

CUMULATIVE PROTECTION OF DESIGNS IN EU AND TURKISH

LAWS (MULTIPLE PROTECTION) * **

I. INTRODUCTION

Designs are, in essence, of a complex structure. A design can be a work of art whereas another one can merely have functional specifications to meet industrial demands. Other designs can bear both features. Some designs can bear artistic qualities to a significant extent while others to a less significant extent. The complexity of the issue is better understood if one takes into consideration the various types of designs according to different product groups such as product designs, fashion and textile designs, graphic designs and architectural designs. In addition, the designer takes into account such factors as production cost, ergonomics and marketing of the product when developing the design. Because of this complex structure of designs, various countries have adopted a number of protection models together with the *sui generis* protection. However, different countries have effected various regulations that differ from one another remarkably with respect to the provision of protection. It is a fact that legal systems have

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** Following is a list of the abbreviations used herein: *Batider*: Journal of Banking and Commercial Law, *CC*: Commercial Code, *CDPA*: Copyright, Designs and Patent Act, *D*: Decision, *Ed*: Editor, *EIPR*: European Intellectual Property Review, *EndTasKHK*: Endüstriyel Tasarımların Korunması Hakkında KHK (Decree-Law on the Protection of Industrial Designs), *etc*: Et cetera, *EU*: European Union, Court of Justice: Court of Justice of the European Communities, *FMR*: Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi (Ankara Bar Association Journal of Intellectual Property and Competition Law), *IAWC*: Intellectual and Artistic Works Code, *IIC*: International Review of Industrial Property and Copyright Law, *MarKHK*: Markaların Korunması Hakkında KHK (Decree-Law on the Protection of Trademarks), *i.e*: id est, *KHK*: Kanun Hükmünde Kararname (Decree-Law), *LD*: Law Division, *MPI*: Max Planck Institute, *No*: Number, *OG*: Official Gazette, *OJ*: Official Journal of the European Communities, *p*: Page(s), *P*: Principle, *PatKHK*: Patentlerin Korunması Hakkında KHK (Decree-Law on the Protection of Patents), *R-D*: Research and Development, *SPO*: State Planning Organisation, *TRIPS*: Agreement on Trade Related Aspects of Intellectual Property Rights, Including Counterfeit Goods, *UCD*: Unregistered Community Design, *V*: Volume, *WIPO*: World Intellectual Property Organisation.

different answers as to which model of protection shall be applicable to different types of designs¹.

The fact that existing laws differ in terms of design protection also holds for EU Member State laws. Now that this multiplicity of legal approaches would have an adverse effect on commercial relations in the Common Market, the Directive² that was aimed at getting Member State laws nearer has been affected in 1998. However, efforts regarding the Community Regulation that shall be in force throughout the Community and that shall realise the **Community Design** are still on the way, and the relevant Preparatory Regulation³ has not been enforced yet. It is to be promptly said that the harmonisation of design legislation and the realisation of Community Design does not allow a desired level of liberalisation trade in Common Market. Because, the existing legislation on intellectual and artistic works, and distinctive signs, patents, utility models, and the legislation on unfair competition include differences with respect to the protection of designs, and such differences are of problematic nature vis-à-vis commercial relations regarding designs in the Common Market.

Whenever there are more than one legal regulations regarding a specific issue, there are three cases: the legal regulations regarding that issue either compete⁴, or co-exist or one among them excludes the other(s). The rightholder has

¹ See **JEHORAM**, Cumulation, p.514 etc.; **FRANZOSI**, The Legal Protection of Industrial Design, p. 154 etc.; **PISTORIUS**, p.178 etc.; **SULUK**, p.134 etc.

² OJ., 28.10.1998 L 289/28.

³ OJ, 31.1.1994, No: C 29/20. There have been a number of amendments on this preparatory regulation in the following dates, the latest of which was on June 1999. For the latest amendment see. <http://www.europa.eu.int/search> (28.2.2001).

⁴ A competition among rights is in fact one that is among the reasons of responsibility, as is the case with tort and default on debts. This amounts to saying that a responsibility can be based on more than one reasons or causes. The creditor can place the same action on two different legal reasons that are independent from one another. In this case the plaintiff reserves an optional right. For further

an optional right in the competition. That is, in this case there is one final conclusion. In the case of coexistence, more than one claim can be made. That is, in this case, there is coexistence of final conclusions. The above-mentioned three options can be exemplified as follows: A contractual obligation regarding an issue competes with a tort-related obligation, the two obligations do not coexist. Likewise, regulations regarding defaults and fraud compete with one another. In other words, the damages of the suffering party are healed only once in such cases. There cannot be multiple indemnity claims. Yet, now that the suffering party enjoys competing rights, such party can depend on his/her preferred protection model (in the example cited above, on either of the tort, contractual, default or fraud provisions). In other words, the rightholder cannot base certain claims on contractual provisions and certain others on provisions relating to tort. S/he is to make a choice. Nevertheless, claims for material compensation and damages for pain and suffering can coexist, or they can be claimed together. As such, there is more than one final conclusion in the case of coexistence because these compensations and damages are claimed for different purposes. And at times when there exists a particular regulation regarding an issue, the general regulation is excluded. If there are general and particular regulations regarding, for example, duration, the particular one is applicable⁵.

information see **TEKİNAY/AKMAN/BURCUOĞLU**, p.1312 etc. For instance, one can file a remuneration suit against the possessor of the property who is in the capacity of an owner, and s/he can also claim that a property leased to the tenant in the capacity of an owner be returned. Likewise, legal reasons compete in a suit filed by one who holds the utility model, design and trademark rights of a pair of shoes. The difference is that while there is an optional right in the former case, the holder of the right can depend on all reasons in the latter. In a suit filed by a rightholder who depends on all protection models, the rightholder shall be able to claim the prohibition of infringement, material compensation and damages for pain and suffering, and indemnity for goodwill, confiscation of products and vehicles, granting of ownership of products. The plaintiff shall be able to claim the destruction of the counterfeit shoes in the example cited and machines used to manufacture them, depending on trademark, patent and design rights. However, the rightholder shall be able to demand material compensation, damages for pain and suffering, and indemnity for goodwill only for once. Such also holds for the destruction or ownership of products. S/he shall not be able to make such claims separately for each of the trademark, patent and design rights.

⁵ For further information see **HATEMİ**, p.113 etc.; **AKBIYIK**, p.61 etc.

