

**CHECKLIST OF ISSUES ON ENFORCEMENT<sup>1</sup>**

Responses from Turkey

**Preliminary Statements**

A. The following legislation directly ensures specific protection of intellectual property rights:

**(a) Industrial Property**

- Patent Decree (N° 551)
- Industrial Design Decree (N° 554)
- Geographical Indications Decree (N° 555)
- Trade Mark Decree (N° 556)
- Amending Act of Patent, Design, Geographical Indications and Trade Mark Decrees (N° 4128)
- (The draft laws for the protection of plant breeders and for chips topographies).

**(b) Copyright and Related Rights**

- Intellectual and Artistic Works Act (N° 5846)
- Cinema, Video and Musical Works Act (N° 3257)

**(c) Regulations**

There are several regulations to ensure the implementation of intellectual property legislation under the above-mentioned two groups of legislation.

B. The following legislation is also relevant to the general implementation of intellectual property law:

**(a) Turkish Constitution (1982),**  
regarding provisions on judiciary.

**(b) Procedural Issues**

- Act of Civil Procedure (N° 1086).
- Act of Criminal Procedure (N° 1412).

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<sup>1</sup> Document IP/C/5.

**(c) Enforcement Issues**

- Enforcement of Criminal Judgements Act (N° 647).
- Enforcement of Civil Judgements Act (N° 2004).

**(d) Administrative Issues**

- Customs Code (N° 4458) which entered into force on 4 February 2000.
- Implementing Regulation of the Customs Code. (Amendment published in the Turkish Official Journal on 29 December 1995.)

These two Codes are relevant for border enforcement as described in Articles 51 to 60 of the TRIPS Agreement.

**(e) Unfair Competition**

- Commercial Code (N° 6762).

**(f) International Conventions**

- Paris Convention (for industrial property),
- Berne Convention (for copyright),
- Madrid Protocol (for trademarks),
- Classification Conventions (Locarno, Nice, Vienna and Strasbourg),
- Patent Co-operation Treaty,
- Budapest Treaty,
- The Hague Convention on Civil Procedure,
- TRIPS Agreement.

Pursuant to Article 90 of the Turkish Constitution, all international conventions have the effect of national statute after their ratification. The prime importance of this provision is its binding force on the courts to implement the self-executing provisions of the convention to the relevant case before the court.

**(g) General Substantive Legislation**

- Civil Code (N° 743).
- Act of Obligations (N° 818).
- Amending Act of the Criminal Code (N° 3506).

**(h) Legislation About the Court Structure**

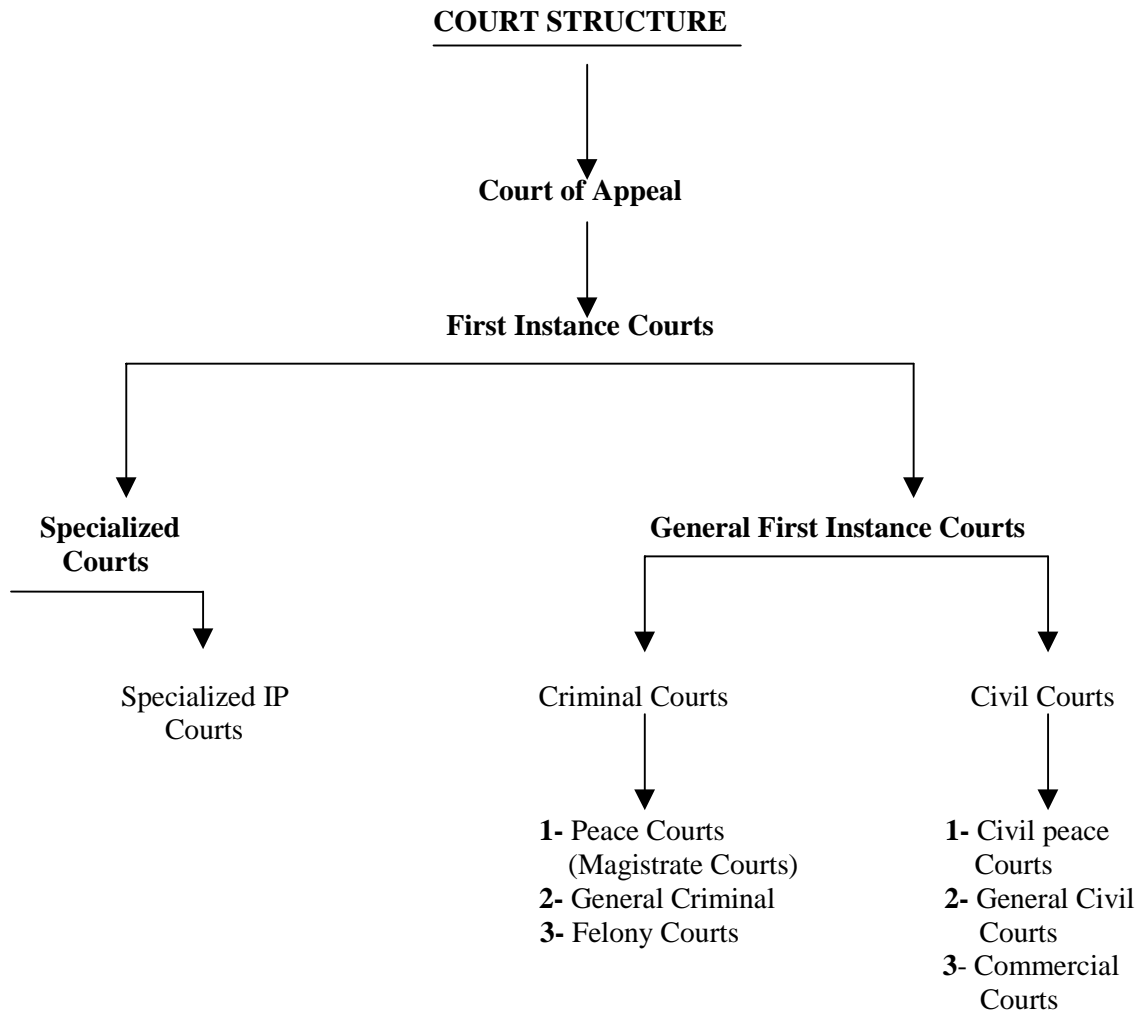
- Act on the Structure of the Courts (N° 469).
- Act on the Court of Appeal (N° 2797).

