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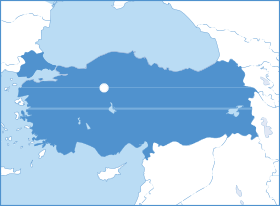
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**Turkey: Law & Practice**

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Moroğlu Arseven

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Law and Practice

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# Intellectual Property Rights and Granting Procedure

* 1. Types of Intellectual Property Rights The Turkish legal system provides for “patents” and “utility models” for the protection of inven- tions. Both of these forms of protection are based on statutory law, they are regulated in the Industrial Property Code (IPC).

## Grant Procedure

Patents

After a patent application is duly and completely filed, the Turkish Patent and Trademark Office (TPTO) conducts a procedural examination.

A priority claim either can made on first filing or two months from the application date.

If the TPTO determines that there is a deficiency in the application documents, the applicant is given two months to correct it.

The applicant must request the TPTO to under- take a standard state of the art search within 12 months from the application date and pay the necessary fee for the search. If the applicant does not request such a search within the per- mitted time period, the patent application will be deemed to be withdrawn.

The search report is the first step in deciding whether or not an invention is patentable. Once the search report is prepared, the TPTO notifies the applicant regarding the report and relevant documents.

After a total of 18 months, as of the application/ priority date, the patent application is published in the Official Patent Bulletin. The applicant may file a request for an earlier publication.

If the applicant decides to proceed with the application, it is entitled to request the prepa- ration of the examination report within three months from the notification of the search report.

If the TPTO concludes that the application meets the patentability criteria, the TPTO will issue the patent (on payment of the necessary fees).

If the TPTO concludes that the application does not meet the patentability criteria, the applicant is allowed three months to either amend its claims or object to the TPTO’s report. Applicants are limited to three rounds of this notification, response and amendment process.

Third parties are entitled to submit oppositions to the patent within six months of the publica- tion of grant. The applicant has the right to file a response to a third-party opposition within three months.

If there is no third-party opposition, the patent becomes final and the final decision of the TPTO is published in the Bulletin.

Utility Models

The grant procedure is shorter and easier for util- ity models.

After the procedural examination, if there is no deficiency or the deficiencies are corrected, the applicant is entitled to request a search report.

Once the search report is prepared by the TPTO, the applicant is notified in this regard.

The application is published in the Bulletin 18 months after the application date. The applicant may file a request for an earlier publication.

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Third parties are entitled to submit their opinions and the applicant is entitled to file an opposition against the publication within three months of publication.

The TPTO examines these opinions and opposi- tions. If the TPTO’s examination decision is posi- tive, the application matures to registration.

* 1. Timeline for Grant Procedure Obtaining a patent takes approximately two to five years. Obtaining a utility model takes around two to three years.

Turkish citizens and Turkish residents do not need a representative to initiate grant proceed- ings; in other words, right-holders can file appli- cations themselves. However, foreign applicants must assign a registered local patent attorney.

Official fees for granting a patent for 2022 can be found on the TPTO [website](https://www.turkpatent.gov.tr/).

Official fees for granting utility models for 2022 can be found on the TPTO [website](https://www.turkpatent.gov.tr/). Official fees for 2023 have also been published and are avail- able at the TPTO’s [website](https://www.turkpatent.gov.tr/).

In a smooth-running proceeding, the cost will vary from EUR5,000–8,000 (including official and attorneys fees). These figures do not include the drafting of the patent application.

Since utility model registration procedures are shorter and less complex, the total cost of the whole registration procedure will vary from EUR3,000–6,000.

## Term of Each Intellectual Property Right

Patent protection lasts for 20 years, whereas utility model protection lasts for 10 years as of the application date.

## Rights and Obligations of Owners of Intellectual Property Rights

Patent and utility model holders are entitled to:

* prevent others from using their inventions;
* seek legal remedies (such as infringement actions and compensation claims) to protect their rights, including the right to an injunc- tion; and
* assign their intellectual property rights, sign licence agreements, or put pledges on the patent or otherwise dispose of it.

Right-holders are obliged to pay the annual renewal fees.

The patent file submitted to and registered with the TPTO becomes publicly available and may be reviewed by any interested person. The TPTO’s online system allows the public to con- duct searches of its online database. One can conduct such searches for a patent based on its applicant, invention summary, invention head- line, IPC class or Co-operative Patent Classifica- tion (CPC) class.

## Further Protection After Lapse of the Maximum Term

There is no further protection after the expiration of protection dates.

## Third-Party Rights to Participate in Grant Proceedings

Third parties are entitled to file third-party obser- vations after the publication of the patent/util- ity model application. If these observations are

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filed before the preparation of the search report, they may be considered during the preparation of the report. Even so, the third party filing the observation does not become a party to the pro- ceedings.

Third parties are entitled to oppose the patent within six months from the publication date of the grant of the patent. This post-grant opposi- tion procedure is not available for utility models.

As for utility models, third parties are also enti- tled to submit observations and objections against the application within three months of the publication of the search report.

## Remedies Against Refusal to Grant an Intellectual Property Right

Applicants are entitled to file actions within two months of the notification date of the decision before the first instance intellectual and indus- trial property rights civil courts of Ankara for the cancellation of a negative and finalised decision of the TPTO.