Another topic that stirs up controversy within design law is whether or not designs could be protected through, in addition to design legislation, intellectual property legislation relating mainly to intellectual and artistic works⁶. Designs can simultaneously bear the properties of intellectual and artistic works, the features belonging to patents and utility models, and the distinctive character that pertains to a trademark. For instance, the appearance (design) of a pair of shoes can be protected via patent (or utility model) protection thanks to its orthopaedic qualities, and via the trademark used for this pair of shoes. In countries where such pair of shoes is protected through some or all of these protection models, the principle of cumulative protection is applicable. In others where one model is in use, this principle is invalid.

Cumulative protection appears to be a problem especially in terms of unregistered designs on the one hand, and registered ones whose protection period terminates, on the other. Matters are also uncertain regarding the protection of unregistered designs. Unregistered designs have not been included within the Directive, yet they go under the heading ***Unregistered Community Design***, which is a new protection model, in the Preparatory Regulation and it is envisaged that they be protected for three years (a.12).

In Turkey, designs have first become subject to particular regulation through the enforcement of the Decree-Law numbered 554 Pertaining to the Protection of Industrial Designs (EndTasKHK). This Decree-Law regulates only the registered designs and stipulates that unregistered designs shall be subject to general provisions, without effecting any reservations relating thereto (a.1/II). This fact brings

⁶ BEIER, p.176.

about conflicts as to whether unregistered designs shall be treated the same as registered designs in terms of the duration, conditions and scope of protection.

The problems put forth above regarding EU Law are apparent in Turkish Law, as well. Shall an unregistered design, in fact, be protected pursuant to other legislation following the expiry of its protection period? If yes, under which conditions? Shall a registered design whose protection period has not expired be protected via legislation on patents, distinctive signs and unfair competition, together with design protection? If yes, shall there be additional requirements for such competition?

Within the scope intellectual property rights, the need for cumulative protection is mostly felt with respect to designs. As explained above, this results from the complex structure of designs. Therefore POSNER⁷ states that no branch of law is so problematic as design law, that design protection is not mentioned in international debates on the issue, and that, as a result, EU Member State laws differ deeply in their handling of the issue. As such is the case, designers are seeking to provide protection pursuant to trademark and/or unfair competition provisions when their designs are not eligible for protection according, for example, to German, French, Benelux, and American Laws⁸.

II. EU LAW

Whether design protection shall be provided through the *patent approach* or the *copyright approach* has caused serious debates. The legislation in EU law

⁷ See POSNER's comment in FRANZOSI's European Design Protection, p.4.

⁸ GREEN PAPER, No:2.7; WIPO, p.229; HENNING - BODEWIG/RUIJSENAARS, p. 668-669; DAVEY, p.472.

abandoned both approaches and adopted the *design approach*⁹. In this market oriented approach designs are deemed to be of economic value. In other words, rather than treating designs as works of art, they are assigned an important role in economic life, and the issue is regulated with a view to meeting industrial demands.

The principle of cumulative protection has been apparently adopted by EU Law¹⁰. It is stated in the Directive and the Preparatory Regulation that¹¹ the protection of designs through the Community's intellectual property legislation such as trademark, patent and utility model shall not prevent their additional protection via different intellectual property legislation adopted by Member States. As this point reveals, the designer can either demand the protection of the design right within Community Design legislation or ask for protection depending on Community legislation regarding patents, trademarks and unfair competition. The rightholder will also be able to claim protection within the framework of the Member State legislation regarding the subject-matters cited above, in addition to the design legislation of the relevant Member State^{12, 13}. For example, if the design of a pair of shoes is novel and has individual character, it shall both be protected as a Community Design and as a, for instance, registered or unregistered British design. The design of such pair of

⁹ One would be mistaken to think that this debate is over. The problem regarding design protection; **LAHORE** quotes JAHORAM say that designs are the most disturbing issue within intellectual property. See. p.428. **CORNISH** also says the issue is irritating nowadays. See. Design Again, p.3. **LAHORE** adds that the word irritating falls short to define the problem. See. p.428. Attention is also drawn to the problem in the **GREEN PAPER**. See. No: 3.1.1. Debates over the method of design protection still continue. For these debates see **LAHORE**, p.430; **JEHORAM**, Cumulation, pp.514-515; **KUR**, Design Approach, p. 374 etc; **SUTHERSANEN**, p.75.

¹⁰ Art 16 and 17, Dir 98/71; Art 100, Preparatory Reg 94/C29; **GREEN PAPER**, No: 11.3.4.

¹¹ It is to be pointed that the issues are dealt with in a parallel way in the Directive and Preparatory Regulation. See **SUTHERSANEN** in this regard, p. 28.

¹² See Art 99, Preparatory Reg 94/C29 and the Explanatory Memorandum relating thereto as to how a resolution will be arrived at in such a case brought before different courts, where the subject-matter and the parties are the same.

shoes can also be protected with a utility model certificate provided that it meets the requirements therefor. It can enjoy trademark protection if it has a distinctive function with respect to the source of the product. This protection takes place through the Community legislation and Member State legislation. All the above makes clear that on the one hand, Community legislation and Member State legislation regarding designs will coexist and be applicable in terms of design protection, and on the other hand, in addition to the design legislation of the Community and the Member States, their respective legislation regulating other aspects of intellectual property will be applicable. As per article 100 of the Preparatory Regulation, such coexistence shall be the case until the intellectual and artistic works legislations of Member States are harmonised¹⁴.

The adoption of the principle of cumulative protection of designs was rendered compulsory in terms of design legislation, and intellectual and artistic works legislation in EU Law¹⁵. That is to say, the designer can both depend on Community Design together with the Community's intellectual and artistic works legislation, and on Member State the design and intellectual and artistic works legislation of Member States. In other words, Member States are responsible for the protection of designs in compliance with design legislation and legislation on intellectual and artistic works. Nevertheless, in what way shall this protection take place is left to the interpretation of the relevant Member State legislation¹⁶. Therefore, such issues as the duration

¹³ See. **FIRTH**, p.45 etc.; **SUTHERSANEN**, p.110 etc. for two tables indicating which protection models are used for the protection of designs in EU Member State laws.

¹⁴ As this reveals, The Community Design and Member State designs shall coexist. However, following the enforcement of Registered Community Design, Member State designs are planned to be invalidated after a while. See. **GREEN PAPER**, No:10.1.3.

¹⁵ Art 17,Dir 98/71; Art 100, Preparatory Reg.

