose as well.¹⁸ On these grounds, Industrial Property Code No. 6769 was prepared and finally legislated and enacted on 01 October 2017.

As previously mentioned, patents and utility models, trademark, industrial design and geographical indications were regulated under different decree-laws. All regulations of these rights were combined in Law No. 6769. Thus, the law consists of five books: trademark, geographical indications and traditional specialties, design, patent and utility models, and common provisions. Subjects regulated in different decrees such as periods and notifications, shared agent, legal transactions, infringement of industrial property rights, compensation, loss of profit, exhaustion of rights, the persons whom an action cannot be brought against, requirements for an action for infringement, effect of rights dated on before the application, courts of competent jurisdiction, lapse of time, action by licensee and its requirements, interim injunction, the persons competent for legal transactions, fees, and process of extermination are now regulated in the law as common

2016/148, K.2016/189, 14 December 2016, Official Gazette 6 January 2017, 29940.

¹⁷ As a matter of fact, the Law No.6769 wasn't the first proposal submitted to the Parliament. At the beginning of the 2000's, Turkish Patent prepared proposals of Law on trade mark, patent, industrial designs which were submitted to the Parliament. In 2013, Turkish Patent submitted another proposal consisting of 102 articles, however this proposal wasn't enacted either. See Suluk (n 2) 93.

¹⁸ Türkiye Büyük Millet Meclisi (General Justification of Law No.6769)

<<https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss341.pdf>> accessed 14 November 2018.

provisions. Through these provisions, storage and preservation of goods that are subjects of a crime are easier.

Although the enactment of Law No. 6769 is described as a 'new era' in IP law in the paper, it is worth clarifying at the beginning that the general structure of the industrial property system is preserved in the new law. Novelties and amendments were made to establish an up-to-date, effective and competent industrial rights system which has to be more harmonized with international conventions and EU law.¹⁹ Some institutions of industrial property law, such as the system of patent without examination, were abolished whereas other institutions, such as letter of consent in the trade mark law or protection of unregistered designs, were introduced. Moreover, some amendments in industrial property law principles, such as the introduction of international exhaustion instead of national exhaustion, were made. In addition to the amendments and novelties regarding industrial property rights, some amendments have been made regarding the Turkish Patent Institute; the name of the institution has been amended as Turkish Patent and Trade Mark Office (there after TurkPatent) and the Turkish IP Academy were established in 2017. Therefore, the enactment of long-awaited Law No. 6769 deserves to be described as a new era in IP Law.

3. NOVELTIES IN THE LAW ON TURKISH INDUSTRIAL PROPERTY

A. TRADEMARK LAW

A large part of the trademarks decree-law was integrated into Law No. 6769.²⁰ Some provisions were amended to

provide conformity with the new EU Trade Mark Directive²¹ and Regulation.²² The most important novelties can be summarized as the introduction of new types of trade marks, letter of consent, proof of use claim in trade mark oppositions, and revocation authorization to TurkPatent.

Art. 5 of the Decree-Law on Trade Mark provides:

A trademark, provided that it is capable of distinguishing the goods and services of one undertaking from the goods and services of other undertakings, may consist of all kinds of signs being represented graphically such as words, including personal names, designs, letters, numerals, shape of the goods or their packaging and similarly descriptive means capable of being published and reproduced by printing.

The condition of being represented graphically had raised some difficulties with registering non-traditional marks such as sounds, smells, and position trademarks. Therefore, the condition of graphic representation was amended as follows:

Trademarks may consist of any signs like words, including personal names, figures, colors, letters, numbers, sounds and the shape of goods or their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and being represented on the register in a manner to determine the clear and precise subject matter of the protection afforded to its proprietor.

¹⁹ Tekinalp (n 14) 298-299.

²⁰ Fatma Özer, '6769 Sayılı Sınai Mülkiyet Kanunu'nun Genel Bir Değerlendirmesi (An Evaluation of Industrial Property Law No.6769)' (2017), 128 Terazi Hukuk Dergisi (Terazi L. J.) 132.

²¹ Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, 2015 O.J. (L 336) 1.

²² Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, 2017 O.J. (L 154) 1.