As a preliminary introduction there is a two instance judicial system in Turkey: the first instance courts and the Court of Appeal as a supreme court.

The first instance courts may be grouped in two types: specialized courts and the general first instance courts.

The general first instance courts are either criminal or civil courts. Although the criminal courts are divided into three types, which cover peace courts, general criminal courts and felony courts; the civil courts have got only two types, i.e. civil peace courts and general civil courts.

Under the above-mentioned Act relating to the court structure, commercial matters are dealt with by the Commercial Courts (of the general civil courts), while all other civil matters are the subject of general ordinary civil courts (as a type of general civil court).



## Civil and Administrative Procedures and Remedies

(a) *Civil judicial procedure and remedies*

### 1. Specify the courts which have jurisdiction over IPR infringement cases.

#### Under the Industrial Property Legislation

Industrial property legislation has suggested specialized industrial property courts which have jurisdiction over industrial property right infringement cases (see Article 146 of the Patent Decree, Article 58 of the Design Decree, Article 30 of the Geographical Indications Decree and Article 71 of the Trade Marks Decree).

Since the establishment of specialized industrial property courts will take time regarding the financing of the courts' infrastructure and training of the judges, the Supreme Council for Judges has assigned the competence to the Commercial Courts in relation to *ratione materiae* jurisdiction, without regarding whether the claim is commercial or not.

The local jurisdiction has been especially designated by the industrial property decrees as:

- in the cases where the plaintiff is a right owner:

The court of the domicile of the plaintiff or of the place where the infringement was committed or of the place where the act of infringement produced effect. If the plaintiff is not domiciled in Turkey the competent court is the court of the location of the business premises of the empowered registered agent or in lack of such empowerment the venue will be the Ankara courts.

- in the cases brought against a right owner:

The venue is the court of domicile of the defendant. Where the right owner is not domiciled in Turkey the above-mentioned venue will apply.

(See Article 137 of the Patent Decree, Article 49 of the Design Decree, Article 25 of the Geographical Indications Decree and Article 63 of the Trade Marks Decree.)

#### Under the Legislation on Copyright and Related Rights

Since the Intellectual and Artistic Works Act has not got a similar provision which empowers the specialized courts regarding material jurisdiction, all civil disputes will fall under the jurisdiction of General Civil Courts in accordance with Article 76 of the said Act.

The local jurisdiction has been determined by the Act of Civil Procedure (Articles 9, 10, 21 and 23). In most cases, the competent court is the one where the defendant has its domicile.

Interim orders which are brought before the main action on the merits, might be claimed in the venue which will provide the judgement to be taken less costly and more expeditiously (Article 104/2<sup>nd</sup> sentence of the Act of Civil Procedure). This provision applies to interim orders claimed under both types of legislation including industrial property, and copyright and related rights.