## Consequences of Failure to Pay Annual Fees

The failure to pay annual fees results in loss of rights.

* If the intellectual property right is granted, failure to pay the annual fees results in the loss of the rights arising from the patent/utility model.
* If the application process is ongoing, it results in the invalidity of the application.

Annual fees must be paid every year on the date that the application was filed, starting two years after the application date (when the second year is completed, and the third year starts). It must be noted that right-holders must pay the annual

fees even if they are not notified in this regard. If the fee is not paid on this date, it is possible to pay within six months provided that an addi- tional fee is paid.

Annual fees differ for patents and utility models, and also are updated every year. The fees can be found via the links provided in 1.3 Timeline for Grant Procedure.

The IPC provides another option for patent hold- ers and applicants, who are allowed to reinsti- tute rights by paying the relevant fees. The IPC allows patent holders to revive a patent which has lapsed due to failure to pay the annual main- tenance fee in time. To revive such a patent, the right-holder must deposit the penalty fee within two months of the TPTO notifying them that the patent has lapsed. The patent will become valid again for a further year, running from the fee pay- ment date.

* 1. Post-grant Proceedings Available to Owners of Intellectual Property Rights Article 99 of the IPC provides a post-grant oppo- sition system, whereby third parties can oppose a patent within six months of the publication of the decision stating that the patent is granted. Upon the TPTO notifying the patent owner about an opposition, the patent owner can file a response or amendments to the patent within three months. If the Re-examination and Evalu- ation Board (the “Board”) examines the opposi- tion and finds that the patent conforms with the IPC, it will refuse the opposition. If the Board concludes that the patent partially conforms to the law, it will confirm the partial validity. It will inform the patent owner accordingly, requesting the amendment of the patent in line with par- tial approval. If no amendments are filed (or the amendments are not approved), the patent will be invalidated.

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Otherwise, the claims of a Turkish patent cannot be amended by the patent holder after the grant of protection. However, Article 140 of the IPC states that the right-holder may restrict its right to the patent, either in full or partially, for one or more claims. The IPC allows for the cancellation of a whole claim; however, it does not provide the right to amend the claim. Where the patent is restricted in part, the patent remains in force for the claims which have not been cancelled.

# Initiating a Lawsuit

## Actions Available Against Infringement

Settlement and Mediation

If the parties seem open to the discussion of a settlement, the right-holder may choose to con- tact the infringing party through a warning letter and may come to terms by signing a settlement agreement.

Moreover, under Turkish Law, mediation has recently become a prerequisite for filing lawsuits concerning commercial disputes with monetary claims, including IP-related disputes. If a lawsuit is filed without applying for mediation first, the case will be dismissed with respect to compen- sation claims ex officio on procedural grounds, without any further examination of the merits, and the examination will continue with respect to other claims such as elimination of the infringe- ment and seizure of infringing items (if any).

Recently, the 11th Chamber of Court of Appeal, which is responsible for IP cases, ruled that there is no need to apply for an obligatory mediation if the action includes prevention of or elimina- tion of the outcomes of the infringement request. Although the regulation does not foresee any exceptions on obligatory mediation, right-hold-

ers may initiate patent infringement actions, including compensation claims, without apply- ing for mediation based on said decision of the Court of Appeal’s respective chamber.

Court Proceedings

The most effective way for a patent owner to enforce their rights is to initiate an infringement action against the alleged infringers before the specialised intellectual and industrial property rights civil courts.

Such infringement actions are generally started with a preliminary injunction claim and the dis- covery and determination of evidence.

To obtain an injunction, the requesting party must prove that, if the injunction is not granted:

* irreparable harm will arise; or
* the outcome the requesting party seeks in its main action will be unlikely to be achieved.

The preliminary injunction procedure may be initiated with or before the main action. How- ever, if the court accepts the preliminary injunc- tion claim, the main action should be filed within two weeks.

The right-holder is also entitled to request the discovery of evidence before filing the main action. According to Article 400 of the Civil Pro- cedural Law, any party is entitled to request the court to conduct a site visit or expert examina- tion, or to hear a witness, on the condition that the requesting party will receive a legal benefit in filing such a request. The condition of the legal benefit is deemed to be met if the evidence will be lost or very difficult to collect unless it is immediately secured. The determination of evidence is a preliminary measure and is there- fore conducted immediately. After the evidence

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is examined, an expert report is obtained. An important point is that, during the determination of evidence procedure, no evidence (eg, infring- ing products) is seized.

Infringement actions may be subject to alterna- tive dispute resolution (ADR).

* 1. Third-Party Remedies to Remove the Effects of Intellectual Property Invalidation Actions

According to the IPC, “[p]ersons concerned, public prosecutors or the relevant public institu- tions and organisations may request the invalid- ity of patent”. Therefore, third parties may ini- tiate invalidation actions. While initiating these actions, third parties may also request a pre- liminary injunction to prevent the right-holder enforcing their rights. However, the courts are generally reluctant to render such preliminary injunction decisions.

The IPC also introduced a post-grant opposi- tion system, whereby third parties can oppose a patent within six months of publishing the deci- sion stating that the patent is granted. Within this opposition, they may argue that:

* the patent does not meet the patentability criteria;
* the invention is not disclosed in a sufficient manner; or
* the patent exceeds the scope of the initial application.