¹⁶ Art 17,Dir 98/71; Art 100/II, Preparatory Reg 94/C29.

and conditions of protection, and level of originality required for the intellectual or artistic work are established according to Member State laws¹⁷. One can say that Member States have regulated the issue quite distinctly. For example, Germany, UK and Italy require the existence artistic features on designs that shall be protected within the framework of intellectual and artistic works legislation while France and Benelux do not apply such requirement. This results in the fact that certain designs shall be protected according to intellectual and artistic works legislation or other legislation in some, and not all of, Member States¹⁸.

The Directive and Preparatory Regulation have also left it to the Member State legislation to settle whether designs shall be eligible for cumulative protection in line with the relevant Member State legislation on patents, trademarks and unfair competition. This means that Member States are free to provide protection according to this legislation, and to regulate such protection, if any, in the way it wishes. Therefore, it can be said that *although EU Law effects the principle of cumulative protection, it has not stipulated a specific method for the implementation of this principle*¹⁹. As such, significant differences might come out in various countries' protection of designs.

A rightholder whose design right is violated will be able to claim protection according to the legislation of his/her choice, since s/he is not prevented from doing so by the Community Directive and the Preparatory Directive regarding designs.

¹⁷ Art 17, Dir 98/71; Art 100, Preparatory Reg 94/C29.

¹⁸ Because of this difference, French and Benelux courts tend to protect designs of German and Benelux origin not as intellectual and artistic works. Because, these designs are not protected in German and Italian Laws. Article 2/7 of the Bern Agreement gives way to this. Yet, as per a decision awarded by the Court of Justice, this practice is prevented. See. Case 92/92 Phil Collins v. Imtrat [1993] ECR I- 5145 (Quoted from the Explanatory Memorandum regarding Article 100 of the Preparatory Regulation).

¹⁹ **SUTHERSANEN**, p.76.

S/he will also be able to ask for protection depending on international agreements like the Madrid Agreement relating to trademarks, and the Vienna Agreement dated 1973 regarding typefaces²⁰.

*In order for the Common Market to operate properly with respect to products whose designs are protected, Member State legislations on intellectual and artistic works protecting designs need to be harmonised*²¹. For instance, in French and Benelux Laws designs enjoy maximum protection pursuant to the legislation on intellectual and artistic works whereas in Italian Law, they are not, as a rule, protected²². In Irish Law, in the event that if a product on which a design is applied is produced more than 50 in number, that design is not eligible for protection under the legislation on intellectual and artistic works. The British Law imposes significant time limitations with respect to the protection of designs according to legislation on intellectual and artistic works²³. As a result, relevant aspects of the Italian, Irish and British Laws should be amended²⁴. Meanwhile, certain limitations have been brought about on the protection of designs within the framework of the legislation on intellectual and artistic works in German, Spanish, Danish and Portuguese Laws²⁵. For instance, the artistic level required for a design to be protected as an intellectual

²⁰ See the Explanatory Memorandum regarding Art 100, Preparatory Reg 94/C29.

²¹ See the Explanatory Memorandum regarding Art 100, Preparatory Reg 94/C29.

²² In order that a design could be protected as an intellectual and artistic work in Italian Law, it should be separable from the product to which it is applied. See. **PISTORIUS**, p.177-178 for further information.

²³ See the article 51 of the CDPA dated 1998.

²⁴ See the Explanatory Memorandum regarding Art 100, Reg 94/C29. Also see **POSNER's** comment on Art 100, Reg 94/C29 in FRANZOSI, European Design Protection, p.392-393.

²⁵ It is essential to stress that there are different practices valid in EU Member States protecting designs according to intellectual and artistic works legislation. For instance, although the principle of cumulative protection is adopted in France and Benelux, there are different practices in France and Benelux. Designs enjoy protection more easily in France as intellectual and artistic works, as opposed to practices valid in Benelux. However, in terms of registered design protection these two legal systems operate vice versa. See. **KUR**, p.375; **PISTORIUS**, p.178 etc.

and artistic work is quite high. However, the current EU Law paves the way for limitations of this kind.

As mentioned above, Member State legislations on intellectual and artistic works differ to an important extent. It has for this reason been said that unless the necessary harmonisation regarding intellectual and artistic works legislations of EU Member States is realised, it shall not be possible to harmonise various design legislations²⁶. As a matter of fact, protecting designs as intellectual and artistic works before resolving the problem of which designs shall be deemed to be intellectual and artistic works might create distinct and unjust implementations. Harmonisation is to be realised especially with regard to what is an artistic work in terms of design protection. Now that various Directives provided harmony among levels of originality required by different laws with respect to intellectual and artistic works, there will not so many problems in this regard^{27, 28}.

The protection of unregistered designs needs to be explained considering various possibilities. First of all, Member States can protect these according to general provisions, and there can be separate regulations as well. Taking into consideration the Member State legislations, it is only the British Law that effected a separate regulation regarding unregistered designs. As per article 216 of the CDPA, unregistered designs are protected for 15 years following the end of the year they were created in, and in the event that they are presented to public in the first five

²⁶ PEROT-MOREL, p.1984, EIPR, p.129 (**SUTHERSANEN**, quoted from p.77). Also see **GREEN PAPER**, No: 10.2.1.

²⁷ See. **SUTHERSANEN**, p.82.

²⁸ In the MPI (Max Planck Institute) Draft regarding Community Design, different systems present in Member State laws regarding this case are taken into consideration, and how the principle shall be applied is left to Member State laws. For further information see. **BEIER**, p.176. Such is still the case with respect to the regulations within Directive and Preparatory Regulation.

years for 10 years following the end of the year in which such presentation took place.

The Directive regarding unregistered designs in EU Law contains no provision in this regard. Because, according to EU Law Member States are not obliged to enforce separate regulations regarding unregistered designs. The issue has been subject to separate regulation in the Preparatory Regulation. As per article 12 of the Preparatory Regulation unregistered designs that bear registered design qualifications (novelty and individual character)²⁹ required for protection shall be protected for 3 years after they are made available to the public. It becomes clear that the Preparatory Regulation effects a new protection model called Unregistered Community Design (UCD). An unregistered design is made available to the public through publication, exhibition, commercial use or another way. However, if a design cannot become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community, then that design is deemed to be not made available to the public. Moreover, other designs that become known due to third party abuses also receive the same treatment³⁰.

UCD is being put forth because some states do not protect designs in accordance with the legislation on intellectual and artistic works³¹. The UCD has significantly been shaped by the needs of the sectors including short-life products, such as textile sector or the fashion sector³². These sectors generally prefer to have their designs protected within the scope of the legislation on intellectual and artistic

²⁹ One needs to pay attention to the fact that protection requirements regarding Unregistered Community Design are heavier than those required for intellectual and artistic works.