The Court of Appeal is the last instance court for the reversal of any judgement given by the commercial courts and the general civil courts.

**2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?**

Standing to assert IPRs

Civil actions may be instituted by the right owner including successors in title.

Pursuant to the provisions of industrial property legislation, an exclusive licensee may bring an action against the infringer unless otherwise provided by the contract. A non-exclusive licensee may bring an action only if the right owner fails to bring an action after his/her notification claiming the institution of the proceedings. (See Article 148 of the Patent Decree, Article 60 of the Design Decree, Article 73 of the Trade Mark Decree.) Nevertheless a non-exclusive licensee has the right to claim provisional measures under all those Decrees.

Representation

The parties may be represented by a lawyer acting as their counsel although they are not obliged to do so (Article 59 of the Act of Civil Procedure).

Legal persons are to be represented by their bodies (Article 48 of the Civil Code, Article 138 of the Commercial Code and Article 39 of the Act of Civil Procedure). If the body wants to appoint a counsel, the counsel is to be a lawyer.

Minors must be represented by a legal representative (mostly their parents), and a person deprived of capacity for legal acts must have a guardian. (Articles 268 and 391)

Personal appearances

There are no special mandatory requirements for personal appearances before the court since a written procedure applies. Nevertheless in every stage of an action, the judge may order the parties with a written notification to appear in person (for hearing them) regarding the facts of the case. Absence from the hearing without an acceptable excuse prevents the absentee from rejection of the transactions initiated during the hearing. (Article 213 of the Act of Civil Procedure)

**3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence that lies within its control?**

First of all, in accordance with the relevant provisions of industrial property legislation (Article 136/f of the Patent Decree, Article 48/d of the Design Decree, Article 24/f of the Geographical Indications Decree and Article 61/f of the Trade Marks Decree), the defendant is obliged to explain how and where he/she obtained the infringing product found in his/her possession.

Not responding to the obligation described in those provisions constitutes an infringement and requires criminal action if there is intention (*mens rea*). (See the Amending Act 4128 and Article 73/A of the Patent Decree, Article 48/A of the Design Decree, Article 24/A of the Geographical Indications Decree and Article 61/A of the Trade Marks Decree.)

Apart from those provisions there is no general rule in the Act of Civil Procedure, except some special provisions to produce evidence which lies within the control of the opposite party. One of those provisions is about the documents as evidence. The judge has the authority to order delivery of the documents which have effect to the proof of the case (Article 330 of the said Act).

For other evidence, excluding documents, the party may claim the determination of the evidence from the court which has competence on the merit of the case or bring an action for determination of the evidence before the civil peace courts (Articles 368-374 of the Civil Procedural Act). Furthermore during this claim or action the judge may *ex officio* decide discovery (Articles 363-366 of the said Act) and may call for an expert (Articles 275-286 of the said Act).

**4. What means exist to identify and protect confidential information brought forward as evidence?**

The Turkish system has not got any special provision regarding confidential information provided in judicial proceedings concerning intellectual property rights.

Nevertheless, in accordance with the Turkish Constitution (Article 141) and the Civil Procedural Act (Article 149), rulings are rendered in public hearings. In cases of public morals and public security, sessions are governed *in camera*.

Pursuant to Article 377 of the Criminal Procedural Act (which is also applicable in civil cases), the judge may prohibit the publication and broadcasting of the trial if there is *inter alia* a danger of infringement of the person's rights (which include intellectual property rights). In case of infringement of this provision the court shall render a fine.

In relation to witnesses, the Civil Procedural Act recognizes the right of the witness to refuse to testify with regard to third party secrets learned during the execution of occupation or work (Article 245/4). Furthermore the same Act also permits the witness to refuse to testify as to confidential information related to his/her business/work (Article 246/3).

The only provision in intellectual property legislation has been inserted in Article 83/3 of the Patent Decree. The provision obliges the information demanding authority (including courts) to take the necessary measures to prevent illegitimate use of confidential information filed for pharmaceutical and veterinary products and for chemicals.

**5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use;**

- **injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

General principles for injunctions have been inserted in Articles 101-113 of the Act of Civil Procedure.

In addition to making a reference to the Act of Civil Procedure, industrial property legislation contains special provisions on the issue (Articles 151 and 152 of the Patent Decree, Articles 63 and 64 of the Design Decree, Articles 34 and 35 of the Geographical Indications Decree, and Articles 76 and 77 of the Trade Marks Decree).

