

The following article was written by **MARQUES** members **Isik Ozdogan** and **Ezgi Baklaci** from **Moroglu Arseven Law Firm**

The Turkish Constitutional Court recently cancelled Article 136/1-a,b of the Turkish Patent Decree Law no: 551 and Article 48/1-a of the Turkish Industrial Design Decree Law no: 554 due to the fact that these articles violated the Turkish Constitution. The cancelled articles defined acts of infringement. The cancelled articles are as follows:

### **Turkish Patent Decree Law no: 551, art. 136/1- a, b:**

The following acts shall be considered infringement of the rights conferred by a Patent:

- a) Imitating by producing in whole or in part a product or the subject of an invention without the consent of the patent holder
- b) Selling, distributing, commercializing in any other way, or importing for such purposes products or keeping these products for commercial purposes or using by applying such products, manufactured as a result of an infringement, where the person concerned knows or should know that such products are imitations in whole or in part;

### **Turkish Industrial Design Decree Law no 554, art. 48/1-a**

The following shall be considered infringement of a design right:

- a) without the consent of the design right holder, to make, produce, put on the market, offer, sell, put to use, import or keep in stock for these purposes products with the identical or significantly similar design;

The cancelled articles defined the acts of infringement as to patent, utility model and industrial design rights. The Turkish Constitutional Court cancelled the aforementioned articles because according to Article 38 of the Turkish Constitution crimes and penalties need to be regulated by a legislative act, not by a decree-law. In Turkey, issuing a decree-law is an exceptional right reserved for the Council Of Ministers. Under normal conditions, only Parliament has the authority to make laws. However, the Parliament may empower the Council of Ministers to issue decrees which will have the effect of Codes. This means with Decree Laws the present Codes can be modified or even cancelled. Technically, Decree Laws are Cabinet transactions, but in practice, they have the same effect as the Codes that are passed by the Parliament.

According to the Turkish Constitution Art. 91, fundamental and individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution cannot be regulated by decree laws. The cancelled articles defined the acts of infringement and the penal articles were being applied to these acts. As the cancelled articles were affecting fundamental and individual rights, the acts of infringement cannot be regulated by a decree law.

The court decision was published on 10.06.2009 and will put into force starting on 10.06.2010 for public safety and to avoid a legal gap in relevant legislation. That means the acts below will not be considered infringement by 10.06.2010 if a new code is not put into force.

- Imitating by producing in whole or in part of a product, subject of the invention, without the consent of the patent or utility model holder AND selling, distributing or commercializing in any other way, or importing for such purposes of products or keeping them in possession for commercial purposes or using by applying such products, manufactured as a result of an infringement, where the person concerned knows or should know that such products are imitations in whole or, in part
- to make, produce, put on the market, offer, sell, put to use, import or keep in stock the identical or significantly similar industrial design without the consent of the design right holder,

If the new code is not put into force until 10.06.2010, the pending cases initiated on the basis of the cancelled articles before that date will be dismissed.