³⁰ Art 12/II, Preparatory Reg 94/C29. Compare with Art 6, Dir 98/71; Art 8, Preparatory Reg 94/C29.

³¹ **JEHORAM**, Green Paper, p.76.

³² **JEHORAM**, Green Paper, p.76; **SUTHERSANEN**, p.78.

works. Yet, Member State legislations vary in their handling of the issue, as mentioned above. International agreements cannot be said to provide sufficient protection, either. It is essential to stress at this point that, had international agreements provided sufficient protection, there wouldn't be any efforts to extend the intellectual and artistic works legislation to cover such issues as computer programs and electronic databases³³. The EU Commission states that following the enforcement of UCD provisions, revisions can be made in order to meet practical needs³⁴.

Although the principle of cumulative protection has been adopted in EU Law, the importance of the legislation on intellectual and artistic works with respect to design protection is gradually declining³⁵. Therefore, article 17 (formerly article 18) of the Directive that deals in detail with the protection of designs according to intellectual and artistic works legislation has been amended. In fact, it is not a proper way to protect designs according to intellectual and artistic works legislation. An intellectual or artistic work is a work of literature or art that bears the peculiarities of its originator. As this makes clear, the originator receives special emphasis regarding intellectual and artistic works. The period throughout which they are under protection is rather quite long for designs. Therefore, time limitations need to be effected regarding the protection of designs in line with intellectual and artistic works legislation.

The existing regulation in EU Law relating to the cumulative protection of designs resembles a building with missing columns, which results from the fact that

³³ SUTHERSANEN, p.78.

³⁴ See. GREEN PAPER, No:11.3.6.9 and 10.

³⁵ See. SUTHERSANEN, p.75 etc, especially p. 78 and 79.

Member State legislations have different answers as to what an intellectual and artistic work is³⁶. In addition, the provisions included in Member State legislations regarding designs are also quite different from one another. In other words, unless the necessary harmonisation work with respect to intellectual and artistic works legislations is done and the Preparatory Regulation that regulates the Registered and UCD is enforced, adoption of such a principle through effecting the Directive that is only aimed to harmonise shall entail certain problems.

According to EU Law, designs shall be protected through various regulations such as the Registered Community Design, UCD, Community Patent, Trademark and Utility Model Legislation, Community Intellectual and Artistic Works Legislation. Some of the cited legislations are not in effect yet and some others took partial effect. Furthermore, designs shall also be protected through the registered and unregistered design legislation, intellectual and artistic works legislation and, if applicable, patent, trademark, utility model and unfair competition and other legislations that are in effect in Member State laws. What matters is that such legislations are of different nature in each Member State. In certain states, designs can be protected through, for example, patent and trademark legislation whereas they cannot in others. Adopting the principle of cumulative protection without carrying out the necessary harmonisation shall entail differences in practice and unjust results.

III. TURKISH LAW

There is a clear provision in Turkish Law stating that designs shall be protected through the intellectual and artistic works legislation as well as the design

³⁶ Now that the historical experience of the legal systems of Anglo-Saxons and Continental Europe are completely different, this harmonisation gets more and more difficult to accomplish.

legislation³⁷. A likewise regulation is also present in article 4 of Intellectual and Artistic Works Code (*IAWC*). Moreover, it has openly been accepted that the design of a product protected through utility model certificate shall enjoy design protection (Patent Decree-Law/). It is inferred from article 5 of the Trademark Decree-Law that a sign of distinctive character can be protected both as a trademark and a design. Although there aren't any open provisions in terms of unfair competition, there is not any regulation of prohibitive nature, either. However, it has been stated that unregistered designs shall be subject to general provisions³⁸. General provisions mean the unfair competition provisions of the Commercial Law, individual rights provisions of the *IAWC* and Civil Law, and those of the Code of Obligations regarding tort. All the above going indicates that the principle of cumulative protection has been adopted in Turkish Law in terms of the protection of designs.

The definition of cumulative protection neither implies coexistence nor competition from my point of view. As such, *if legal reasons are not in a general provision – particular provision relation, then there is a kind of a coexistence of legal reasons*. Because, the rightholder is not obliged to make a choice. The rightholder can, if relevant conditions are present, depend on one, some or all of the legislations cited above at the same time. In other words, if conditions are available the designer can depend on, in addition to design legislation, patent, trademark and intellectual and artistic works legislation. The designer can further depend on unfair competition legislation because design legislation and unfair competition legislation stand in a general provision – particular provision relationship, and the former is the general provision. However, *if the particular provision inures to the benefit of other party, the*

³⁷ Design Decree-Law article 1/III.

³⁸ Design Decree-Law article 1/II.

general provision cannot be depended on. For example, although article 22 of the Design Decree-Law envisages a 3-year protection of spare part designs, the designer will not be able to depend on unfair competition that provide unlimited protection. Even though the particular provision is more attractive than the general provision, if the rightholder depended on general provision, then the *principle which envisages the judge's being bound by the claims of the plaintiff* included in Turkish Procedural Law takes effect.

The full implementation of the principle in terms of time will bring about certain concerns. For instance, it has been claimed that protection is without any time limitation according to unfair competition rules, and therefore even though the protection period of a design expires it shall not be made available to the public and protection shall continue as envisaged by unfair competition provisions³⁹. A new ruling by the Turkish Court of Appeals is also supportive of this view⁴⁰.

I think the matter can be approached as follows: Intellectual property law protects intellectual rights for a certain period of time. When such period is over, products that are the results of creative activities are made available to the public. The design right is a time-bound right. When time is up, the design right terminates. A design whose period is over is deemed to be made available to the public. From that time on, unfair competition provisions cannot, as a rule, be depended on⁴¹. As such, an individual imitation of another party's product shall not constitute unfair competition. In order that the use of a design can be deemed to create unfair competition, it should be confusing or deceiving the public opinion and competition should be abused,

³⁹ **GREEN PAPER**, No:2.7; **FRANZOSI**, The Legal Protection of Industrial Design, p.157; **SPO**, p.179.

⁴⁰ 11th LD., 26.3.1997, P.1997/2514, D.1997/4904. For a critique of this decision see **ASLAN**, p.19 etc.

together with the imitation of the product (Commercial Code article 57/5 and Design Decree-Law article 22/c). Furthermore, when implementing this provision, the Turkish Court of Appeals required the existence of deceptive nature, stating that the mere imitation of another party's product was grounds for unfair competition⁴².

