

## Using Unfair Competition Provisions To Protect Intellectual Property Rights In Turkey

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There comes a point where trademark registration is not enough to protect a company's intellectual property rights from infringement. In these circumstances, the unfair competition rules under the Turkish Commercial Code (TCC) become relevant. Businesses have come to view these provisions as highly important in protecting intellectual property rights. This article considers how the Turkish courts have applied the unfair competition provisions of the TCC to trademarks and designs.

As everyone knows, best-selling products sold under well-known trademarks are targets for infringers. Clever infringers seem to constantly find confusing loopholes to exploit and thereby skirt the scope of protections provided by trademark registration. In cases where the infringer does not use a company's trademark and the company does not have any design registration for the package, businesses should consider the redress available under the unfair competition rules of the TCC. In recent years the Turkish courts have rendered many promising decisions for businesses in this regard.

Recent amendments to the TCC aimed to widen implementation of the unfair competition provisions. The explicit purpose of the unfair competition provisions in the TCC is to create fair and uncorrupted competition for the benefit of all participants, including competitors and customers.

The principle underpinning the TCC's unfair competition rules is common in Turkish Civil Law. This principle says parties must act "as a prudent businessperson and in a bona fide manner". The TCC defines unfair competition as (i) any misleading act or commercial practice that has an impact on competitors or on relations between customers and suppliers and (ii) any act or commercial practice that violates the bona fide principles. Therefore, in addition to the usual intellectual property avenues, businesses protecting their intellectual property rights should evaluate infringement under these two areas of the TCC as well.

Article 55 of the TCC provides a detailed but non-exhaustive list of acts which constitute unfair competition. One of the examples provides board protection to companies when trademark protection is not enough, stating that "to create confusion with others' businesses, business products or activities is unfair competition" (article 55 (1) a-f). Based on this definition, many courts have found the existence of unfair competition in lawsuits. Some examples of this and the courts' approach are outlined below.

### **Calgon v Peros (2012)**

The 11th Civil Chamber of the Court of Appeals affirmed the Court of First Instance's decision that the Peros packaging was found to be confusingly similar to the Calgon packaging. The court said:

*"Although the trademarks are not similar, the packaging is confusingly similar and it creates a likelihood of confusion. Therefore even though there is no specific trademark infringement there is still unfair competition*

*in this case ..."*

### **Nivea Soft v Rebel Soft (2006)**

The 11th Civil Chamber of the Court of Appeals affirmed the Court of First Instance's decision that the Rebel Soft cream packaging was confusingly similar to the Nivea Soft cream packaging. The court said:

*"The trademarks 'Nivea Soft' and 'Rebel Soft' are not similar, therefore there is no trademark infringement in this case. Both cream jars are in white, dark blue (navy) and green colors.*

*"An average consumer might think that the products are manufactured by the same company. There isn't any technical or functional necessity to select the same colors, therefore it can be deemed that the defendant used the package to unfairly benefit from the plaintiff's commercial success. Therefore there is no trademark infringement, but there is unfair competition in this case ..."*

### **Danino v Büyümix (2012)**

The 11th Civil Chamber of the Court of Appeals affirmed the Court of First Instance's decision that the Büyümix yogurt packaging was confusingly similar to the Danino yogurt packaging. The court said:

*"The packaging is similar enough to mislead the consumer, especially considering that the subject products' consumers are mainly children and the method of placing the subject products on to shelves, which reinforces the possibility of delusion.*

*"Despite a lack of technical necessity, the defendant replaced its former packaging with a new packaging that was confusingly similar to the complainant's style of packaging. It was decided that replacing the packaging constituted unfair competition since it misled the consumer by being confusingly similar."*

Although these court cases are promising for businesses, it is important to note that the courts do not protect all infringed unregistered rights. The unfair competition provisions regulate unfair competition acts occurring within Turkey. Therefore, in order to establish the existence of an act that constitutes unfair competition, the infringing product must have been used in the Turkish market (i.e. the product should be in the market or its packaging should be used).

Article 62 of the TCC outlines the punishments associated with the unfair competition provisions. This states that (among other things) those who intentionally commit acts of unfair competition or intentionally provide false or misleading information in order that their offers and proposal are given preference above those of competitors may be fined or receive two years of imprisonment.

Taking into account the court cases discussed above, there should usually be reasonable grounds to challenge intellectual property infringers who attempt to skirt around the scope of existing legal protections. Therefore, where businesses find their intellectual property rights are not sufficiently protected from infringement, they should not neglect to investigate whether the TCC's unfair competition rules provide protection.

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