The new provision is consistent with EU trade mark law as well. Thus, the registration of non-conventional signs as a trademark is now possible.²³

Unlike in European Trade Mark Law, '[s]igns which are identical to or indistinguishably similar to a trademark-relating to identical goods and services or to goods and services of the identical type' are regulated as an absolute ground for refusal both in the decree-law and Law No. 6769. This provision means TurkPatent makes a similarity examination after it receives the application and must refuse it even though the trade mark owner consented to the registration. Therefore, letter of consent was introduced in the Law No. 6769. A letter of consent should be a notarial document indicating the clear consent of the prior trade mark owner according to article 5, paragraph 3 of Law No. 6769. Procedure and rules regarding the letter of consent are regulated in the Regulation on the Industrial Property Law.²⁴ Letter of consent should be unconditional and irrevocable according to article 10, paragraph 5 of this Regulation. In fact, it is more appropriate to regulate this condition under the Law, because restricting the fundamental rights through the Regulation may be brought to the Court for cancellation. In practice, TurkPatent published a standard letter of consent form on its web site and this form should be filled and notarized by the trade mark owner.²⁵ The letter of consent, which is a unilateral declaration, is mostly based on co-existence agreements. It should be stated that the validity of the co-existence agreement does not have any effect on the letter of consent and the registration.

There are also other amendments relating to the relative grounds of refusal, such as the registration of a sign that is identical or similar to a well-known trade mark is

regulated as a relative ground of refusal and bad-faith application is accepted as relative grounds of refusal.

'Proof of use claim' in the opposition proceeding is introduced under article 19, paragraph 2 of Law No. 6769. Proof of use can only be claimed provided two conditions are fulfilled. First, the opposition shall be based on the likelihood of confusion due to identity with or similarity to the earlier trade mark covering the identical or similar goods or services. Second, the earlier trade mark which is the ground for opposition should have been registered for at least five years at the date of application or date of priority application. If these two conditions are met, the applicant can invite the opponent to submit evidence proving the genuine usage of his trade mark for the registered goods and services. If the opponent fails to submit evidence proving the genuine usage or proper reason for not using the trade mark, opposition shall be refused.²⁶ This provision aims to provide the effective use of registered trademarks in the market and prevent the abusive usage of an opposition proceeding.

Law No. 6769 makes a clear distinction between the revocation and nullity of trademarks. The authority of revocation is given to TurkPatent. This amendment completely conforms with EU trade mark law. Pursuant to article 26 of Law No. 6769, lack of usage of a trade mark is accepted as a ground for revocation and TurkPatent has revocation authority. This article becomes effective in 2024 and the authority of revocation shall be exercised by the court until article 26 is enforced according to the provisional article 4. Clear distinction with the revocation and nullity of trade marks is an affirmative development. However, there is a problem arising from the cancellation of art. 14 of Decree-Law which regulated the revocation of trade mark on the ground of lack of usage by the Constitutional

²³ Ateş (n 2) 175; Özer (n 20) 141; Suluk (n 2) 94.

²⁴ Regulation on Implementing the Law on Industrial Property, Official Gazette 24 April 2017, 30047.

²⁵ Turk Patent: Türk Patent ve Marka Kurumu, 'Marka İslm Formlari'

<<http://www.turkpatent.gov.tr/TURKPATENT/forms/informatio nDetail?id=100>> accessed 14 November 2018.

²⁶ Law No. 6769 (n 1) Art. 19.

Court. This decision was ruled only four days before the Law No.6769 came into effect. Decree-Law shall be applied to the cases already filed before the Law No. 6769 was adopted. So the question is: what should the courts do in those cases where revocation is requested due to the lack of usage? This situation brought the issue up for discussion whether there is a legal gap,²⁷ whether the cases filed before 2017 would be dismissed²⁸ or whether the judges should fill this legal gap through the rule that the judge would make as legislator.²⁹ In addition to these discussions, Tekinalp stated that although the provisional article had determined authority of revocation should be exercised by the courts, courts could not apply this provision because it was not effective.³⁰ As it can be seen, both the wording and silence of the law led to many problems on a very simple issue.

²⁷ Merdivan stated that there is no legal gap. See Fethi Merdivan, 'Tescilli Marka Hakkına Dayalı Tecavüz Davasında Kullanmama Def'i (Non-Use Defense in Infringement of Registered Trademark Cases)' in Feyzan Hayal Şehirli Çelik (ed.), *6769 Sayılı Sınai Mülkiyet Kanunu Sempozyumu (Symposium on Law No.6769 on Industrial Property)* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2017) 483,491-492.