Injunctions may be claimed before or during the proceedings on the merits of the case or after the case.

The purpose of injunctions is:

- cessation and prevention of the infringing acts;
- provisional seizure of the infringing goods.

The copyright and related rights legislation has also reiterated the same rules in a special provision (Article 77 of the Intellectual and Artistic Property Act) indicating:

- the provisional seizure of the infringing goods and devices used to produce pirated goods.
- the injunction which orders the person to do certain acts or refrain from doing certain acts.

Apart from this special provision in Article 81/3, the Act recognizes the right of Intellectual Property Associations to apply for injunctions in relation to infringing goods and devices.

The application shall be forwarded to the public prosecutor and the decision shall be taken by the court.

Nevertheless, in urgent situations, where the delay will cause irreparable harm, the prosecutor himself will take the decision on provisional seizure. In such a situation, the decision of the public prosecutor should be presented for approval by the court within three days (Article 81/4 of the Intellectual and Artistic Works Act).

#### Damages, including recovery of profits, and expenses, including attorney's fees

Damages actions require the injuring party to have acted intentionally or negligently (Article 41 of the Act of Obligations).

The industrial property legislation describes the damages and the mode for the calculation for recovery of profits in the Decrees. (Articles 138-140 of the Patent Decree, Articles 50, 52 and 53 of the Design Decree, Articles 64, 66 and 67 of the Trade Marks Decree.)

The Decree on the Geographical indications includes only damages (Article 26).

The Intellectual and Artistic Property Act proposes damages in case of infringement of both moral and financial rights (Article 70).

Pursuant to Articles 413-426 of the Civil Procedural Act, the losing party must pay the costs (Article 417), which include attorney's fees (Article 423/5), unless the judge decides otherwise.

However the Act goes further and imposes an administrative fine (Article 422) to the defendant if he commits the infringement with bad intention. This is also relevant for bad intentioned plaintiff regarding bringing an action.

In accordance with Article 32 of the International Private Law and the Procedural Law Act, foreigners who bring an action in Turkey should give security to the court as *cautio judicatum solvi* for the defendant's costs. It is a caution for a successful defendant's costs and it stays free when the plaintiff wins the case. Nevertheless since Turkey is a party<sup>2</sup> to the 1954 "The Hague Convention on

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<sup>2</sup> Since 1972

Civil Procedure", Turkish courts have not ordered this payment from foreign plaintiffs who are resident in, and nationals of one of the States parties to the Convention.

Destruction or other disposal of infringing goods and materials

In the light of Articles 137, 49, 25 and 62 of the Patent, Design, Geographical Indication and Trade Marks Decrees, respectively, the intellectual property right owner may appeal for :

- proprietorship over infringing goods (in such case the value of the products shall be deducted from the damages awarded);
- the destruction of the infringing goods and material;
- the confiscation of infringing goods. Article 79 of the Intellectual and Artistic Works Act has provided the same opportunity to the right owners regarding pirated goods and materials used to produce them

Any other remedies

Pursuant to the Articles indicated in the above paragraph, right owners may request the disclosure of the judgement by means of media. In such cases the cost of this implementation shall be born by the offending party.

**6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods of services found to be infringing and of their channels of distribution?**

See the answer to question 3 above for industrial property legislation. However there is no equivalent provision in the Intellectual and Artistic Works Act.

**7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?**

With regard to injunction claims, the plaintiff should pay a security which is to meet the likely damage to the defendant (Article 110 of the Civil Procedural Act).

The same principle is reiterated in the industrial property legislation (Article 152/c of the Patent Decree, Article 64/c of the Design Decree, Article 35/c of the Geographical Indications Decree and Article 77/c of the Trade Marks Decree).

A bad intentioned plaintiff bringing an action may be imposed an administrative fine by the court (Article 422 of the Civil Procedural Act).

Furthermore, as a general principle of the Turkish Constitution (Article 125) the State and public authorities are liable for any damage caused by defective functioning of their services.

The responsibility of the judges is possible only if they acted intentionally to breach their official duty (Articles 573-576 of the Civil Procedural Act).



**8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.**

(See the answer to question 25 below.)

There is no special provision governing the minimum and maximum duration and cost of the proceedings.

Pursuant to Article 141/last sentence of the Turkish Constitution, cases should be dealt with at the lowest possible cost and dealt with expeditiously.

Recent statistical data taken in 1998 have shown that the average duration of the civil proceedings in Commercial courts is 201 days, while it is 234 days in other General Civil Courts.

