

## Turkish Constitutional Court Annulled Article 81/13 of Law on Intellectual and Artistic Works, the Joiner of Offences Rule on Breach of Banderole Liability Crime

27 Oct 2020

Pursuant to Law numbered 5846 on Intellectual and Artistic Works ("**Law**") reproduced copies of musical and cinematographic works and non-periodical publications should bear a special label, called a banderol for commercial exploitation. The breach of banderole liability crimes and related punishments are regulated under article 81 of the Law. Article 81/13 of the Law, on the other hand, sets forth a special joiner of offences rule by making a reference to article 71/1-1 of the Law that infringement of the moral and financial rights crime regarding an artistic work is laid down.

According to article 81/13, if breach of the banderole obligation crime is committed together with infringement of the moral and financial rights crime regarding the same artistic work, instead of punishments set in article 81, punishments under the article 71 should be applied by increasing the punishment by a third.

Izmir 1<sup>st</sup> Intellectual and Industrial Property Criminal Court applied to the Constitutional Court for the annulment of the article 81/13. The Constitutional Court found article 81/13 of the Law against the principle of proportionality and article 2 of the Constitution. Accordingly, the article was annulled by the Constitution Court and the decision was published on the Official Gazette number 31188 dated 17 July 2020. The reasoning of the decision is as follows:

- Article 71 of the Law regarding infringement of the moral and financial rights crime, stipulates judicial fine or imprisonment as elective sentence, and under some conditions set forth in article 71/3 it is possible to renounce from punishment. The crimes regulated under article 71 are prosecuted upon complaint of the right owner of the artistic work.
- Other than article 81/11, which set forth only imprisonment, article 81 of the Law also stipulates judicial fine or imprisonment as elective sentences. These offenses are investigated and prosecuted on behalf of the public *ex-officio*.
- While it is possible for a perpetrator, who has only committed to banderole obligation crime, to receive an imprisonment sentence as per article 81/4, if the perpetrator also commits infringement of the moral and financial rights crime, the perpetrator, upon complaint, may face lighter punishments such as judicial fine or under some circumstances no punishment at all, as per article 71. In other words, a perpetrator, who has violated both offenses may face heavier punishments in case there is no complaint, and lighter punishments if the right holder files a complaint. In fact, although the use of the right to complaint indicates the effect of the violation is more intense, the result of the complaint is more in favor of the perpetrator. This situation is beyond principle of proportionality as it is unsatisfying for the rights holder, who complained, and results with different punishment for same action.
- Additionally, right owners can commit breach of the banderole obligation crime, as well. Whereas the offenses stipulated under article 71/1 are mostly committed by third parties who are not involved with the artistic work. In this case, the owners of the artistic works who have violated the banderol

obligation can be punished heavier than third parties who have committed both offenses.

The Constitutional Court decided cancelation of the article by a majority vote with the decision dated 12 June 2020 and numbered 2019/74 E. 2020/24. K.

Please see this [link](#) for full text of the decision (only available in Turkish).

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