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A Holistic Approach to the Proposed Changes to the IP Law

Authors: Gönenç Gürkaynak Esq., Burak Yeşilaltay and Türker Doygun, ELIG, Attorneys-at-Law.

I. Introduction

The Law No. 5846 on Intellectual and Artistic Works ("IP Law") is the main legislation in Turkey that is applicable to copyright related matters. In early May, Ministry of Culture and Tourism's General Directorate of Copyrights shared on their website a Draft Law Amending the Law No. 5846 on Intellectual and Artistic Works ("Draft Law") and announced that the proposed amendments are open for public opinion. The Draft Law proposes many amendments to the current text of IP Law which include revisions to certain articles, re-definition of terms and concepts along with fundamental changes to injunctive reliefs, prevention of online infringements and functions of collecting societies. As of June 2, 2017, deadline for submission of opinions has passed and the opinions are currently under the Ministry's evaluation which will review and revise the Draft Law accordingly, if needed.

IP Law was enacted in 1951 and since then amended for thirteen times[1]. Ten of these amendments were made in the last sixteen years, as of 2001 and five were in the last five years, as of 2012. The increased frequency of the amendments alone proves that IP Law started to regularly fail certain demands of contemporary issues caused by ever changing and developing information technologies and technical means such as ease of digital reproduction and transmission, expanding scope of products that are *de facto* considered and treated as works though they do not always fall within the scope of IP Law's definitions and problems encountered during prevention of infringements including allocation of liability and effectiveness of prevention measures.

[1] http://www.mevzuat.gov.tr/MevzuatMetin/1.3.5846.pdf

In general, these amendments aimed to provide necessary revisions and, where these revisions failed, additional measures to protect copyrighted materials against illegal use. For example, collecting societies have been included in the law as institutional bodies with the hope that they can enable collective and thus more effective fight against illegal use of works. Another example is the Additional Article 4 which authorized public prosecutors to access ban pirated contents that are broadcasted on the Internet medium. However, eventually these amendments might be deemed to have failed to reach their intended purposes and to provide the required protection.

IP Law regulates establishment of collecting societies. That said, Turkey has lacked collection societies that are comprehensive with respect to its area of interest and thereby able to act on behalf of and effectively protect the works of the copyright holders in that sector. According to General Directorate of Copyright's statistics, Turkey has ten (10) collecting societies related to movie sector, six (6) in the music sector, eight (8) in science and literature sector[2]. Despite the high number of collecting societies in these fields, copyright holders tend to enforce their copyrights on their own rather than enforcing them through collecting societies, which might be due to lack of authority and powers that collecting societies have in terms of acting on behalf and for the benefit of their members.

The other example, Additional Article 4 of IP Law, allows rendering access ban decisions upon a right holder's request on contents illegally broadcasted on the Internet medium. However, the article fails to clearly define and specify responsibilities of Internet actors. Although the article seems to provide certain protection based on an interpretation of its wording at first glance, in practice the application of the article becomes problematic, as there is already a specific law regulating the broadcasts in the Internet medium which has no correlation with the relevant provisions of the IP Law. For instance, the IP Law requires “service” providers to provide a list of ”information content providers“ to the Ministry. The Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed Through Such Broadcasts ("Law No. 5651"), on the other hand, defines

[2] http://www.telifhaklari.gov.tr/Turkiye-de-Meslek-Birlikleri

Internet actors as “access providers”, “hosting providers” and “content providers”. In light of that, if “service providers” are interpreted as “access providers” and “information content providers” are interpreted as “content providers”, then the access providers are required to provide a list of all content providers on the Internet, which might be billions of people, to the Ministry. Clearly, the access providers cannot be expected to comply with such a request as it is nearly impossible to maintain a list as such.

In addition to the foregoing, the IP Law fails to provide adequate protection with respect to audiovisual contents. Article 5 of the current IP Law defines cinematographic works and does not include any reference to audiovisual contents, and remains as it was drafted back in 1951. In order to protect audiovisual contents other than cinematographic works such as television programs which may qualify as a work, the Draft Law could have defined audiovisual works in a way that is parallel to the European Union Directive 2010/13/EU which specifically regulates audiovisual media services to encompass present and future format of audiovisual contents in addition to films. The use of the term audiovisual content would also help create harmony with global developments on the issue since regulations in U.S.A. and European Union along with other countries around the world adopt or are in the process of adopting use of the term audiovisual.