²⁸ Hayrettin Çağlar, '6769 Sayılı Sınai Mülkiyet Kanununa göre Tescilli Markanın Kullanılmamasının Hukukî Sonuçları ve Anayasa Mahkemesinin 556 Sayılı KHK M. 14 Hükümünü İptal Eden Kararının Etkileri (Legal Consequences of Non-Use of Registered Trademark pursuant to the Industrial Property Law Numbered 6769 and Legal Effects of the Constitutional Court Decision on the Cancellation of Article 14 of the Decree law no. 556)' (2017) 21 Gazi Üniversitesi Hukuk Fakültesi Dergisi (J. of Gazi Univ. Fac. of L.) 3, 16-17.

²⁹ Ali Paslı, 'Anayasa Mahkemesi'nin MarkKHK m.14'ü İptal Kararı'nın Etkisi: Kullanmama Gerekçesine Dayalı Hükümsüzlük/İptal Davaları Düşecek Mi? (The Effect of the Constitutional Court's Cancellation Decision of on article 14 of the Decree-Law on Trade Mark: Will Nullity/Revocation Cases on the ground of Lack of Usage be Dismissed?)' (Ticaret Kanunu Net, 20 January 2017) <<http://www.ticaretkanunu.net/makale-25/>> accessed on 14 November 2018; Arzu Oğuz, 'Markanın

B. GEOGRAPHICAL INDICATIONS

GIs not only protect the goodwill of the producer or producer groups, but also protects the consumers from deception. In addition, protecting GIs are accepted as a valuable tool for economic development of the region or area where products are manufactured³¹. In that sense, GI protection is indispensable for rural development³². All these facts indicate that Turkey needs an efficient GI protection system, considering Turkey's GI richness and the importance given to rural development.

GI is one of the areas where most novelties were introduced through Law No. 6769. Although an efficient GI protection was aimed with the repealed decree-law No. 555 on the Protection of Geographical Indications, there were too many system deficiencies. These deficiencies were very clearly determined in the law's reasoning and all the novelties are adopted to eliminate

Kullanmama Nedeniyle İptal Konusunun Yeni Sınai Mülkiyet Kanunu Hükümleri Çerçevesinde Değerlendirilmesi (An Analysis of Absence of Use as Ground for Cancellation of Trademarks under the New Industrial Property Rights Act)' (2017) 128 Terazi Hukuk Dergisi (Terazi L. J.) 132; Numan Sabit Sönmez, '6769 Sayılı Sınai Mülkiyet Kanununa Göre Markanın Kullanılmaması Neticesinde Ortaya Çıkan Sonuçlar (Consequences of Not Using a Trademark Based on Industrial Property Rights Act Number 6769)' (2018) 76 İstanbul Hukuk Mecmuası (J. of İstanbul Univ. Fac. of L.) 277,283.

³⁰ Tekinalp (n 14) 307.

³¹ For further information, see Michael Blakeney and Getachew Mengistie, 'Geographical Indications and Economic Development' in Michael Blakeney, Thierry Coulet, Gatachew Mengistie and Marcalin Tonye Mahop (eds), *Extending Protection of Geographical Indications* (Earthscan 2012) 94-95; Navin Kumar, *Legal Protection of Geographical Indications* (Lambert 2012) 84, 94-95; Tapan Kumar Rout, 'GIs as Instrument for Sustainable Development: A Case of Pochampally Ikat' in Tapan Kumar Rout and Bidyadhar Majhi (eds.), *WTO, TRIPS and Geographical Indications (GIs)* (New Century Publications 2014) 51.

³² Rout (n 3) 58-59.

them on the basis of international agreements and Regulation (EU) No 1151/2012 of The European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.³³

First, traditional specialties were introduced in Law No. 6769 in addition to the appellations of origin and indications of source.³⁴ Scope of the traditional specialties is stated under article 34, paragraph 3 as,

‘Words that are not covered as appellations of origin or indications of source; but have been used to indicate a product for at least 30 years are named as traditional specialties guaranteed. However, it has to meet one of the criteria below:

- (a) It has to be either originated from a traditional combination or mode of production or mode of processing, or
- (b) manufactured from traditional raw materials.’