Non-infringement Decisions

Obtaining a declaratory judgment in which a court determines that infringement has not occurred (a “non-infringement determination”) is a key pre-emptive defensive measure. Sending a warning letter to the counterparty is not a pre- requisite for filing the action, though the timing

is important. In general, for all cases, the plaintiff must have a legal benefit in filing the action at the time the action is filed. In pharma cases, the timing of the non-infringement action is espe- cially important, because the settled practice of the courts underline that as long as the actions of the plaintiff fall within the Bolar exemption, the action is deemed untimely and refused on procedural grounds.

Compulsory Licensing

The IPC sets certain conditions for granting a compulsory licence (CL) in Turkish practice and regulates the following CL request/grant pro- ceedings, respectively.

* In the case of non-use arguments – the courts are entitled to handle these requests.
* In the case of interdependency of the sub- jects of the patents – the courts are entitled to handle these requests.
* In cases where plant breeders cannot devel- op a new type of plant without infringing on a preceding patent.
* In cases where patent holders engage in activities that prevent, distort or restrict com- petition while using the patent – the Turkish Competition Authority is entitled to handle these requests.
* To meet the requirements of the Doha Dec- laration (the export of pharmaceutical prod- ucts to foreign countries experiencing public health problems) – the courts are entitled to handle these requests.
* In the interest of public order – Turkey’s Ministry of Health and the Ministry of National Defence are entitled to request these CLs and the President decides on the granting.

Even though actions for CLs are possible, in Tur- key they are very rarely seen.

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## Courts With Jurisdiction

First Instance

All patent cases are handled by the specialised IP courts, which exist only in Istanbul, Ankara and Izmir. In other cities, the Third Civil Court of General Practice is authorised.

According to the general jurisdiction rules of the Civil Procedural Law No 6100 (CPL) and specific rules of the IP Law, several courts are authorised to handle disputes. These include:

* the court of the domicile of the defendant;
* the court of the domicile of the plaintiff;
* the court of the place where the infringing act was carried out; and
* the court of the place where the act of infringement produced its effects.

In addition, Article 156 of the IP Law determines the jurisdiction of the courts.

Accordingly, jurisdiction is determined on the following basis.

In actions which are initiated by the right-holder against third parties, if the plaintiff resides in Tur- key, the courts in the following places have juris- diction: the domicile of the plaintiff or the place where the infringement takes place (or the place where the infringing acts have their results).

Where the plaintiff is not domiciled in Turkey, the court of the place where the registered patent attorney resides has jurisdiction. If there is no registered attorney, the court where the TPTO is located has jurisdiction.

In actions initiated by third parties against the right-holders, if the defendant resides in Turkey, the courts where the defendant is domiciled have jurisdiction. If the defendant does not reside in

Turkey, the court of jurisdiction is the court in the location of the business of the plaintiff’s agent. If the agent’s record has been deleted from the registry, the court of jurisdiction is one of the specialised IP courts of Ankara, where the TPTO is located.

Generally, both the plaintiff and the defend- ant will prefer the dispute be handled by the IP courts – as long as the jurisdiction rules allow the action to be filed in Istanbul, Ankara or Izmir

– since these courts have extensive knowledge of IP disputes.

Second Instance

The first-instance courts’ decisions can be chal- lenged before the Regional High Court.

Third Instance

The Court of Appeal is the third and final judicial authority.

## Specialised Bodies/Organisations for the Resolution of Disputes

The parties are always entitled to settle the issue amicably at any stage of the proceedings. As to arbitration, it is widely accepted that the dis- putes regarding the invalidation of a patent can- not be subject to arbitration since the results of ADR are only binding on the parties, but such a dispute relates to the official registry and the TPTO is not a party to the invalidation action. However, it is accepted that a declaratory action for non-infringement, or infringement actions, may be subject to ADR. However, ADR is still not as effective as court proceedings.

Moreover, Turkey has recently adopted new legislation requiring an application to manda- tory mediation for monetary claims arising from trade law disputes, including intellectual prop- erty disputes (see 2.1 Actions Available against

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Infringement for further detail). In addition, dur- ing the period between the application to the mediation bureau and the preparation of the final report by the mediator, the statute of limitations will be suspended.

The parties can apply to the Mediation Bureau within the jurisdiction of the competent court with regard to the subject of the dispute at hand.

## Prerequisites to Filing a Lawsuit

As explained in 2.1 Actions Available against Infringement, mediation is a prerequisite for fil- ing lawsuits concerning commercial disputes with monetary claims, including IP-related dis- putes. However, current court decisions rule that there is no need to apply for an obligatory mediation if the action also includes claims for determining and preventing an infringement.

## Legal Representation

It is not obligatory to be represented by a law- yer in IP matters, parties can therefore represent themselves. However, although representation is not mandatory, it is common/advisable given the complexity of the matters involved and the unique procedural law principles.

## Interim Injunctions

Interim injunctions are available in Turkish Law.

As intellectual property rights can be irreparably and irrecoverably damaged by third-party acts, injunctions play a significant role in litigation. Injunctions are effective tools in patent litigation to preserve the results which plaintiffs hope to achieve.