The average appeal duration in the Court of Appeal has been calculated as 116 days (Civil Division of the Supreme Court) for 1998.

However, provisional measures have taken only 1-2 days in general.

(b) *Administrative procedures and remedies*

**9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.**

Proceedings relating to infringement of intellectual property rights are not governed by administrative authorities, but by courts. The only exception is related to border enforcement of counterfeit and pirated goods which are seized provisionally by the customs authorities.

**Provisional Measures**

(a) *Judicial measures*

**10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.**

See the answer to question 5 in relation to injunctions.

**11. In what circumstances may such measures be ordered *inaudita altera parte*?**

Pursuant to Article 105 of the Act of Civil Procedure, where there is an imminent situation which requires the protection of the plaintiff's interest at once, the court may decide by a ruling without making an oral hearing and without hearing the opposing party. Nevertheless this situation applies only to the claims on provisional measures. *Ex parte* rulings are subject to objection. However the objection shall not prevent execution unless otherwise decided by the court (Article 107).

**12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.**

See the answer to question 5 in relation to injunctions.

In addition, where the provisional measure claimed in the action on the merits of the case, the judge of that case may refer the claim to another local court if he believes that the ruling shall be taken there more imminently and less costly (Article 104/3 of the Act of Civil Procedure).

Where the provisional measure ruling taken before the action on the merit of the case, the applicant for the provisional measure shall have to bring an action on the merits of the case in 10 days from that ruling. Otherwise the ruling directly loses its effect without the requirement of any decision (Article 109 of the Act of Civil Procedure).

In order to prevent the abuse of the provisional measures, the judge has the authority to order the applicant to provide an adequate security to compensate the injury caused to the defendant or to a third party (Article 110 of the Act of Civil Procedure). However, if the defendant provides a security after the acceptance of a provisional measure the judge may change the measure or even repeal it (Article 111 of the Act of Civil Procedure).

A person who prevents the execution of the ruling on the provisional measure shall be imprisoned from 1 month to 6 months by the criminal court (Article 113/2 of the Act of Civil Procedure).

**13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.**

See the answer to question 8 above.

(b) *Administrative measures*

**14. Reply to the above questions in relation to any administrative provisional measures.**

With the exception of border measures relating to suspension of release by the Turkish Customs, there are no administrative proceedings before the courts.

**Special Requirements Related to Border Measures**

**15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis imports*). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?**

Pursuant to Article 57 of Customs Law N° 4458<sup>3</sup>, customs authorities shall apply border enforcement in two situations, by two methods. First, a right holder under any copyright and related

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<sup>3</sup> N.B.: Prior to Customs Law N° 4458, amended Article 21 of Law N° 1615 and inserted Section Seven of the regulation on its implementing provisions, which provides parallel provisions on suspensive arrangements except *ex officio* action, have been in force as from 1 January 1996.

rights, and industrial property legislation may apply to customs authorities for the suspension of infringing goods. As it is shown in the Article, this way of suspension covers all types of infringing copyright and industrial goods (patents, trademarks, designs, geographical indications and copyright goods), and it requires the application of the right holder. The second way is *ex officio* suspension by the customs authorities and it covers only counterfeit trademark goods (excluding patents, designs and geographical indications) and pirated copyright goods. *Ex officio* suspension applies if there is *prima facie* indication of infringement. The lawmaker has thus allowed the competent authorities to take measures not only for counterfeit or pirated copyright goods but also for all rights under the protection of related legislation.

Regarding goods in transit, it is not possible to use the suspension procedure in this field of customs services, as the provision of the footnote 13 (referred to in Article 51) provides there shall be no obligation to apply such procedure to goods in transit.

The suspension procedure does, however, not apply to goods:

- which are, without the consent of the right holder, brought into the customs territory of Turkey and released into free circulation or re-exported or imported with a conditional relief;
- which are exported without the consent of the right holder, even though they are permitted to be produced in Turkey, or to be produced or to bear a trademark under different conditions from those allowed by the right holder, and
- which are personal goods and gifts brought by passengers and postal consignments of non-commercial nature.

**16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?**

The competent authorities for implementing suspension procedures are the authorities of the customs administrations.

The right holder of a good who alleges that the goods infringe his copyright or industrial property right may lodge a written application with the competent customs authorities. For initiating and carrying out the procedure, it is enough to attach two documents to the application, i.e. a detailed description of the goods and the proof that the applicant is the right holder. In certain cases, the right holder may also provide to help the authorities giving other particulars regarding, for instance, the place of the goods, destination, particulars identifying the consignment or packages, date of arrival or departure of the goods, the means of transport, the importer, exporter or their representative. The absence of this secondary information shall not prejudice the validity of the application.