While any natural or legal persons had the right to apply for registration under decree-law on GIs, producer groups, public institutions and organizations as well as professional organizations, associations, foundations and cooperatives operating for public interest in relation to the product or authorized to protect the economic interests of their members, and the relevant producer in case the product is produced only by a single producer, have the right to apply for registration under Law No. 6769. Applications shall be published in the Official Trade Mark Bulletin instead of the Official Gazette or national or regional newspaper. With this amendment, it is foreseen the cost of publishing will decrease by

approximately \$1.10-\$1.70.³⁵ The period for publication duration has been shortened to three months and control reports shall be submitted annually instead of every 10 years. Additionally, an emblem shall be used on the product or its packaging together with the appellation of origin and indications of source. Law No. 6769 has been effective for almost two years and these amendments have already given initial results. While there were 112 applications in 2016, 249 applications were filed to the Turkish Patent in 2017.³⁶

C. DESIGN LAW

Protection of non-registered designs and novelty examination was introduced by Law No. 6769 in the field of design law. Furthermore, non-visible pieces of a complex product are removed from the scope of protection which is consistent with EU law. Additionally, a three-year protection for the use of some complex products is exempted from protection according to a list which will be published by the Ministry of Science, Industry and Technology. The period for design publication is shortened from six months to three months, implying a more rapid process for registration. On one hand, partial refusal and partial nullity were introduced both in the opposition proceeding and the cases. On the other hand, bad faith application is accepted as a ground for opposition and nullity. Most of these amendments are consistent with EU design law.

One of the most significant novelties in the design law is the introduction of non-registered design protection in Law No. 6769. Non-registered designs could indeed be protected both by provision on unfair competition and copyright laws before the enactment of the law. However, there were some uncertainties and difficulties

³³ Regulation 1151/2012 of The European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, 2012 O.J. (L 343) 1.

³⁴ For the criticism on definition and description, see Tekinalp (n 13) 307-308.

³⁵ Özer (n 20) 132.

³⁶ See Turk Patent and Trade Mark Office, 'Statistics of Geographical Indication and Traditional Specialties' <<http://www.turkpatent.gov.tr/TURKPATENT/geographicalRegisteredList/>> accessed 14 November 2018.

in determining whether unfair competition existed in the concrete case or whether the design is considered to be work or not and to what extent the aforementioned provisions would be applied.³⁷ The introduction of a non-registered design protection is of great importance in the industries with a high number of designs such as fashion, textile and packaging.³⁸ Considering these reasons, non-registered designs are granted protection under Law No. 6769. A design shall be protected by an unregistered design right if it is made available in Turkey. The term of protection of a design is three years starting from the date it is made available to public.³⁹ The scope of the unregistered design right is more limited than the scope of the registered design right, which is parallel to the European design law. Although the law was based on the Council Regulation (EC) No 6/2002 of 12 December 2001 on community designs, there are differences between the mentioned regulations.⁴⁰ Unregistered designs confer the right to prevent the acts only if the contested use results from copying the protected design pursuant to article 19 of the Regulation. The right to prevent is accepted only in cases where copies of identical designs or in respect of overall impression copies of indistinguishably similar designs are used according to the article 59, paragraph 2 of Law No. 6769. Hence, the usage of identical design or indistinguishably similar design was preferred in determining the scope of the right in Law No. 6769. This expression is used in the infringement of design rights too. However, the expression 'identical or indistinguishably identical' is

criticized by the doctrine because this terminology is more related to trademark law and it is not consistent with article 58, paragraph 1, which states, 'Design owner may use his rights arising from this Law against designs which have no individual character compared to his own design.'⁴¹

A visibility requirement for the components of complex products is also introduced by Law No. 6769. Decree-Law on Industrial Design was silent on this issue; however, the rule that only the visible components of complex products shall enjoy the protection of design law was developed by case law in accordance with EU design law.⁴² This rule is integrated in article 56 of Law No. 6769.

Article 22 of the Decree-Law on Industrial Designs stated the use of the design of a component part used for the purpose of repairing a complex product so as to restore its original appearance within three years after design is made available would not be deemed as an infringement. This provision was retained in Law No. 6769, however an exception relating to the use of equivalent parts published by the Ministry of Science, Industry and Technology was introduced. This exception has three conditions: equivalent parts should be in the list published by the mentioned Ministry, these equivalent parts should be used for the purpose of repair of a complex product so as to restore its original appearance, and the usage of them should not be misleading the public about the source of these parts. If these conditions

³⁷ Justification of art. 56, p.23. Şehirali Çelik stated that justification of the article 56 is can be described as very detailed. Feyzan Hayal Şehirali Çelik, 'Sınai Mülkiyet Kanununun Tasarım Hukukuna Getirdiği Temel Yenilikler (Basic Novelty in Design Law by the Law on Industrial Property)' in Feyzan Hayal Şehirali Çelik (ed.), *6769 Sayılı Sınai Mülkiyet Kanunu Sempozyumu (Symposium on Law No.6769 on Industrial Property)* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2017) 255, 282.