The legal framework and criteria for injunctions in Turkey are outlined by the CPL and the IPC.

Injunctions can be obtained before or during a trial. To obtain an injunction, the requesting party must prove to the court’s satisfaction that:

* irreparable harm will arise if the injunction is not granted; or
* the outcome which the requesting party seeks in its main action will be unlikely to be achieved unless the injunction is granted.

The IP courts are conservative in rendering pre- liminary injunction decisions, especially in the lack of an expert report, as such decisions gen- erally lead to the restriction of property rights and/or commercial activities.

Procedure

In patent litigation, upon receipt of a preliminary injunction request, a common approach for a court is to handle the preliminary injunction pro- cedure as follows.

* Even though it is left to the discretion of the judge to conduct the preliminary injunction proceedings ex parte or inter partes, the judg- es generally determine a hearing date to hear both parties’ arguments on the injunction; the hearing is generally scheduled within a month of the request.
* At the hearing, the judge generally decides to send the file for expert examination, as the merits of patent litigation generally involve technical issues; the report is prepared within one to two months.
* The judges generally grant their decision in line with the report in return for payment of a guarantee; this guarantee will be between EUR7,000–100,000, or more depending on the value of the patent and the parties’ eco- nomic situation.
* The expert report is notified to the parties, who then have two weeks to file objections.

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These steps generally take around one to three months.

* 1. Protection for Potential Opponents There are no options provided to a potential opponent. However, under Article 159/2-c of the IPC, the court may require the defendant to deposit a guarantee for the possible losses to the plaintiff from a preliminary injunction. Which type of preliminary injunction shall be applied is left to the sole discretion of the judge.

## Special Limitation Provisions

There are no special limitation provisions for patent infringement actions. The general rules apply.

As for a patent invalidation action, the action can be filed during the patent protection term and up to five years afterwards.

As for patent infringement actions, these actions can only be filed following the publication of the patent. However, if the defendant has been informed about the patent and its scope, the action may be filed before the application date. The limitation period for infringement actions, including compensation claims, is two years as of the date on which the infringement and the infringer are discovered, and a maximum of ten years as of the infringing action(s). As long as the infringing actions continue, the limitation period does not start running.

## Mechanisms to Obtain Evidence and Information

Evidence Determination

Article 400 of the CPL describes the procedures concerning determination of evidence. Accord- ing to these, any party is entitled to request the court to conduct a site visit or expert examina- tion, or to hear a witness, on the condition that

the requesting party will receive a legal benefit in filing such a request. The condition of the legal benefit is deemed to be met if the evidence may be lost or very difficult to set forth unless it is immediately secured.

The determination of evidence should be requested through a petition, either before fil- ing or during the action. If the request is filed before filing the action, it should be filed before the competent court of jurisdiction to handle the main action. As to the timeline, the determination of evidence is a preliminary measure and is there- fore conducted immediately. The counterparty has the right to oppose the determination of evi- dence decision of the court within one week as of the notification date. If the counterparty does not oppose it, the determination of evidence is performed one week after the request.

Expert Reports, Evidence Seizure and Other Issues

Generally, judges allow the expert around one month to prepare their report. The report should not include any conclusions as to the merits of the case, but the report should simply assess the existing situation or secure the evidence. It is important to underline that during the determina- tion of evidence procedure, no evidence, such as infringing products, are seized.

In order to seize the evidence, a preliminary injunction decision should be granted by the court, as such a seizure directly affects prop- erty rights.

Additionally, under Article 288 of the CPL, the judge may decide that discovery should be conducted ex officio or upon the claim of one of the parties in the courts or in the place of the dispute. Within the scope of discovery, the

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judge can also decide to have expert assistance regarding the technical aspects of the dispute.

Compensation

Moreover, according to Article 150/3 of the IPC, the right-holder may ask the court to order the person responsible for compensation to submit to the court the documentation related to the use of the industrial property right:

* before instituting a legal proceeding for compensation related to infringement of an industrial property right, in order to determine the evidence; or
* if a legal proceeding for compensation has been instituted, in order to determine the amount of damages.

## Initial Pleading Standards

The procedures for intellectual property lawsuits are regulated in the CPL; therefore, no special provisions apply to pleading standards in pat- ent litigation.

The parties must submit all arguments and list the evidence that support these arguments during the exchange of petitions phase, which includes two petitions per party. Then, as the court invites the parties to the preliminary examination hear- ing, the court grants the parties two weeks’ peremptory additional time as of the receipt of the notification to submit missing evidence. According to the CPL, the parties can change their arguments during the exchange of petitions phase; otherwise, widening and amending of the claims or defence are not allowed.

Additionally, after this limited time frame, if a par- ty explicitly consents to it, the other party may change its claims or arguments. If one of the parties is not present at the preliminary examina- tion hearing without any valid excuse, then the

present party is permitted to change or extend their argument without seeking the counterpar- ty’s consent.

* 1. Representative or Collective Action Turkey has no mechanisms for class or collec- tive actions.

However, depending on the type of the action, plaintiffs and defendants may number more than one. For example, the plaintiffs may include the patent owner and the licensee and there may be multiple defendants.

