Question Q231

National Group:	Turkish Group
Title:	**The interplay between design and copyright protection for Industrial products**
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Date:	02.04.2012

Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

Cumulative Protection

1) Can the same industrial product be protected by both a design right and a copyright? In other words, is the cumulative protection of the same industrial product by copyright and design law allowed in your country?

Yes. Cumulative protection by copyright and design law is allowed in our country.

Article 2(7) RBC

2) In your country, has copyright protection for applied art ever been refused for a work with a foreign country of origin pursuant Article 2 (7) RBC?

Turkish Group has not encountered any decision among the published jurisprudence in which copyright protection has been refused for applied art of a work with a foreign country of origin pursuant to Article 2(7) of RBC.

Nevertheless, since international agreements have the force of our internal laws and even rank on the above of our internal laws in terms of "hierarchy of norms" according to Article 90 of Turkey's Constitutional Law, Article 2(7) of RBC, to which Turkey is a member country, shall be implemented as "de lege feranda" law once a work with a foreign country of origin is sought copyright protection in our country. On the other hand, our Law on International Private Procedural Law No.5718 –the law which regulates the principles of conflict of law based on actions and relations of civil law with foreign component– envisages that the rights pertaining to Intellectual Property Law (including "Law on Intellectual and Artistic Works" numbered 5846 (hereinafter referred to as "Law No. 5846") shall be subject to the legislation of the country where

the protection is sought. Therefore, if a work with a foreign country of origin seeks copyright protection in Turkey, Law No. 5846 shall be applicable unless Turkey provides special protection to such work if it is protected in the country of origin solely as designs and models pursuant to Article 2(7) of RBC. Therefore, as for the authors of works protected solely as designs and models in the country of origin seeking copyright protection in Turkey shall be first made subject to an examination to determine as to whether or not our country provides a special protection to that work and if not, that work shall be protected as an artistic work, in terms of procurement of at least a minimum protection, according to Law No.5846 and Article 2(7) of RBC.

In this respect, saved for the situations where foreign country of origin provides shorter term of copyright protection than our Law No. 5846 and if any, other similar restrictive provisions envisaged in international conventions or bilateral agreements to which Turkey and country of origin are members, our relevant legislation, instead of refusing the works with foreign country of origin, is regulated with a tendency to accept and embrace these works along with Article 2(7) of RBC provided that Turkey is the country where the copyright protection is sought.

Therefore, suffice it to say, in Turkey, if the works of applied art with a foreign country of origin meet the subjective and objective requirements of being a protected work, we may say they will enjoy the copyright protection as of the creation date of the work.

Registration/Examination

3) In order to enjoy design right protection for industrial products is registration of a design necessary? In order for the design to be registered, is a substantial examination necessary?

Yes. In order to enjoy design right protection for industrial products, registration of the design is necessary. However, the unregistered designs are also protected in our law according to the general provisions regarding unfair competition or as a work in accordance with Law No. 5846 if the requirements are fulfilled.

No. Substantial examination is not necessary for the design to be registered. All the design applications are only published in a Bulletin for the third party oppositions.

Requirements

4) What are the requirements to obtain industrial design protection or copyright protection, respectively, for industrial products in each country? What are the differences between these requirements?

There is not any “sui generis” requirement to obtain industrial design or copyright protection specifically for “industrial products” according to Turkish design or copyright law.

According to Turkish Decree Law No. 554, Pertaining to the Protection of Industrial Designs (hereinafter referred as “DL 554”); an industrial design has to be novel and must have a distinctive (individual) character to be protected.

Being novel has been described as;

“if before the date of reference no identical design has been made available to the public in the world”

in the said decree law and *"to make available to the public"* covers all actions of sale, use, publication, publicity, exhibiting, or such similar activities.

Distinctive character has been described as the overall impression left on the informed user which shall be significantly different from the overall impression created on the same user by any design that is made publicly available previously.

Only registered designs can enjoy design right protection according to said Decree-Law.

According to Law No. 5846, a work can enjoy copyright protection if it is a creation bearing the individual characteristics of its author which falls within the categories listed "numerus clausus" in Law No. 5846 namely; a scientific and literary or musical work or work of fine arts or cinematographic work.

Differences between these requirements:

INDUSTRIAL DESIGN	**COPYRIGHT**
An industrial design must be registered in order to enjoy the protection.	Copyright Law provides a formality free protection. Therefore, there is not any registration requirement to enjoy the protection.
An industrial design must be novel ("absolute novelty") in order to enjoy the protection.	A work must bear the individual character of its author in order to enjoy the protection which is different from novelty.
There is not any criteria restriction according to the type of work in order to enjoy the protection.	A work must fall within the limited type of works indicated in the relevant code.