³⁸ Justification of art. 56, p.23.

³⁹ Law No. 6769 (n 1) Art. 69, para.2.

⁴⁰ Council Regulation 6/2002 of 12 Dec. 2001 on Community designs, 2001 O.J. (L 003).

⁴¹ Şehirali Çelik (n 37) 292.

⁴² Tekinalp (n 14) 310; Şehirali (n 37) 264-265; Özgür Semiz and Muazzez Kılıç, 'Tasarımlara Yeni Bir Çerçeve: 6769 Sayılı Sınai Mülkiyet Kanunu Üçüncü Kitap (A New Framework for Designs: The Design Clauses of Industrial Property Law No.6769)' (2017) 128 *Terazi Hukuk Dergisi* (Terazi L. J.) 163, 66-67; İlhami Güneş, 'Sınai Mülkiyet Kanunu'nda Tasarım Tescili Konusundaki Yenilikler (Novelty on Process of Registering of Designs in the Industrial Property Act)' (2017) 128 *Terazi Hukuk Dergisi* (Terazi L. J.) 116, 117.

are met, the use of these parts shall not be deemed as an infringement of the design right even though the usage has taken place less than three years after the design is made available.⁴³ This issue is still being discussed in EU law. Although there are some concerns about the scope of the equivalent parts, it can be said this exception will have a positive effect on the economy considering the equivalent/spare part sector in Turkey.⁴⁴

D. PATENTS AND UTILITY MODEL LAW

The aims of patent and utility models amendments can be summarized as harmonization to the international conventions and European patent law, improvement of the patent quality, increasing the commercialization of inventions, and simplification of the registration procedure.

The provision on patentable inventions was revised and 'all fields of technology' expression was added in conformity with article 52 of European Patent Convention (EPC).⁴⁵ Biotechnological inventions were not regulated under the Decree-Law on Patents and Utility Model. However, it should be mentioned that Turkish Patent and case law granted patents to these inventions.⁴⁶ Unlike decree-law, biotechnological inventions were mentioned in the context of exceptions of patentability in article 82 of Law No.6769 as:

- biological processes relating to plant varieties or animal races; or intending to generate plant varieties or animal races with the exception of microbiological processes or products obtained in the result of such processes;
- discovering only one of the parts of human body including human body and a gene sequence or a partial gene sequence in the various phases of their generation and evolution⁴⁷;
- the human cloning processes, the changing processes of genetic identity of human sexlinked inheritance, using human embryos for industrial or commercial purposes, changing processes of genetic identity in a way that may agonize the animals without providing any significant medical avails for human or animals and animals that are obtained in the result of such operations.

It is noteworthy to mention the law maker chose to be silent on secondary medical use patents, although article 54 of the EPC explicitly grants patent for the second medical use by regulating an exception. The minutes of the meeting of the Commission on the Industry, Trade, Energy, Natural Sources, Information and Technology which Law No. 6769 was negotiated can enlighten the reasons of this choice.⁴⁸ While foreign investors demanded the addition of a provision on the secondary

⁴³ Law No. 6769 (n 1) Art. 59, para. 5.

⁴⁴ See Şehirli Çelik (n 37) 272-275.

⁴⁵ European Patent Office, European Patent Convention (2016), <[http://documents.epo.org/projects/babylon/eponet.nsf/0/029F2DA107DD667FC125825F005311DA/\\$File/EPC_16th_edition_2016_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/029F2DA107DD667FC125825F005311DA/$File/EPC_16th_edition_2016_en.pdf)> accessed on 14 November 2018.

⁴⁶ Suluk (n 2) 97.