## Restrictions on Assertion of an Intellectual Property Right

In principle, the enforcement of a patent does not constitute an antitrust violation, as using a legal right cannot be deemed to be unlawful according to the Turkish Constitution. However, there could be liability in the case of an abuse of a legal right causing an antitrust violation. In such a case, the antitrust issues should be separately examined. It must be noted that the Turkish Competition Authority (TCA) does not have any precedent for the enforcement of pat- ent rights and its relationship with antitrust law.

The IP Law sets certain and exceptional condi- tions for granting compulsory licences, which are very rare. Such compulsory licence condi- tions may be interpreted as a restriction on IP rights.

# Infringement

## Necessary Parties to an Action for Infringement

According to the IPC, the patent owner is enti- tled to file infringement claims. Unless otherwise agreed in the licence agreement, the exclusive

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licensee is entitled to file an infringement action on behalf of themselves.

For non-exclusive licence agreements, by default, the licensee does not have direct rights to file an infringement action. The non-exclusive licensee can ask the patent owner to file an action against a patent infringement, unless it is otherwise limited in the agreement. If the patent owner does not take the requested action within three months, the non-exclusive licensee can file the action themselves.

Distributors cannot file patent infringement actions, unless they are licensees.

No other party can file patent infringement actions.

* 1. Direct and Indirect Infringement Indirect patent infringement is not explicitly set forth under the infringement rules in the IPC. Instead, according to Article 86 of the IPC titled “Prevention of the Indirect Use of the Invention”, the patentee is granted a right to prevent the fac- tors or equipment regarding a part which makes the practice of the invention subject to a patent possible, and which constitute the essence of the invention, from being released by third par- ties to parties who do not have an authority to use the invention subject to a patent.

In this context, the conditions of indirect use of the invention are as follows.

* The element or the instrument supplied to the infringer must relate to a part that constitutes the essence of the invention.
* The supplier must be aware of the following, or these matters should be sufficiently clear:
  + 1. the elements or the instruments are suit- able for the implementation of the inven- tion; and
    2. such elements or instruments will be used for the implementation of the inven- tion.

In cases of direct infringement, the infringing action should directly comply with the actions listed in the law and must include all features of the patent. In an infringement action, the defend- ant is the party who takes the mentioned infring- ing actions.

## Process Patents

There are several provisions that the holder of a process patent can rely on during the proceed- ings.

According to Article 141/2 of the IPC, if the sub- ject of a patent is related to a process for obtain- ing a product or material, the court may ask the defendant (instead of the plaintiff) to prove that the process used for obtaining the same prod- uct or material was different from the patented process.

Moreover, if the product obtained by using the patented method is new, it is deemed that the same product or material is produced by the patented method. Anyone who claims otherwise is obliged to prove it.

## Scope of Protection for an Intellectual Property Right

The scope of protection of the patent is deter- mined by its claims. The description and draw- ings are also taken into account when interpret- ing the claims. The claims are not interpreted word for word, but the scope of protection can- not be extended to the features that are obvious to an expert yet not clearly written in the claims.

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When determining the scope of protection, all elements equivalent to those defined in a claim are also considered. If an element performs the same function and provides the same result as that specified in a claim, that element is accept- ed as equivalent.

Moreover, to determine the scope of the patent, the statements of the patent owner made during the prosecution history and the validity term of the patent are also considered.

## Defences Against Infringement

Patent Cancellation

The most common strategic defence is to request the cancellation of the patent. Even though there is no bifurcated system in Turkey, cancellation proceedings still affect infringement actions. In other words, the court awaits the outcome of the cancellation action regarding the patent before deciding on the infringement.

Bolar Exemption

The Bolar exemption is another common defence, especially in pharma litigation. Pursu- ant to this exemption, the patent owner cannot prevent third parties’ experimental activities. These activities include performing experiments with an invention subject to a patent, the licens- ing of pharmaceuticals, and performing all nec- essary tests and experiments. The Bolar exemp- tion is widely accepted and applied in Turkey.

Exhaustion of Rights

Another defence might be the exhaustion of rights principle. Turkish law adopts the interna- tional exhaustion principle; that is, if a product is sold anywhere in the world, the right to first sell is exhausted, and the original product can be sold by anyone.

Personal Use

Personal or experimental use of the invention may be brought forward as a defence in an infringement action, as such actions are clearly excluded from the scope of protection of the patent.

Prior Use

According to Article 87 of the IPC, prior use may also be used as a defence against infringement claims. If third persons have been using the pat- ent in Turkey or taken real and serious measures in good faith at or before the application date, the patent holder cannot prevent such activities. Such activities should always be proportionate and cannot be extended to harm the rights of the patentee.

Agricultural Defences

Additionally, farmers are allowed to use produc- tion materials resulting from production per- formed on land if they have themselves culti- vated it with a patented product that is:

* sold by the patent owner;
* used with its permission; or
* obtained through other commercial means.

Farmers can also use patented breeding or other animal reproduction materials sold by the patent owner, or used with its permission, or obtained through other commercial means for agricultural purposes.

## Role of Experts

The judges of the IP courts do not have a tech- nical background and therefore appoint experts in order to understand the technical merits of a case. As a result, these expert witnesses play a significant role in patent disputes. It is reason- able to say that these reports determine the judge’s decision in most cases.