In Turkish Law, the conditions required for the protection of unregistered designs are less than those required for registered ones, taking into account the existing regulation. Provided that a design is *novel* and *original* – and such novelty need not be an absolute one - it shall be protected according to unfair competition provisions, even if it is not of an individual character. The reason for this is that designs that are not of an individual characters are also created after spending intense amounts of effort and money. The copying of a design that is the result of effort and money by competitors is not in line with integrity and constitutes unfair competition. In this context, originality needs to be understood as the originality that relates to intellectual and artistic works.

A final point is that designs that are within the scope of exception of protection cannot be also protected as unregistered designs (Design Decree-Law article 9, 10, and 21 etc.).

IV. ASSESSMENT

1. In General

The adoption of cumulative protection principle in terms of design protection brings about certain problems. Some authors are ardent supporters of the principle. For example, referring to his article dated 1983, JEHORAM repeats a view of his

⁴¹ See **TEKİNALP** for the same, p.33-34.; **HORTON**, p.311; **BAŞ**, p.45; **DİLEK**, p.58. For an opposing view, **GREEN PAPER**, No:2.7; **FRANZOSI**, The Legal Protection of Industrial Design, p.157; **SPO**, p.179.

⁴² 11th LD., 28.6.1988, P.87/8850, D.88/4339 (**DÖNMEZ**, p.181 etc.).

which follows that 99% of the novel designs have not been registered, therefore they should be protected within the scope of intellectual and artistic works legislation. According to the author, if the principle is not adopted, novel designs shall be easily copied now that 99% of them have not been registered⁴³. The author thinks, as a result, that the protection of designs according to intellectual and artistic works legislation meets an important need.

To me, more than one factor should be taken into consideration and protection should be provided through more than one model (cumulative protection). Yet, the conditions required for cumulative protection vis-à-vis each protection model should be established. Emphasis will be placed herein on protection according to intellectual and artistic works legislation and unfair competition provisions, both of which are of problematic nature in terms of the implementation of the principle. More, unregistered designs shall be dealt with now that Turkish Law lacks necessary regulations in this regard.

As PHILLIPS informs us⁴⁴, it can be said that design registration is not a preference throughout the world. Inspired by this, one can add that there is a need for the protection of unregistered designs. However, as is the case with Turkish Law, a general reference to general provisions in this regard is far from being enough. Such a reference shall cause certain problems especially with respect to time. Therefore the limits for the protection of unregistered designs have to be fixed, and considering that this type of protection is adopted to meet the needs of short-life sectors, the duration of protection should be shorter. In this context, the 3-year protection envisaged in EU Law can be proposed to take effect in Turkish Law, as

⁴³ See **JEHORAM**, Cumulation, p.515.

⁴⁴ See p.432.

well. This kind of protection does not grant exclusive rights, and only of use with respect to anti-copying. Furthermore, any regulation that annuls or reduces the importance of the system of registration is to be avoided.

In practice, many of the designs of novel and individual character have not been registered, indeed. This results from the fact that registration is an expensive and demanding procedure, as is the case with textiles and fashion sectors, or designers are not willing at all to complete formalities in this regard. Therefore protecting designs as unregistered and within the framework of intellectual and artistic works legislation meets an important need⁴⁵. That is, the designer will be able to claim protection according to intellectual and artistic works legislation if his/her design is not being protected pursuant to design legislation because it does not meet the necessary requirements for design protection. In the event that it does not meet the requirements of intellectual and artistic works legislation, then s/he will be able to depend on unfair competition laws. And if it can meet the requirements of all or part of these protection models s/he will be able to depend on the protection model of his/her choice.

It deserves emphasis in this regard that if the principle is adopted, the rightholder shall further claims depending on the protection model whose period has not expired, when such period expires for another model. For example, if the logo of a firm is protected both as a trademark and a design, the designer's right shall terminate following the expiry of 25 years, the maximum period of protection for designs. However, considering that trademarks are protected for an unlimited period of time, subject to a refreshment of the trademark life once in ten years, the rightholder will be able to ask for unlimited protection of the logo after making such

⁴⁵ See **BEIER** for further information, p.176.

refreshment. Now that there is no time limitation in terms of unfair competition, whether unfair competition provisions can be depended on regarding a design whose protection period is over is of vital importance. This shall be discussed below.

One needs to deal in detail with under what conditions can the rightholder whose design is violated depend on other protection models in addition to design legislation.

2. Protection According to Intellectual and Artistic Works Law

In practice, the rightholders need to have their works of applied art⁴⁶ protected within the scope of intellectual and artistic works. This need at times arises out of the expiry of design protection, and at times from the fact that the design has not been registered at all. It is not a common practice that a design is protected according to the legislation on intellectual and artistic works because of the expiry of the protection period. It can therefore be said that following the adoption of an unregistered protection model with a relatively short period, there will not be any need for the protection of designs according to intellectual and artistic works legislation, extreme exceptions not included.

A design that bears the peculiarities of its designer and that is of artistic value because of its aesthetic qualities shall be additionally protected as an intellectual and artistic work in Turkish Law. In order that a design can be protected according to intellectual and artistic works legislation, the level required for its protection should be high and it should be an artistic work. Because, the intellectual and artistic works legislation is not an attractive protection model in terms of design protection.

The protection provided by design legislation and intellectual and artistic works legislation have the following aims: First, the intellectual and artistic works

⁴⁶ The expression is used as an antonym for works of pure art and works of fine art. For further information on these concepts see **PISTORIUS**, p.8 etc.

legislation protects the owner of the work (in this case the designer). Design legislation, on the other hand, provides legal protection for the industry. Second, the duration of protection provided by each are different. The long-time protection of intellectual and artistic works is not, in principle, appropriate for designs. And third, design protection grants exclusive rights (monopoly rights) to the designer whereas intellectual and artistic works legislation provides protection against copying only. A designer depending on the intellectual and artistic works legislation should prove that the third party has imitated his/her design. However, if one depends on the design legislation then one is merely to prove that one's design is identical with the third party design. Fourth is that, designs that shall be protected according to intellectual and artistic works legislation need not be registered and therefore time and money shall be saved. This being so, this provision meets an important need, considering that most designs are not registered today. However, a special regulation to be effected with respect to unregistered designs shall eliminate the need for protecting designs as a rule in this way according to intellectual and artistic works legislation. Finally, the scope of the protection of registered design is narrower than that of the intellectual and artistic works protection⁴⁷. Because, it is the novel and individual character of a design that is protected. Such qualities are less found in a design than originality is in an intellectual and artistic work. This results from the fact that the level is kept high in Turkish and EU Laws⁴⁸.