Customs authorities may request from the applicant a guarantee corresponding to the CIF value of the goods in order to secure the rights of the importer or public, where they deem appropriate for the case (Article 53).

The right holder or his representative, upon request, may examine the goods in question or may take samples thereof following the notification of the suspensive decision, or may have such information as the owner's and consignee's name or trade name and address except confidential

information or commercial secrets or information involving any infringements of the rights on commercial or industrial designs (Article 57).

- 17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?**

The right holder must expressly specify for what period the customs authorities may take action in the case of goods not presented, for that time, to customs. This period shall not be longer than 30 days. However, having a judicial decision which orders a precautionary measure within a 10-day period, the length of finalizing the case depends on judicial proceedings.

As for the costs, the right holder or his representative shall deposit with the customs administration the amount corresponding to the administrative costs regarding the application.

- 18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?**

Pursuant to Article 57 of Customs Law N° 4458, customs authorities shall apply border enforcement in a way that is *ex officio* suspension and it covers only counterfeit trademark goods (excluding patents, designs and geographical indications) and pirated copyright goods. *Ex officio* suspension applies if there is *prima facie* indication of infringement. Please see the response to question 15 for more information.

- 19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.**

If the court decides upon an infringement and does not order any explicit measure, the customs authorities destroy the goods or render them without commercial value.

### **Criminal Procedures**

- 20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.**

Regarding *ratione materiae* General Criminal Courts have jurisdiction over criminal acts of infringement of intellectual property rights.

The same general provisions apply in respect of local jurisdiction.

- 21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?**

#### Industrial Property Legislation

Infringement has been described in the Patent Decree as:

- Imitation of the product subject of the invention by manufacturing partially or wholly without the consent of the patent owner;
- manufacturing, offering for sale, putting on the market or using the product that is the subject of the patent or importing or possessing the product manufactured by partly or wholly infringing the patented invention;

- making use of a process that is the subject matter of a patent or product obtained by such process, offering such use, marketing, importing without the consent of the patent owner;
- broadening the rights conferred by the contractual or compulsory license and transferring these rights to third parties;
- contribution, promotion or facilitating in any way to any of the acts mentioned in the preceding paragraphs in any form;
- refraining from giving information about the source of the product that was produced or marketed through infringement;

Following are the infringement cases described in the Design Decree:

- without the consent of the design right holder, to make, produce, put on the market, offer, sell, put to use, import or keep in stock for these purposes the identical or significantly similar design;
- to transfer to third parties or to expand rights acquired by a licensing contract;
- to participate or to assist or to encourage or to facilitate in whatever form the acts referred to in the two preceding paragraphs;
- to abstain from explaining where and how an illegally produced and marketed product has been obtained when found in his possession;
- seizure of entitlement.

In the Trade Marks Decree:

- violations of Article 9;
- use of the same or confusingly similar trademark without the consent of the proprietor of the trademark;
- where being aware or should being aware that a mark is plagiarized, sell, distribute or put to commercial use or import or keep in possession for these purposes the goods carrying the infringed trademark;
- to transfer to third parties or to expand rights acquired by a licensing contract;
- to participate or to assist or to encourage or to facilitate in whatever form the acts referred to in the preceding paragraphs;
- to abstain from explaining where and how the product carrying the registered or confusingly similar trademark was obtained when found in possession are among the infringements.

Copyright and Related Rights Legislation

Infringing acts are described as infringement of moral rights indicated in Articles 14, 15 and 16 (right to issue - first time - to the public, the right of paternity, the right to object to derogatory treatment), and infringement of economic rights elaborated in Articles 21, 22, 23, 24 and 25 (right of adaptation, right of reproduction, right of distribution, right of performance, right of broadcasting) of the Intellectual and Artistic Works Act.

- 22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?**

Industrial Property Legislation

As a general principle the right of complaint belongs to the right owner. After the complaint, the case becomes a public issue and prosecutors shall continue to complete the legal procedure.

In addition to the right owner, under the Industrial Property Decree, the Turkish Patent Institute, Consumer Associations and Associations for Commerce and Industry have been given the competence to bring an infringement action in case of the two types of infringement described in the answer to question 24 below.

Complaints shall be treated as urgent matters in relation to the Act of Criminal Procedure (Article 423).

Copyright and Related Rights Legislation

Pursuant to Article 75 of the Intellectual and Artistic Works Act a right owner's complaint is the requirement for the criminal procedure. It should be emphasized that in accordance with Article 344/1-8 of the Criminal Procedural Act, it is the private person (right owner) who has standing to initiate criminal proceedings.