5) Are the requirements for copyright protection for industrial products different from the requirements for copyright protection for other ordinary artistic products (fine arts)?

There is not any "sui generis" requirement for copyright protection specifically for "industrial products" according to Law No. 5846.

Beyond the general criteria of copyright, a necessity of the aesthetic value of a work is compulsory for a work of fine art. An industrial product may enjoy the protection as "a work of fine arts" if it has an aesthetic value and fulfill other requirements.

Scope of Protection and Assessment of Infringement

6) Is the scope of the copyright protection for industrial products different than that for other ordinary artistic products (fine arts)? If so, in what ways?

No, the scope of the copyright protection for industrial products is not different than that for other ordinary artistic products.

7) Are the criteria for assessing infringement of copyright protected industrial products different from the criteria for assessing infringement of a design right?

Yes, the criteria for assessing copyright infringement and design infringement are provided under different laws and are different.

The differences are as follows:

a. DL 554 provides the definition of infringement as follows:

i. without the consent of the design right holder,
ii. to make, produce, put on the market, offer, sell, put to use, import or keep in stock for these purposes the identical or significantly similar design; to transfer to third parties or to expand rights acquired by a licensing contract; to participate or to assist or to encourage or to facilitate in whatever form the above referred acts; to abstain from explaining where and how an illegally produced and marketed product has been obtained when found in possession; seizure of entitlement.

Whereas in the Law No. 5846 there is no description for the infringement as such, but the said Law provides that the owner of a work whose moral or pecuniary rights have been infringed may request that the infringement is eliminated. In addition, Law No. 5846 includes the following provision: The court considers the immaterial and financial rights of the owner of the work, the scope of the violation, the presence of a fault, if any, its gravity and the damages that the infringer will possibly be subjected to in case of elimination of the violation, and decides upon the implementation of the measures that it will deem necessary for the elimination of the violation.

b. In assessing similarity and thus infringement the criterion set by the case law under Law No.5846 is whether the accused work is beyond being inspired of the original work.

In terms of designs, when assessing similarity and thus infringement, the main criterion is similarity in the overall impression. The freedom of choice of the creator is also taken into account in determining whether the similarity is justifiable.

8) Is it a relevant defense under copyright or design law that the industrial product was created independently of the older work or design?

According to DL 554, an industrial design has to be novel and must have a distinctive (individual) character to be protected. Being novel has been described as;

"if before the date of reference no identical design has been made available to the public in the world"

In the said decree law and *"to make available to the public"* covers all actions of sale, use, publication, publicity, exhibiting, or such similar activities. In this respect, even if the industrial product was created independently of the older work or design it is not possible to seek protection with the defense of independent creation.

With regards to Law No. 5846, however, the answer of this question might differ on a case by case basis due to differences between the requirements of copyright protection and design protection. According copyright law; a work can seek copyright protection if it is an intellectual and artistic creation carrying the characteristics of its author and is considered as scientific and literary, musical, artistic or cinematographic. In this respect where there is a defense saying that the industrial product, albeit that might be protected with copyright law, was created independently of the older work the Court has to examine the industrial product in terms of the fulfillment of the requirements of copyright protection and if all the requirements are

fulfilled then the Court compares the characteristics of the authors of the industrial product and the older work to decide. Such analyses will determine if;

- the industrial product is a reproduction (copy) of an older work and therefore creates copyright infringement,
- the industrial product has been adopted from an older work but carries the characteristics of its own author and therefore might not create copyright infringement
- the industrial product has been created without going beyond the inspiration from an older work and therefore does not create copyright infringement.

Duration of Protection

9) How long is the duration of industrial design protection or copyright protection for industrial products, respectively?

The duration of industrial design protection is 5 years from filing, which may be extended to 25 years by renewal of per 5 years.

The duration of copyright protection for industrial products, however, is lifetime of the author/designer and 70 years thereafter.

If the first author is a legal person, the term of protection shall be 70 years from the date on which the work was made public.

10) What happens upon expiration of the IP right having the shorter term? In other words, after the term for industrial design protection expires, does the copyright protection continue?

Copyright protection continues after the term for industrial design protection expires.

Measures for adjustment

11) In your country, is there any measure for adjustment so that the same industrial product may not be protected, by both a design right and a copyright or, by a copyright after the design right expires?

No, in Turkey, the same industrial product may be protected, by both a design right and a copyright or, by a copyright after the design right expires and there is no law providing otherwise.

