

Turkish Constitutional Court Strikes Out Legislative Basis for Non-Use Trademark Cancellation Actions

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The Turkish Constitutional Court has ruled that the Article 14 of Decree Law No. 556 on the Protection of Trademarks ("**Trademark Decree Law**") is contrary to provisions of the Turkish Constitution. The court ruled to strike out the basis article for cancelling a trademark based on non-use. The decision will have consequences for pending cancellation actions based on non-use, since their legal ground has now been cancelled. However, legislation which is currently at the final stages of enactment looks likely to address uncertainty caused by the Constitutional Court's decision.

Article 14 of the Trademark Decree Law generally sets forth the requirements to use a trademark. Accordingly, a trademark can be cancelled if:

- It not been used within five years after registration, without a justifiable reason, or
- Use has ceased for an uninterrupted period of five years.

In 2014, the Constitutional Court struck out Article 42/1-c, which refers to Article 14. According to common practice, cancellation of Art. 42/1-c meant that the effect of cancelling a trademark based on non-use will be prospective, rather than retrospective. However, the Constitutional Court has now struck out the basis for cancelling trademarks based on non-use (Article 14).

Article 14 was brought to the Constitutional Court's attention by the 2n Intellectual and Industrial Property Rights Civil Court's judge in Istanbul. The first instance court argued that cancelling a trademark based on non-used conflicts with the right to property, a fundamental right protected by the Constitution (Article 35). Accordingly, the lower court claimed that this cannot be regulated by decree laws.

The Constitutional Court agreed that Article 14 is indeed to restrict property rights and is contrary to Article 91 of the Turkish Constitution, which sets forth that (with limited exceptions) decree laws may not regulate fundamental rights, nor may they regulate individual or political rights and duties. Therefore, the Constitutional Court unanimously ruled to cancel Article 14.

As to the consequences of the Constitutional Court's decision, we are of the opinion that pending cancellation actions based on non-use will be highly affected, since their legal ground has been cancelled. The decision will result in dismissal of such actions. Yet, it remains unclear how first instance courts and the Court of Appeal will react to cancellation of Article 14.

As a separate note, Turkey is on the verge of enacting a new Industrial Rights Law ("IP Law"). The IP Law passed through the Turkish Parliament on 22 December 2016 and now awaits approval from the President of the Turkish Republic, in order to be published in the Official Gazette. The new legislation will regulate use of a trademark (Article 9), including reference to such use as an invalidation ground (Article 26). Therefore, although the Constitutional Court's decision creates ambiguity, and will have consequences for pending cancellation actions based on non-use, this situation will likely be resolved once the new IP Law comes into effect.

Related Attorneys

- EZG? BAKLACI GÜLKOKAR, LL.M.
- MERVE ALTINAY ÖZTEK?N

Moroglu Arseven | www.morogluarseven.com