Subsequently, the public prosecutor after receiving the complaint may initiate criminal proceedings if only he/she finds a clear public benefit to do so (Articles 346 and 347 of the Criminal Procedural Act).

- 23. Do private persons have standing to initiate criminal proceedings and, if so, who?**

See the answers to question 22 above.

- 24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:**

- **imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

Industrial Property Legislation

Article 73/A<sup>4</sup> of the Patent Decree describes three types of infringement and criminal remedies:

- (a) Infringement which requires between 1-2 years imprisonment and a fine between the amount of 300 million and 600 million Turkish Lira:
- Infringement of Article 44.  
(False indication about the identity of the inventor during the patent application).
  - Removal without authority of the sign indicating a patent rightfully placed on a patented product or on its packaging.
  - Falsely representing himself as the proprietor of a patent application or a patent right.
- (b) Infringements which requires between 2 and 3 years prison term and a fine of between 600 million and 1 billion Turkish Lira:
- To transfer, to place on security or to undertake any such other transaction without having any authority on patent application right and on patent right.
  - Without being the rightful proprietor of the patent right or after the expiration of the protection term or after the invalidation of the patent:  
  
affixing signs on:
    - a product, or
    - its packaging, or
    - on commercial documents, or
    - on advertising materials,  
in such a way that would convey the impression as if a relation exists with a protected patent right.
- (c) Infringement which requires prison term between 2 and 4 years and a fine of between 600 million and 1 billion Turkish Lira and closing down the business premises and prevention of commercial activities at least for one year:
- committing the actions described in Article 136.

Article 48/A<sup>5</sup> of the Design Decree describes three types of infringement and criminal remedies:

- (a) Infringements which requires prison term between 1 and 2 years and a fine between 300 million and 600 million Turkish Lira:
- False indication about the identity of the design creator during the design application.

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<sup>4</sup> Inserted by the Amending act N° 4128, dated 7 November 1995.

<sup>5</sup> Inserted by the Amending Act N° 4128, dated 7 November 1995.

- Removal without authority of the sign indicating a design right rightfully placed on a product or on its packaging.
  - Falsely representing himself as the proprietor of a design application or a registered design right.
- (b) Infringements which require between 2 and 3 years prison term and a fine of between 600 million and 1 billion Turkish Lira:
- To transfer, to place on security or to undertake any other transaction without having any authority on design application right or on design right.
  - Without being the rightful proprietor of the design right or after the expiration of the protection term or after the invalidation of the design:  
  
affixing signs on:
    - a product, or
    - its packaging, or
    - commercial documents, or
    - on advertising materials,in such a way that would cause the impression as if a relation exists with a protected design right.
- (c) Infringements which require prison term between 2 and 4 years and a fine of 600 million and 1 billion Turkish Lira and closing down the business premises and prevention of commercial activities at least for one year:
- committing the actions described in Article 48.

Article 61/A<sup>6</sup> of the Trade Mark Decree describes three types of infringement and criminal remedies which are parallel to those issued in the Design and Patent Decrees:

- (a) Infringements which require a prison term between 1 and 2 years and a fine between 300 million and 600 million Turkish Lira:
- False indication about the identity of the trade mark owner in the course of a trademark application.
  - Removal without authority of the sign indicating a trademark rightfully placed on a product or on its packaging.
  - Falsely representing himself as the proprietor of a trademark application or a registered trademark.
- (b) Infringements which require a prison term between 2 and 3 years and a fine between 600 million and 1 billion Turkish Lira:
- To transfer, to place on security or to undertake any other transaction without having any authority on trademark right.

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<sup>6</sup> Inserted in the Amending Act N° 4128 dated 7 November 1995.



- Without being the rightful proprietor of the trademark right or after the invalidation of the trademark :

affixing signs on:

- a product, or
- its packaging, or
- commercial documents, or
- advertising materials,

in such a way that would cause a false impression as there is a registered trademark.

- (c) Infringements which require prison term between 2 and 4 years and a fine between 600 million and 1 billion Turkish Lira and closing down the business premises and prevention of commercial activities at least for one year:
- committing the actions described in Article 61.

#### Copyright and Related Rights Legislation

In case of infringement of moral rights:

Article 71 of the Intellectual and Artistic Works Act imposes a prison term from 3 months up to 1 year and a fine between 300 million and 600 million Turkish Lira for the infringement of moral rights.