II. Proposal for Harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the protection of the appearance, shape, or ornamentation of industrial products. More specifically, the Groups are invited to answer the following questions:

11) What should be the requirements for obtaining copyright protection for industrial products?

The Turkish group believes that once the cumulative protection for industrial products is accepted, the requirements for copyright protection should depend on the internal laws of each country.

12) For industrial products, should there be any cumulative protection by industrial design rights and copyright?

The Turkish group believes that the cumulative protection is indeed necessary for industrial products. Although the requirements for industrial designs and copyrights differ at a considerable level, it is clear that an industrial product can fulfill the requirements of both. The Turkish Group is of the opinion that it would be unlawful and in fact constitute the breach of undertakings as per relevant international agreements to ignore either scope of protection.

13) If so, should there be any measures to resolve this overlap? What measures should be taken? For example, once a certain artistic work has enjoyed industrial design protection, should copyright protection be denied for the same work?

As per the responses to (12) above, the Turkish Group believes that the overlap is not a problem to be solved.

14) National Groups are invited to comment on any additional issue concerning the relationship between design and copyright protection for industrial products that they deem relevant.

The Turkish Group wants to further emphasize that the industrial design protection aims protecting the financial rights of its registered owner whereas the copyright entitles both the copyrighted work and its author to a much broader protection, from not only pecuniary but also moral rights point of view. Thus, the fact that its creator enjoys from a product from an industrial point of view should not mean that it cannot be protected as per copyright law.

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SUMMARY

The Turkish Group sees that even if the cumulative protection is not clearly recognized, there is no provision in Turkish law preventing the same industrial product be protected by both a design right and a copyright; thus cumulative protection is indeed possible in Turkey.

The Turkish Group is of the opinion that dual protection of industrial products as such is very important, as copyright protection covers not only pecuniary rights of its creator but also the moral rights thereof which are not covered by industrial design rights. Thus, ignoring especially the copyrights on an industrial product would result in serious loss of rights for its creator.

Although the requirements and scope of protection concerning industrial designs and especially copyrights may differ in each jurisdiction, the Turkish Group believes that the harmonization thereon would not be vital whereas harmonization in concept of dual protection for industrial products would be sufficient in order to reach the aim.

RESUME

Le Groupe Turc estime que, même si le cumul de protection n'est pas clairement reconnu, il n'existe aucune disposition dans le droit turc interdisant qu'un même produit industriel soit protégé à la fois par le droit relatif aux dessins et modèles et par le droit d'auteur; une protection cumulative est donc possible en Turquie.

Le Groupe Turc est d'avis que la double protection des produits industriels en tant que telle est très importante, étant donné que la protection du droit d'auteur couvre non seulement les droits pécuniaires de l'auteur, mais également ses droits moraux, alors que ceux-ci ne sont pas couverts par le droit des dessins et modèles. Ainsi, négliger les droits d'auteur pour un produit industriel engendrerait une considérable perte de droits pour son créateur.

Bien que les modalités et la portée de la protection des dessins et modèles industriels, et les droits d'auteur en particulier, diffèrent parfois entre les juridictions, le Groupe Turc considère qu'une harmonisation à ce sujet n'est pas indispensable, alors qu'une harmonisation du concept de double protection pour les produits industriels serait suffisante pour atteindre l'objectif poursuivi.

ZUSAMMENFASSUNG

Die türkische Gruppe ist der Auffassung, dass selbst wenn der kumulative Schutz nicht klar definiert ist, keine Bestimmung im türkischen Recht vorhanden ist, die verhindert, dass gleiche Industrieprodukte sowohl als ein Recht auf ein Geschmacksmuster als auch als ein Urheberrechtsschutz geschützt werden können; daher ist kumulativer Schutz in der Türkei tatsächlich möglich.

Die türkische Gruppe ist der Meinung, dass der doppelte Schutz von Industrieprodukten als solche sehr wichtig ist, da Urheberschutz nicht nur Vermögensrechte seines Urhebers, sondern auch die Urheberpersönlichkeitsrechte davon, die nicht durch Geschmacksmusterrechten erfasst werden. Daher würden vor allem die Urheberrechte an einem Industrieprodukt zu schwerem Verlust von Rechten für seinen Urheber führen.

Obwohl die Voraussetzungen und der Umfang des Schutzes in Bezug auf Geschmacksmusterrechten und vor allem Urheberrechten in den einzelnen Länder unterschiedlich sein können, glaubt die türkische Gruppe, dass die Harmonisierung hiervon nicht entscheidend ist, jedoch eine Harmonisierung im Konzept des doppelten Schutzes für Industrieprodukte ausreichend wäre, um das Ziel zu erreichen.

April 2012