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Experts submit their opinion in writing. If the judge deems it necessary, further questions may be addressed to the experts to shed light on the technical merits of the case or to clarify contra- dictions. Experts must attend the examination hearing if the judge orders them to do so and respond to questions put to them.

The experts are appointed by the court. How- ever, if the parties agree to appoint experts, they may put their suggestions to the court for its approval.

## Procedure for Construing the Terms of the Patent’s Claim

There is not a separate procedure for construing the terms of the patent’s claims. In the case of an invalidation action, the patent’s claims are exam- ined by the court. Generally, the judges appoint experts to prepare a report in this regard.

* 1. Procedure for Third-Party Opinions Expert witnesses play a significant role in patent disputes. Please see 3.6 Role of Experts.

Moreover, the CPL regulates that the parties to a lawsuit may obtain further information from an independent expert about the subject of the lawsuit. The judge, upon request or ex officio, may decide to invite and listen to the expert from whom this information is obtained.

Turkish law does not set forth amicus briefs. Only the parties to the action or parties duly invited to the action to defend or plead can submit opinions and statements. The parties, however, are entitled to submit private expert reports as stated in 3.6 Role of Experts.

# Revocation/Cancellation

## Reasons and Remedies for Revocation/Cancellation

Under Article 138 of the IPC, a patent is declared invalid by the court if the:

* patentability requirements are not met;
* invention has not been described in a suf- ficiently explicit and comprehensive way to enable a person skilled in the concerned technical field to implement it;
* patent exceeds the scope of the application or is based on a divisional application and exceeds its scope;
* holder of a patent does not have the right to a patent; and
* patent exceeds the scope of its protection.
  1. Partial Revocation/Cancellation Under the IPC, a court can partially invalidate a patent for one or more claims. However, a single claim cannot be partially invalidated.

For partial invalidation of a patent, the remaining claims of the patent must fulfil the patentability requirements, which are novelty, inventive step and applicability to industry.

If an independent claim is invalidated, the dependent claims remain intact if they meet the patentability criteria.

## Amendments in Revocation/ Cancellation Proceedings

During the post-grant opposition proceedings before the TPTO, it is possible to amend claims.

During invalidity actions before courts, where the grounds for invalidity concern only part of a patent, a partial invalidity shall be ruled by can- cellation of the claims pertaining to that part. An

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individual claim may not be partially invalidated. In other words, a claim may not be amended, but may be cancelled as a whole.

On the other hand, a European patent vali- dated in Turkey may be limited by amending those claims in proceedings before the courts or authorities that relate to the validity of the European patent under Article 138/3 of the Euro- pean Patent Convention. The patent, thus lim- ited, shall form the basis of the proceedings. It should be noted that the practice of this Article and the precedents whereby such requests are accepted are very few.

## Revocation/Cancellation and Infringement

Turkey does not have a bifurcated system, and invalidity and infringement procedures are sep- arated. Invalidation actions can be filed either separately or as a counterclaim within the time- frame to respond to the infringement claim in an infringement proceeding. If the invalidation is filed as a counterclaim, both the infringement and the invalidation claim are handled by the same court regardless of the jurisdiction rules. At the end of the case, the invalidation claim is concluded first since it is about the validity of the patent, which is also the basis of the infringe- ment claim.

Even if the invalidation is filed separately, these actions are considered to be closely associated. The outcome of invalidation is awaited in the infringement action or the cases may be com- bined.

Generally, the proceedings before the first instance courts both for infringement and invali- dation take around 18–24 months.

# Trial and Settlement

## Special Procedural Provisions for Intellectual Property Rights

The general procedural provisions are set out by the CPL and are the same for all civil proceed- ings.

Even though some steps may change based on the nature of the dispute, the phases of a civil action in general are as follows.

If there is a preliminary injunction request, such request is initially examined. The court will con- duct such examination before or during a hear- ing.

Once the plaintiff’s petition is duly served on the defendant, the defendant is obliged to submit a response within two weeks. Following the defence notification, the plaintiff is also obliged to respond within two weeks. Subsequently, the defendant can submit their second response to the plaintiff’s counter-arguments within two weeks as of the receipt. The defendant’s sub- mission to the plaintiff’s counter-statement con- cludes the exchange of petitions phase. The exchange of petition phase usually takes three months. After this phase, the judge determines a hearing date.

Upon the end of the exchange of the peti- tion phase, the preliminary examination phase begins. In this phase, the court examines the conditions of the conflict between the parties. This examination is considered as a prepara- tion for the analysis of the merits of the case. The parties should file their evidence and argu- ments within two weeks as of the receipt of the invitation to the preliminary examination hearing date. After that, new evidence and arguments

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may only be filed with the consent of the coun- terparty.

After the preliminary examination phase, the investigation phase begins. The court evaluates evidence submitted as well as investigating the accuracy of the facts alleged by the parties. In order to examine the submitted documents’ accuracy, the court may decide to confer with an expert witness. After the expert witness report is delivered to the parties, the parties are entitled to file comments on or objections against the report. Prior to the decision, the court evaluates the report and comments. If the court finds the report adequate, it does not ask for an expla- nation and concludes the investigation phase. However, if the report is considered inadequate, further explanation can be requested from the expert, or another expert panel can be assigned. Expert examination is almost obligatory in patent cases due to case law, because of their technical nature. Expert reports are obtained in writing at investigation stage. The court is entitled to invite the experts to the hearing and, in such cases, the attorneys of the parties are entitled to pose questions to the experts directly. Generally, the judges prefer this route, including patent litiga- tion, with very limited exceptions. If there is a request for compensation, the file is also con- ferred to an accounting expert for calculation.