In light of the foregoing, the Draft Law is expected to provide clearer regulations and more effective measures on these issues along with other amendments that might update the current scope of the IP Law which either excludes from its scope certain contents that are considered works throughout the world in other countries or allows their inclusion only through wide interpretations of its provisions.

Based on the foregoing remarks, the following discusses the most significant issues that the Draft Law offers to the copyright realm.

II. Online Piracy

Draft Law regulates prevention of infringements through the Internet medium with an independent article and proposed addition of Article 77/B to the IP Law. First paragraph of the relevant article states that those, whose rights, which are protected within the scope of IP Law, are violated, may apply to the "content provider or hosting provider" by way of communication means provided on their "Internet pages" and request removal of relevant contents. Although this provision apparently aims to provide a regulation compatible with the Law No. 5651 by referring the terms defined therein, the provision does not take into account differences as to liabilities of Internet actors. The article does not make any distinctions between the content providers and hosting providers whose responsibilities, as determined in the Law No. 5651, are fundamentally different. According to the Law No. 5651, hosting providers are not required check whether the hosted content is lawful or not, whereas content providers are responsible for any kind of content they present to the Internet medium. Current wording of the proposed provision might result in a situation where right holders prefer to address hosting providers, who are more likely to be reached easily, without even trying to reach content providers, who are in fact the party responsible for the relevant infringement. This might not be an effective measure to fight against piracy as the pirating parties in question, the content providers would not come into equation during the process and thus might not face the consequences of their actions.

Furthermore, Article 77/B proposed by the Draft Law requires the relevant content provider or the hosting provider to comply with the removal request within "twenty four hours". This period is quite short to take action particularly for hosting providers who engage in huge amounts of content available on their websites. Additionally, determination of a certain time period, especially a short one, regarding these obligations within in the law might create practical difficulties and unintended consequences for the involved parties. For example, hosting providers that host large amounts of contents and that try to comply with these requests taking into consideration fundamental rights and freedoms of Internet users might be forced to take action on certain contents without conducting a proper analysis of the contents

subject to the relevant requests. As a result of this practice, contents that are lawfully broadcasted by Internet users could also be subject to removal by the hosting providers in an attempt to avoid potential criminal and monetary sanctions. Indeed, in the United States of America and European Union, the legislation on the issue does not determine a fixed time period for hosting providers to comply with their obligations. Yet, they are obliged to take the required actions "promptly"[3]. This approach might be more in line with the reality of the large amounts of contents that certain hosting providers are required to handle on a daily basis. Accordingly, they are required to take action promptly without a predetermined time limitation as the necessary time can significantly change based on the scope of the relevant request.

According to eight paragraph of the proposed Article 77/B, if someone continues a violation after two warnings sent by the Ministry or an institution authorized by the Ministry informing him/her that his/her dissemination constitutes a violation and the consequences of such actions; then public prosecutor shall decide to decelerate the connection speed of the Internet service provided to that person. This provision brings a legitimacy, a legal ground for "throttling" which has been discussed in the recent years as a method of restriction of illegal contents in Turkey. The number of warnings to be sent to user before the user's connection speed is decelerated is proposed as two (2). However, taking into account the digital literacy and experience of an average user, it is easy and probable for users to accidentally view, stream and/or download illegal content on the Internet and thereby unintentionally take part in an infringement. Moreover, users with malicious intentions might employ many tools, technics and other means and use copyrighted materials unlawfully in order to direct such inexperienced users to contents on their websites for purposes of gaining illegitimate benefits. Therefore, two warnings that will be given to the user before decelerating their connection speed might not be enough to protect the users against accidental and unwanted use. The application of the provision as is might lead to restrictions on citizen's freedom of communication where their actions may, in fact, be due to uninformed and/or bad judgment on their side regarding a content and/or

[3]Legislations in the USA and EU respectively at https://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/pdf/USCODE-2010-title17-chap5-sec512.pdf and http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN

hosting provider. In that line of thought, countries around the world adopt at least a three strike system in general and there are countries that prefer a warning count even higher than that. For instance, the U.S.A. adopted a six warning requirement before implementing measures against a user.