A significant number of people agree that, due to differences cited above, exceptions are to be brought about regarding the protection of designs according to intellectual and artistic works legislation. Nonetheless, consensus as to what these

⁴⁷ **KRUGER**, p.178.

⁴⁸ For further information see **SULUK**, p.21 etc.

exceptions shall be has not been reached yet.⁴⁹ Indeed, taking into account the particular purposes of the intellectual and artistic works legislation, such purposes are seen to be different than those included in design legislation. Therefore, it would be proper to impose certain exceptions regarding the protection of designs as intellectual and artistic works. If the work in question has qualities that are characteristic of an intellectual and artistic work, then it should be protected according to design legislation; if otherwise, protection should be provided within design legislation only. For example, protecting a design used as an economic instrument for 70 years throughout the life and after the death of the designer is not in line with the purposes of this protection.

3. Protection According to Unfair Competition Law

a. In General

There are three conditions that need to coexist in order that an act can be deemed to constitute unfair competition aa) Economic competition bb) Deceptive attempt or otherwise conduct violating goodwill cc) Abuse of competition⁵⁰. Creating confusions as to the source of the product, plagiarism and systematic copying are first among acts that create unfair competition. The first of these acts bears special importance with respect to designs⁵¹. If the imitating party eliminates confusing elements of the source of the product when imitating, such conduct shall not, as a rule, lead to unfair competition. Certain factors as the season and market

⁴⁹ ALRC, No: 13.47.

⁵⁰ See DİLEK, p.60.

⁵¹ KRUGER, p.182.

conditions in the fashion sector, for example, shall be taken into account when dealing with the existence of unfair competition⁵².

The analysis of the concrete case is of vital importance with respect to protection against unfair competition. In this analysis, various factors such as the acts performed up to the time of unfair competition by the party claimed to create unfair competition in a concrete case, the conditions present in the concrete case, relevant reasons and instruments used in imitation are taken into consideration⁵³.

The principle of cumulative protection is of vital importance with respect to spare part designs. Article 2 of the Design Decree-Law regulates the uses aimed at repairs. In the event that a spare part is used for purposes of repairs it remains under protection for 3 years following its launch in the market. However, the design must be depending on the general visibility of the complex product to which it is attached (must match part designs)⁵⁴. Furthermore, following the expiry of three years, third parties using the design are obliged not to confuse the public opinion. The rule of non-confusion of the public is aimed to prevent unfair competition. Third parties fulfilling the requirements of this rule will be able to use the design freely after three years from the launch of the product in the market. This rule mainly has the purpose of providing competition in the automobile spare parts market. In spite of this provision, the recent decision awarded by the Turkish Court of Appeals⁵⁵ is likely to cause mistakes in practice. If this decision remains applicable with respect to other future practices, spare part designs, be they registered or unregistered, shall be protected for an unlimited period of time, which conduct would not get

⁵² KRUGER, p.184.

⁵³ KRUGER, p.182.

⁵⁴ For further information on must match part designs see **SULUK**, p.133 etc.

along well with the main purpose of design protection and the existing regulation in Turkish Law which was enforced in 1995.

b. Protection of Registered Designs (of Patent, Trademark or Utility Model) According to Unfair Competition Provisions

Registered intellectual property rights such as the patent, utility model, trademark and design grant exclusive rights to their owner. In the event that these are used by third parties the case of infringement takes place *per se*. The conditions that the party causing the infringement is in are disregarded. The phrase *the party causing infringement* is used only because such party used the patent, trademark or design in question. Therefore, the rightholder can either depend on the *sui generis* protection model or on unfair competition provisions. In other words, unfair competitions are applicable in case they are needed and directly and primarily, and not secondarily.⁵⁶

‘Because the subject-matters of intellectual and artistic works law, trademark law, industrial design and patent law are respectively the protection of rights on the work, trademark, design and patent, and the holders thereof, whereas the subject-matter of unfair competition is the protection of the labour including operational endeavours, experience and investment as per the principle of labour, against commercial methods and practices violating principles of integrity. That is, protection depends on different principles.’⁵⁷

⁵⁵ 11th HD., 26.3.1997, P.1997/2514, D.1997/4904 (ASLAN, p.19 etc.).

⁵⁶ TEKİNALP, p.33.

⁵⁷ TEKİNALP, pp.33-34.

Now that the two protection models differ in terms of scope and purpose, it is natural that they cumulate. Yet, certain limitations have to be imposed on the implementation of this rule.

If a right does not grant exclusive authorities, infringement of that right could be the case in the event that the use thereof is unfair. In this case, it is not the protection of an exclusive right, but the scope of unfair competition that matters. If a patent, trademark or design that is not exclusively protected is being used properly, or not unfairly, by third parties one cannot talk of unfair competition⁵⁸. What matters is whether the act of the user constitutes unfair competition, and not whether an intellectual right is being protected or not. In this case, two conditions are required to coexist, however. If an act is violating a right that is protected by a special regulation (i.e. patent, trademark and design rights) such act will constitute, as mentioned before, unfair competition (objective criterion). This criterion pays attention to the original quality of the item protected via unfair competition. This is an essential requirement. Because, *ordinary things are not protected through intellectual property law*. However, the existence of originality is essential, but not the only reason for the existence of unfair competition, although the level of originality is not⁵⁹ the one required for patent or design protection. In short, a product made available to public and used commonly can be used by everyone. In addition, in the event that the act of the relevant party regarding the concrete case can be deemed to constitute unfair

⁵⁸ See. **FRANZOSI**, *The Legal Protection of Industrial Design*, p.157.

⁵⁹ As a matter of fact, the German Federal Court ruled in a case to annul a ruling by the Lower Court which followed that the design causing conflicts because it did not bear any novelty could not be protected according to unfair competition. According to the Federal Court, novelty and originality are not required to protect a design according to unfair competition provisions. See. BGH 19977 GRUR 614 with note by Fezer- Gebaudefassade (**KRUGER**, quoted from p.184 and p.185).

competition, then one can talk of unfair competition (subjective criterion)⁶⁰. The second criterion is related directly to the act of the violating party. Systematic copying is worth mentioning in this regard. Such can take place in the form of a problematic act or direct reception of third party contribution⁶¹.