Following the conclusion of the investigation phase, the judgment phase begins. In this final phase, the judge renders a decision after exam- ining the accuracy of the claims. The judge then prepares the reasoned judgment, which is served to the parties upon request. According to the Turkish Procedural Law, the plaintiff bears the costs of the proceedings. Once a final verdict has been proclaimed by the court, the legal pro- ceedings’ official expenses are paid by the los- ing party to the adverse party. If there is a com-

pensation claim regarding damages caused by infringement, the case has to be referred to man- datory mediation before the case is filed. Gen- erally, the proceedings before the first instance courts take around 18–24 months, after a series of hearings are conducted.

## Decision-Makers

All patent cases are handled by the specialised IP courts, which exist only in Istanbul, Ankara and Izmir. In other cities, the Third Civil Court of General Practice is authorised. All first-instance courts, including the IP courts, consist of one judge. The parties are not allowed to choose the judge who will hear the case. Jury proceedings are not applicable under the Turkish legal sys- tem.

Regional courts and the Court of Appeals have a minimum of three judges.

While the judges in the specialised IP courts have a significant understanding of the Indus- trial Property Law, they do not have a technical background and commonly appoint experts to better understand the technical merits of a case.

## Settling the Case

According to the CPL, during the preliminary hearing, the courts recommend settlement and mediation to the parties. In this regard, if the judge is of the opinion that the conflict could be resolved by settlement/mediation, the prelimi- nary hearing will be postponed once.

For further detail regarding mandatory media- tion, please see 2.1 Actions Available against Infringement.

## Other Court Proceedings

Please see 4.4 Revocation/Cancellation and Infringement for discussion of the relationship

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between invalidation and infringement actions and how the outcome of one may affect the other.

The concept of the anti-suit injunction is not recognised in Turkish law, and courts are not obliged to consider foreign anti-suit injunctions. However, within the scope of patent invalidation or determination of non-infringement actions, the plaintiff can request the patent owner to be prevented from using its rights arising from the patent registration for itself or its clients as a preliminary injunction (PI). In the case of such a PI, the patent owner is restricted from filing an infringement action and a PI request. Other- wise, its actions shall be considered as breach- ing the granted PI. In any event, such PIs are quite exceptional and rarely granted.

# Remedies

## Remedies for the Patentee

Typical remedies granted to successful plaintiffs in main infringement actions include:

* compensation for damages (moral, material and reputational);
* the destruction of infringing products;
* the confiscation of manufacturing tools; and
* the publication of the judgment.

Damages

As per the IPL, “damages” means actual dam- age and lost profits. “Actual damage” is the net decrease in the requesting party’s assets. The requesting party may also ask for lost profits, which are calculated based on one of the fol- lowing methods set out in the IPL:

* the income which the patent owner would have generated if the infringing party’s com- petition had not existed;
* the infringer’s income; and
* the amount that the infringer would have paid as an appropriate licence fee had the parties entered into a licensing relationship.

Generally, plaintiffs are reluctant to request compensation, as the calculation of the com- pensation may be problematic, considering the unrecorded nature of much of the economy and improperly kept trade books. It is common for plaintiffs to receive less compensation than they request. Thus, choosing the calculation method based on a licence fee is more common.

Punitive damages are not available under Turk- ish law. However, under Article 150/2 of the IPC, where the industrial property right is infringed, additional compensation may be claimed if the reputation of the industrial property right suffers damage because the products or services form- ing the subject of the right are used or produced in an inferior manner, or such products produced in this way are made available or launched to the market in an improper manner.

If losing party does not comply with the court order and pay compensation, it could be enforced through enforcement offices.

Other Remedies

The most common remedies accepted at the end of an action are the destruction of the infringing goods and the prevention of the counterparty from committing infringing actions.

While the confiscation of manufacturing tools is executed, it is important to be proportionate and not to prevent the defendant from continuing its

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trading activities with respect to non-infringing goods.

Costs

Losing parties bear the costs, including the suc- cessful party’s official attorneys’ fees. The official attorneys’ fees are determined in line with the annual tariff declared by the Turkish Bar Union and are updated every year. The official attor- neys’ fees are also collectable through enforce- ment offices.

## Rights of Prevailing Defendants

The losing party bears the litigation costs and attorneys’ fees.

## Types of Remedies

There are not different types of remedy for pat- ents and utility models. The same remedies are valid for both types of IP right.

## Injunctions Pending Appeal

Decisions relating to intellectual and industrial property rights can only be enforced once they are finalised (after both stages of appeal).

Unless otherwise specified, the effect of the preliminary injunction continues until the deci- sion regarding invalidity/infringement is finalised. According to the CPL, a preliminary injunction can be requested at any stage of the proceed- ings, and it can be re-evaluated if the condi- tions change. Thus, if the preliminary injunction was not accepted at the beginning of the action and then the action is accepted before the first instance, the plaintiff may request a preliminary injunction at the appeal stage. Nevertheless, the acceptance of preliminary injunction requests at the appeal stage is not common.