⁴⁷ Öztürk stated that law maker should have regulated the patentable biological inventions and their conditions firstly like EPC and Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions instead of mentioning these in the article justification. Özgür Öztürk, 'Sınai Mülkiyet Kanunu'nda Patent ve Faydalı Modellere ilişkin Düzenlemeler ve Yenilikler (Regulation and Novelties on Patent and Utility Models in the

Law on Industrial Property)' in Feyzan Hayal Şehirli Çelik (ed.), *6769 Sayılı Sınai Mülkiyet Kanunu Sempozyumu (Symposium on Law No.6769 on Industrial Property)* (Banka ve Ticaret Hukuku Araştırma Enstitü 2017) 341,345-346. For the Biotechnology Directive, see Directive 98/44 of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, 1998 O.J. (L 213/13).

⁴⁸ Minutes of the 8th Meeting of Industry, Trade, Energy, Natural Sources, Information and Technology Commission of the Parliament on 5 May 2016, *Türkiye Büyük Millet Meclisi* <https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklar_i.goruntule?pTutanakId=1626> accessed on 14 November 2018.

medical use, the national pharmaceutical sector opposed this demand. Judge Adem Aslan, a member of the Court of Cassation of Turkey stated the Court of Cassation had given protection for the secondary medical use by interpreting decree-law. Therefore, the lack of any special provisions relating to it did not prevent either national applications or European applications from being registered. He furthermore indicated that instead of having such a very clear provision in the law, courts could evaluate more effectively whether there was a new invention.⁴⁹ Therefore, it can be said law makers were silent to give more discretion to the Turk Patent and courts.⁵⁰

The main novelties regarding patents can be indicated as the abolishment of patent without examination system, acceptance of post-grant opposition, mandatory declaration in the application of 'genetic resources' and of 'traditional knowledge based on genetic resources', introduction of farmer exception and new regulations on reestablishment of rights. Furthermore, the registration process has been simplified and shortened like trademarks, designs and geographical indications. In utility models, mandatory requirement for preparation of a research report is introduced.

Amendments were also made relating to employee and university inventions. In addition, regulation on inventions generated in project supported by State was introduced. One of the most significant and controversial novelties on patent law is the channelling of invention rights by scholars to universities, provided at least one-third of revenue generated by commercialization of the invention will be allocated to the scholar herself. The

system amendment makes sense because of the positive effects of the American Bayh-Dole Act on the commercialization of university inventions. It is worthy to mention that countries like Germany and Japan have changed the regime of university inventions as well.⁵¹

4. CONCLUSION

The decree-laws on industrial property rights enacted in 1995 aimed to harmonize Turkish law to be in accordance with EU law and to fulfil the requirements of international conventions. Therefore, the general structure of IP law in Turkey was established in 1995 and Law No. 6769 preserved this structure. Special courts on IP were founded, case law on new system of industrial property law has been developed and the number of IP experts has increased. The importance of industrial property law was better understood between 1995 and 2016. On one hand, the deficiencies of the Turkish industrial property system were realized. On the other hand, IP law or special industrial property law has continued to improve in line with new technological developments. Therefore, a need for an up-to date IP law emerged and the new law was finally enacted on 22 November 2016.

Law No. 6769 on Industrial Property sometimes brings complete, and sometimes partial, solutions to some of the main problems of Turkish industrial property law. Some important issues such as revocation due to the lack of usage of trademark and university inventions are still under discussion and new problems will arise when applying new legal institutions. However, this long-awaited law is a very positive development in general.

⁴⁹ Ibid 48. On the other hand, Öztürk indicated that without an explicit provision, patent for secondary medical use could be granted only the application through the EPC or PCT. See Öztürk (n 47) 349.

⁵⁰ Aydın Mutlu, 'İkinci Tıbbi Kullanım İstemlerinin Yeni Sınai Mülkiyet Kanunu Işığında Patentlenebilirliği (Patentable of Secondary Medical Use Patents in the Light of the New Law on Industrial Property)' (2017) Ankara Barosu Fikri Mülkiyet ve

Rekabet Hukuku Dergisi (Intell. Prop. and Competition L. J. of Ankara Bar) 91, 106.

⁵¹ Selin Özden Merhacı, 'Amerika Birleşik Devletleri Bayh-Dole Yasası ve Türk Hukukunda Öğretim Elemanlarının Buluşlarına İlişkin Bir Değerlendirme (The Bayh-Dole Act and an Analysis on the Inventions of University Lecturers in Turkish Law)' (2015) 64 Ankara Üniversitesi Hukuk Fakültesi Dergisi (Ankara Univ. Fac. of L. J.) 105.

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