According to FRANZOSI, although the design is not novel and individual, it should be protected in line with unfair competition provisions, providing that it is not commonplace (non-commonplaceness). The author thinks that cannot create slavish imitations of a design (patent, trademark or intellectual and artistic work) even though its protection expires⁶² or it does not meet protection requirements. This is because of the fact that a product is launched in the market for use and not for others to imitate its design or patent. Competitors can make similar ones but cannot imitate it. Otherwise, the imitating competitor shall have made use of the originator's labour without spending any effort or money. The thing the use of which is prohibited is not the idea of producing that particular product, but slavish imitation. This means imitation without any personal contributions whatsoever. One who develops a product upon being inspired by the idea applied on the competing product (indirect imitation) eliminates unfair competition⁶³. Moreover, the act of unfair competition will or will not take place according to the quality of the instrument used when copying a product that is not protected as an exclusive right but that is original (non-

⁶⁰ See Baumbach-Hefermehl, Wettbewerbsrecht, 14. Aufl., p.710 for a ruling by the German Federal Court (**FRANZOSI**, The Legal Protection of Industrial Design, quoted from p.157 footnote 25).

⁶¹ See **FRANZOSI**, The Legal Protection of Industrial Design, p.157.

⁶² See **FRANZOSI**, The Legal Protection of Industrial Design, p.157. For opposing views see **TEKİNALP**, p.34; **ARKAN**, p.10 and the footnote 25 therein; **HORTON**, p.311; **BAŞ**, p.45; **DİLEK**, p.58.

⁶³ See **FRANZOSI**, The Legal Protection of Industrial Design, p.158. Compare with **JEHORAM**, Green Paper, p.187.

commonplaceness). As a result, the author says that in the case of slavish imitation unfair competition exists, and in the event of indirect imitation, it does not⁶⁴.

GREEN PAPER deals with the fact that other protection models can cumulate with unfair competition provisions in terms of designs⁶⁵. Yet, there is no regulation in British Law relating to unfair competition, and it is pointed that such can constitute an exception to this cumulation. In addition, according to the GREEN PAPER (in line with what FRANZOSI thinks) the regulation and practices in Benelux⁶⁶ and Italian Laws regarding the free production of registered designs when their protection period expires are mistaken. This regulation included in the said laws depend on the principle which follows that *when the protection period of a product that contains an exclusive right expires that product can be freely produced by everyone*. This view is not acceptable to the GREEN PAPER. According to the GREEN PAPER and from FRANZOSI's viewpoint, a design whose protection period has expired could still be a well-known and valuable design. Therefore designs whose protection period expires should be able to be protected through unfair competition provisions.

From my viewpoint, designs that are *unfairly* imitated by competitors should be protected within the scope of unfair competition provisions.⁶⁷ In this context, although FRANZOSI's ideas regarding unfair competition are valid, the view that designs (intellectual and artistic work, patent, trademark and utility model) whose protection period is over shall be protected according to unfair competition provisions is not appropriate. By the same token, the view expressed by the GREEN PAPER is

⁶⁴ See **FRANZOSI**, *The Legal Protection of Industrial Design*, p.158.

⁶⁵ See **GREEN PAPER**, No: 2.7.

⁶⁶ See also **JEHORAM**, *Green Paper*, p.76 and See (14 April 1989), *Burberrys Ltd. v. Superconfex B.V.* (IIC, V.22, No:4/1991, p.568-570) for a ruling in this regard by the Benelux Court of Justice.

⁶⁷ Unfair competition has not been particularly regulated in British Law and it is being stressed that the lack of such regulation is deeply felt in terms of practices. See. **JEHORAM**, *Cumulation*, p.516.

not agreeable, either, because *in that case a time-bound right shall have been protected for an unlimited amount of time, which would not be in line with the fact that intellectual property rights are time-bound*. It is known that lawmakers grant exclusive rights to the owner of the intellectual property right as a rule, thereby protecting him/her against competition. This is intended to provide returns out of his/her R-D investments and to reward him/her in the name of promoting inventions and novelties. Lawmakers are aware that, through such conduct, they are limiting competition for a while in the product group to which the intellectual property right in question is applicable. The reason that underlies this is the aim to promote novelties and inventions and thereby to pave the way for the country's economy for competition in global markets in the long-run. Motivated by this fact, paragraph 1 of the Article 1 of the Design Decree-Law, exactly says that: '*This Decree-Law is aimed to protect designs that are compliant to the provisions herein, **to create a competitive environment, and to help industry develop***'.⁶⁸ In short, *what matters is competition; not the protection of intellectual property rights. The protection regarding intellectual property is therefore, due to the reasons cited above, if this word can be used to define it, an incidental protection*. As such, the owner of a design whose protection period expires, I think, cannot depend on unfair competition provisions. Because, the main principle of design law is that protection should be temporary and the design should be made available to public when protection period is over. Depending on unfair competition rules although the protection period is over is an obvious violation of this principle⁶⁹. There is only one exception to this rule. In

⁶⁸ Italics belong to the author of this paper.

⁶⁹ See for the same **TEKİNALP**, p.34; **HORTON**, p.311; **ARKAN**, p.10 and footnote 25 therein; **ASLAN**, p.27 etc.

the event that third parties use the design the protection period of which is over in a way to confuse public opinion, then unfair competition takes place. As a matter of fact, pursuant to Article 22 of the Design Decree-Law, third parties can freely use must match part designs following the expiry of three years after their launch in the market⁷⁰, which approach is supportive of this view. So, claiming the existence of unfair competition is not a time-related issue. The possession of design whose protection period expires by third parties or their use of the source thereof in a way to confuse public opinion can constitute unfair competition in a concrete case.

Good designs should be made available to the benefit of the public after a certain period of time. In practice, there are such designs that the product can fulfil its function in the event that these are developed in a different way. Maximum utility is gained only when they are produced in a specific way. That is, the production can fulfil the function expected of it only if it is designed in that particular way. So, competitors intending to provide maximum utility shall never be able to design and launch the product in the market in a way that it could fulfil the most effective function expected of it, which is because of the protection provided according to unfair competition provisions. Such a result is not in line with the purposes of design protection. If the view expressed by FRANZOSI and in the GREEN PAPER is accepted, slavish imitation of patents whose protection period is over is to also to be prohibited, which practice is not the case in any country. In practice, a patent the protection period of which expires can be freely used by everyone today.

⁷⁰ The said provision is not clear as to which acts are of a confusing nature regarding public opinion. On this issue see **OHLGART**'s comment in FRANZOSI, European Design Protection, p.159; **SULUK**, p.206 and 207. The issue has been resolved in a Court of Justice ruling in line with the view argued for herein. See Case C 63/97, BMW v. Ronald Karel Deenik [23 February 1999] (<http://europa.eu.int/>) (28.2.2001).

c. Protection of Unregistered Designs According Unfair Competition Provisions

The protection of unregistered designs is within the scope of general provisions in Turkish Law⁷¹. Among the general provisions are those relating to unfair competition.