# Appeal

## Special Provisions for Intellectual Property Proceedings

There are no special provisions concerning the appellate procedure for intellectual property rights proceedings. It is regulated by the general provisions set out by the CPL.

## Type of Review

Second instance appeals before the Regional High Court imply a full review, including the facts of the case as well as the legal review.

In third instance appeals against the Regional High Court’s decisions before the Court of Appeal, the examination is limited to legal review.

# Costs

## Costs Before Filing a Lawsuit

There are no protective briefs available in Turk- ish law.

If parties send notarised letters or conduct e-determination, notarisation costs will arise. However, these costs may vary depending on the evidence determined or on the pages of the letter.

The average cost of a notarised letter is TRY800– 1,300, whereas average e-determination costs are around TRY1,000–2,000.

## Calculation of Court Fees

At first instance, the official fees and expenses – excluding the expert fee for patent actions with- out claiming damages – are around TRY5,000.

If the case is referred to an expert body, the expert fee can be around TRY2,000–5,000 per

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expert. Considering these cases are generally examined by an expert committee consisting of three experts, the expert fee can be around TRY6,000–15,000. The minimum attorneys’ fee determined in line with the annual tariff declared by the Turkish Bar Union is TRY15,000 in cases of invalidation actions and infringement actions without claims for damages. If there is a com- pensation claim, the official attorneys’ fees are calculated in percentages depending on the amount requested.

Professional attorneys’ fees may vary depending on the complexity of a case.

## Responsibility for Paying the Costs of Litigation

In general, the plaintiff bears the litigation costs until the end. The losing party bears the official litigation fees and official attorneys’ fees of the counterparty.

# Alternative Dispute Resolution

## Type of Actions for Intellectual Property

Disputes regarding the invalidation of a patent cannot be subject to arbitration since the results of ADR are only binding for the parties. An inva- lidity dispute relates to the official registry and public policy.

However, negative declaratory and infringement actions may be subject to ADR.

# Assignment and Licensing

## Requirements or Restrictions for Assignment of Intellectual Property Rights

Assignment of patents and utility models must be in writing and notarised. Approval from the notary public is a validity condition for assign- ments. The recordal of the assignment to the registry is not compulsory, but rights arising from the assignments that are not recorded in the registry cannot be claimed against third par- ties acting in good faith. Therefore, it is highly recommended and good practice to have the assignments registered.

## Procedure for Assigning an Intellectual Property Right

Initially, parties should execute an assignment agreement in writing.

The assignment agreement should be signed by the representatives of the parties and notarised.

After notarisation, the assignment is duly com- pleted and valid.

As a rule, it is optional to record the assignment agreement with the TPTO. The recordal only has an explanatory effect.

If a party files a request and pays the fee, the assignment is recorded before the TPTO and published in the Official Bulletin.

* 1. Requirements or Restrictions to License an Intellectual Property Right Licence agreements must be in writing. Notari- sation or notification to the TPTO is not obliga- tory. Rights arising from licence agreements that are not registered in the registry may not be claimed against third parties acting in good

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faith. Therefore, it is highly recommended and good practice to register the licence agreement.

## Procedure for Licensing an Intellectual Property Right

Initially, parties should execute a licence agree- ment in writing.

Notarisation or legalisation is not required for licensing.

As a rule, it is optional to record the licence agreement with the TPTO. The recordal only has an explanatory effect.

However, as with assignment agreements, it is advisable to record the licence agreement before the TPTO.

If a party files a request and pays the fee, licens- ing is recorded before the TPTO and published in the Official Bulletin.

Additionally, the patent applicant/patent owner can declare that they will issue a licence to any- one who wishes to use the invention subject to the patent with a written request to the TPTO. The TPTO publishes the licensing offer accord- ingly.

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Moroğlu Arseven is a full-service law firm, with broad expertise and experience in all aspects of business law. Established in 2000, the firm combines a new generation of experienced international business lawyers who have aca- demic, judicial and practical experience in all aspects of private law. Its dynamic and dedi- cated team has a reputation for carefully ana- lysing legal frameworks to provide flexible so- lutions for clients. The firm serves local clients in international markets, as well as international clients operating in Turkey. Moroğlu Arseven

operates across a wide range of industries, in- cluding manufacturing, retail, energy, banking and financial markets, construction and real estate, pharmaceuticals, life sciences, informa- tion technologies, telecoms, media, entertain- ment and sports. In-depth sector knowledge ensures seamless service across practice ar- eas, enabling the firm to meet all a client’s legal needs in Turkey. The firm’s lawyers are capable of communicating in English, French, German and Turkish.

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Merve Altınay Öztekin supports clients with complex intellectual property disputes and litigation, as well as offering day-to-day advice on managing IP assets.

She regularly assists clients in understanding and navigating local regulatory rules, such as those in the pharmaceutical sector or for advertising and product liability. Merve specialises in helping clients to protect, enforce and commercialise their trade marks, patents and designs. She has successfully represented many well-known brands and patents on both sides of high-stakes and complex IP lawsuits.



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