Tenth paragraph of the proposed Article 77/B regulates establishment of centers to prevent violations of rights within the scope of the article. We understand that the purpose of these centers is to enable implementation of swift action on infringing contents where irreparable damages may be incurred by the right holder, if such action is not taken. That said, granting the authority to implement the sanctions determined in this article to an administrative authority might lead to disproportionate interference with fundamental rights and freedoms, unless there is an effective supervision of the courts as to activities of these centers. Additionally, wide interpretation of the provision might lead to instances in its application where an administrative agent is granted through administrative and/or technical structures or systems the authority to decide and act as if she/he is a judge. The article does not precisely define the authority of these centers to prevent applications. In line with that, there might have been an explicit reference to fundamental rights and freedoms of Internet users to emphasize the necessity of establishing a balance between these rights and freedoms; and the rights of the copyright holders and to prevent administrative agents from intervening with the foregoing rights and freedoms.

On a separate note, these centers may also not be as effective as it is contemplated. Considering the amount of content currently available on the Internet and the geometric increase thereof, it would require a great amount of resources to establish new centers from ground and to maintain these centers for the purposes of handling copyright infringements on the Internet medium. Moreover, administrative actions of these centers are highly likely to be disputed before courts which might lead to ineffectiveness of these centers. In light of the foregoing, these “centers” may not yield the results expected from them.

III. Collecting Societies

IP Law currently includes provisions pertaining to collecting societies. However, the amendments proposed in the Draft Law include many revisions and additions to the current legal framework of these societies. Some of these changes that might be of importance to and have an impact on the current practice have been mentioned below briefly.

According to proposed version of Article 42 of the IP Law, collective management of rights, which include determination of tariffs, preparation of agreements, collection and distribution of revenues, supervision of uses and application to administrative, judicial and criminal procedures shall be conducted by collecting societies. The wording of the article as proposed in the Draft Law is significantly different than the wording of the current IP Law as it clearly states that these activities may only be conducted by collecting societies. In addition, the article also determines that two or more collecting societies may establish a collective licensing association together in order to manage their members' rights more effectively (Proposed Article 42-3). This approach attests the law makers' will to involve collecting societies more in the management and protection of copyrights in the Turkish jurisdiction.

Moreover, the Draft Law also increases the number of members that is required to establish a new collecting society in a sector where there is already an existing collecting society from one third to half of the member count of the existing collecting society (Proposed Article 42/A-2). This increase in the necessary member count might also prove useful in preventing establishment of several collecting societies in the same sector which inevitably decreases their effectiveness and promote copyright holders to work together within the roof of existing collecting societies.

In addition to the foregoing and more importantly, the proposed Article 42/E states that right to demand a proper price and right to demand a cut from resale cannot be

pursued individually. According to the provision, these rights may be pursued by the collecting society, if there is only one in the relevant sector; or by a collective licensing association that shall be authorized by the Ministry if there is more than one collecting society in that sector. Furthermore, certain rights of related right holders may be managed by the collective licensing association even if these related right holders did not provide an authorization to a collecting society. This provision requires copyright holders to become members of collecting societies if they wish to benefit from the foregoing rights provided by the IP Law. This requirement, along with other authorizations provided to collecting societies would inevitably increase the involvement of copyright holders in collecting societies and thus create more active and involved collecting societies that are more effective in their functions.

Active, involved and effective collecting societies in specific sectors would ultimately result in better protection of existing copyrighted works and a better environment for creation of more works, since parties involved in copyrighted materials would be more open to invest in new productions, ventures and co-operations without any fear but with trust knowing that there are adequate measures in place protecting their commercial and individual investments.