The conditions required for the protection of unregistered designs are less than those for registered ones. A registered design is to have novel and individual features to be protected. However, as per Article 1 of the Design Decree-Law, the protection requirements for unregistered designs that are subject to general provisions shall be established according to general provisions as well⁷². Those practices envisaged by Turkish Case Law before 1995 are to be taken into consideration in this regard. According to the Turkish Court of Appeals, novel and individual designs are protected. In order to protect an unregistered design, the criterion to be required is relative novelty instead of absolute novelty. However, in terms of registered designs, it is the principle of absolute novelty that is in effect in Turkish Law⁷³. *Originality* is to be perceived within the context of *bearing the peculiarities of the owner*, as in the case of intellectual and artistic works. The level of this is relatively low compared to individual character in registered designs.

Article 1 of the Design Decree-Law leaves the protection of unregistered designs to general provisions and does not effect any regulation with respect to duration. Now that the duration for protection under the IAWC is established, if an unregistered design bears the qualities of an intellectual and artistic design it shall be

⁷¹ Design Decree-Law article 1/II.

⁷² As mentioned above, the protection requirements for the Unregistered Community Design and those for the Registered Community Design are the same. **ALRC** has also adopted a likewise approach in its proposal. See Proposal No: 12.4.

subject to time limitations specified therein. However, there is no time limitation in protection according to unfair competition. I think this legal can be filled in making use of the provision in Article 12 of the Design Decree-Law relating to the protection period of registered designs. As such, unregistered designs should be protected for 25 years, as is the case with registered designs. It is not acceptable that the lawmaker shall protect unregistered designs for an unlimited period of time while limiting the protection of designs to 25 years. The rule of preference justifies the view argued herein. Following the expiry of 25 years, the designs should be deemed to be made available to public. Taking it to be otherwise translates into protecting designs for an unlimited period of time according to unfair competition provisions, which would not be in line with the purposes of protection.

Therefore, with reference to Article 1 of the Design Decree-Law, unregistered designs should at most be protected for 25 years according to unfair competition provisions. In addition, a design whose 25-year protection expires or which is not protected as registered due to lack of 5-year renewals should be benefiting from the protection of unregistered designs until the 25-year protection expires. For example, if one renews a registered design 5 years after registration and makes no renewal thereafter, this design should be protected as registered for 10 years, and for as unregistered for the remaining 15 years. If a non-renewed design is not protected until 25 years expires, the designer shall be in a weaker position compared to other who have not registered their designs at all, which would not be in line with the purposes pursued by the lawmaker. Those interpretations that weaken registered designs vis-à-vis unregistered designs are not to be taken into consideration.

⁷³ Design Decree-Law, article 6.

The explanations herein demonstrate that a special kind of regulation is needed in this regard. Otherwise, mistaken practices could end in the weakening of registered designs. Or, protecting a time-bound right for an unlimited period of time yield results that are not in line with the main objectives of protection. Protection of unregistered designs has the purpose of preventing piracy in such short-life sectors as textiles and fashion⁷⁴. Considering this purpose, a potential regulation might envisage a 3-year protection for unregistered designs, as is the case in EU Law.

Exaggerating the protection of unregistered designs might destroy the very reason of the *sui generis* protection. Providing unfair competition protection for designs that are deemed to be made available to public because their protection period has expired might result in the protection of designs for an unlimited period of time, which result would not be in line with design protection. It would not be proper to define the slavish imitation by subsequent competitors without spending any efforts of a design whose protection period is over as unfair competition. The owner of designs already gains returns for his investment and obtains the *design premium*⁷⁵ after being protected for a certain and sufficient amount of time. Protecting such a design from public use thereafter means the protection of a time-bound right for an unlimited period of time. In this case, the individual interests of the rightholder are preferred to social interests. What matters is the provision of balance between individual and social interests. And this is possible through a time-bound protection of the said rights. Yet still, third parties should not confuse public opinion when making such use.

V. CONCLUSION

⁷⁴ KUR, p.378.

⁷⁵ Design premium is the surplus value added to the product by the design. This value is identified by the interest of the consumer. See SULUK, p.215.

The adoption of the principle of cumulative protection is a proper regulation in EU Law in terms of design protection. However, the necessary harmonisation regarding the legislation on intellectual property rights, and especially on intellectual and artistic works has not been done yet, therefore, how the principle shall be implemented stands ahead as a separate problem.

Another point to be stressed is that the implementation of the principle without giving way to any exceptions would not be in line with design protection. *Especially, providing unfair competition protection for designs whose protection period has expired will contradict the very purpose of design protection.* Because, the lawmaker's purpose of providing a competitive environment in the long-run shall not be realised, and more, the rightholder will be likely to have monopoly over the sector in question, which would not be in line with the fact that intellectual property rights are time-bound.

If a design meets the relevant requirements, it is appropriate that it be protected within the scope of the provisions that regulate other areas of intellectual property, together within the scope of design legislation. The implementation of the principle with respect to utility model, trademark, and intellectual and artistic works legislation –with the exclusion of time-related issues- shall not create significant problems. Furthermore, the protection of a registered design according to unfair competition provisions shall not result in –still with the exclusion of time-related issues- any problems. However, unless the protection requirements and the duration of such protection regarding unregistered designs are regulated, serious problems might be encountered in practice.

The regulation in Turkish Law following that unregistered designs shall be subject to general provisions is an incomplete regulation. In fact, how unregistered

designs shall be protected especially according to unfair competition provisions is uncertain with respect to this reference. Such uncertainty may also be the case in some EU Member State laws until the enforcement of Unregistered Community Design.

I think, an unregistered design should be protected for a maximum period of 25 years, providing that public opinion is not confused in the meantime. *One should not be able to depend on unfair competition laws in principle when such period expires.* This is required by the fact that design protection is time-bound. Otherwise, the design in question shall be protected for an unlimited period, which result is in contradiction to the main principle of design protection. Nevertheless, in the event that third parties engage in acts that confuse public opinion, depending on unfair competition provisions will not be a time-bound conduct (comparative implementation of Article 56 of the Turkish Commercial Code and Article 22 of the Design Decree-Law). Unfair competition provisions can be particularly depended on if third parties engage in acts that claim possession of the design by such parties.

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