IV. Databases

Current version of Additional Article 8 of the IP Law already protects databases. The amendments proposed in the Draft Law provide a more detailed protection for right holders of databases along with certain exceptions to that protection. In the reasoning of this article in the Draft Law, it is indicated that it is proposed based on the EU Directive 96/9/EC on the legal protection of databases. However, this directive has been harshly criticized by the EU Commission in their DG Internal Market and Services Working Paper[4]. The EU Commission indicated that the economic impact of the "sui generis" right on database production was unproven and that the empirical evidence was not enough to suggest that such protection is necessary for a thriving

[4] First evaluation of Directive 96/9/EC on the legal protection of databases; available in English at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

industry (Section 1.4). Furthermore, the European Parliament also stated that the commission's evaluation of the directive on databases considers the directive as an impediment to the development of a European data-driven economy and called on the commission to abolish the directive (Section 4.1)[5]. More recently, EU Commission launched a public consultation on May 24, 2017 to assess the legislation on databases by evaluating its impact on users and identifying possible needs of adjustment, which attested that its existing legislation, which the proposed article is based on, is insufficient to ensure full legal certainty and is not useful[6]. In light of the foregoing, it might be suggested that the protection provided by the article to databases may have negative effects on the growth of national digital economy instead of helping it develop based on the EU experience on the matter.

V. Exceptional Uses

Current text of the IP Law provides an exception for private use of copyrighted material subject to the conditions set forth in Article 38. The Draft Law proposes four other exceptions in addition to private use which are namely (i) temporary reproduction, (ii) reproduction through photocopy and other similar means, (iii) freedoms for purposes of use by the disabled and (iv) temporary reproductions of radio-television institutions. Furthermore, in addition to uses for education and teaching purposes, the Draft Law proposes (a) lending to public, (b) reproductions and distributions for archiving purposes and (c) incidental reproductions and uses for parody purposes.

Although determination of exceptional circumstances and uses might prove useful in clarifying legally allowed uses of copyrighted materials, it might also cause the legislation to become out-of-date more easily due to rapid technological and economic developments and changes that might render the scope of these exceptions too wide or too narrow depending on the relevant case.

[5] European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI)), available in English at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0009+0+DOC+PDF+V0//EN

[6] https://ec.europa.eu/digital-single-market/en/news/commission-launches-public-consultation-database-directive

For instance, the current wording of Article 38/A allows temporary or incidental reproductions that are essential and inseparable part of a technological transaction process aiming rightful use or transfer of works to third parties within a network; and that do not have an independent financial value. The article provides an exception for certain temporary reproductions of no financial value in order to enable use of various technological means that are employed for lawful use of works and contents but which require these temporary reproductions for their functions. That said, considering the recent technological developments in today's world and taking into account future applications that might be applied to works and contents that are protected under IP Law, such temporary reproductions might also be required for purposes other than transfers in network. For example, the scope of the article might be extended to include and provide exception to allow similar temporary reproductions for scientific purposes and researches as well.

Moreover, most of these exceptional uses and/or reproductions are allowed on condition that there is no financial value, purpose or benefit attached to such activities. Adopting such a condition might be considered in violation of Turkey's obligations under the Berne Convention for the Protection of Literary and Artistic Works. Article 9/2 of the Berne Convention requires signatory parties to permit reproductions of works in certain special cases, provided that such reproductions do not conflict with normal exploitations of the works and do not unreasonably prejudice the legitimate interests of the authors[7].

Furthermore, this requirement might also affect innovative initiatives from benefitting from the exceptions provided in the article and restrict artistic freedoms and legitimate financial benefits that might be acquired by non-governmental organizations through fair use of copyrighted materials otherwise. The conditions determined in the Berne Convention might alone be sufficient for acceptable uses regarding works.

[7] Available in Turkish at http://www.telifhaklari.gov.tr/resources/uploads/2012/03/18/2012_03_18_349175.pdf and in English at http://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf

VI. Conclusion

The Draft Law provides hope for better collective management of copyrights through collecting societies that might be of help with respect to licensing of works in great quantities which is needed in today's digital word where almost infinite reproductions are possible. That said, considering the lack of reference and thus protection to "audiovisual contents", the article regarding databases, and the lack of an exception for scientific studies and researches within the scope of lawful uses along with the requirement as to not having a financial purpose; one might argue that the Draft Law still fails to take into account recent developments in the world with respect copyright issues. Moreover, the provisions set forth to fight against online piracy seem to disregard the specific law regarding unlawful contents broadcasted on the Internet medium and existing practice thereof as the article does not even differentiate between the responsibilities of Internet actors. Despite the foregoing concerns, the provisions proposed by the Draft Law will still bring a fresh breath to the copyright realm.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

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