In case of infringement of economic rights:

- (a) Infringements which require a prison term between 3 months and 1 year and a fine from 300 million to 600 million Turkish Lira are:
- Without the written permission of right owner (Article 72):
    - adapt a work in any manner,
    - reproduce a work in any manner,
    - sell or offer for sale or place into circulation of infringing copies,
    - perform, exhibit or display in public premises or diffuse by radio or other similar means,
    - rent out,
    - importation.
  - Infringement of neighbouring rights (described in Article 80).
- (b) Other infringements which require the imposition of a prison term from 3 months up to 3 years and a fine from 300 million up to 600 million Turkish Lira (described in Article 73) are:
- Put up for sale or exploit for purposes of diffusion by means of performance in public premises or broadcast by radio or for profit in any other way, copies of a work which they are aware or should be aware have been reproduced in violation of the provisions of the present law.

- Sell to others or exploit for purposes of diffusion by means of performance in public premises or broadcast by radio or profit in any other way, copies of a work which they are aware or should be aware have been put up for sale in violation of the provisions of the present law.
- Assign or give or pledge to another person or make subject of any disposal an economic right or a licence which they are aware or should be aware is non-existent or over which they have no right of disposal.
- Reproduce or cause to be reproduced in excess of the number of copies than the amount he is allowed to do by agreement or by law.
- Keep in their possession for commercial purposes, copies of a work which they are aware or should be aware have been reproduced in violation of the provisions of the present law.
- Keep in their possession or distribute for commercial purposes, any technical device serving the circumvention or unauthorized removal of a technical instrument applied solely for the protection of a computer program.

Regarding monetary fines an Act Amending the Criminal Code (N° 4421), introduced a new system to raise the fines (not for only in copyright and industrial property legislation but all legislation imposing fines). In accordance with this system, the raising of the fines is connected with a re-evaluation ratio which is calculated and announced by the Ministry of Finance within the framework of an average price rise *per annum* for the gross domestic product.

The re-evaluation ratio is 52.1% for the year 1999.

The conversion question has been provided for in the Enforcement of Criminal Judgements Act. Pursuant to Articles 3 and 4 of this Act, conversion may apply if the duration of imprisonment is less than one year. In this framework the relevant Articles of the Decrees and the Intellectual and Artistic Works Act which impose one year or less than one year have given a discretionary power to the judge, to convert imprisonment into a fine. Nevertheless it should be mentioned that in imprisonment judgements of less than one year (as it is the case mostly in Articles 71 and 72 of the Intellectual and Artistic Works Act), it is not a mandatory rule for the court to convert the sanction.

All court Judgements shall have reasoning pursuant to Article 141/3 of the Turkish Constitution. Consequently the judge has to show the reason why he/she has chosen to convert or not to convert the sanction. All the judgements and their reasoning shall be reviewed through an appeal procedure by the Court of Appeal.

**25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.**

As it is described under civil procedure (see the answer to question 8 above), there is no special provision relating to maximum and minimum length and cost of the criminal procedure. Consequently the same basic principle of the Turkish Constitution prevails as a principle for all courts Cases should be dealt with at the lowest possible cost and should be dealt with expeditiously (see the answer to question 8 above). Concerning the cost before civil courts, the Ministry of Finance issues General Circulars on Charges each year. The Circular for 2000<sup>7</sup> stipulates that:

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<sup>7</sup> General Circular, Serial number 36, O.J. 16 December 1999, N° 23908, pp. 21-22.

- Petition charges are:
  - 2.080.000 Turkish Lira before General Civil Courts (including Commercial Courts).
  - 3.160.000 Turkish Lira for an appeal procedure.
- Hearing charge (in case of causing the suspension of the hearing) is:
  - 01,5% of the value of the dispute.  
This charge is paid by the party who has caused the suspension of the hearing.
- Decision charge is:
  - 04,5% of the value of the dispute when the court decides on the substance of the case.
  - 3.390.000 TL when the court takes preliminary measures.

The Act of Criminal Procedure issues the principles on the distribution of costs in Articles 406 to 415.

The State bears the necessary cost to carry out the criminal proceedings during the procedure. However it is the convict who should pay the expenses at the end of the procedure. Nevertheless, if he/she dies before the judgement, her/his heirs are not obliged to pay the cost (Article 407).

The average length of judicial proceedings<sup>8</sup> is shown below according to civil and criminal actions brought before civil courts (commercial courts and general civil courts), and criminal courts:

In Civil Actions

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Commercial Courts }	289 days	342 days	301 days	201 days
General Civil Courts }	320 days	331 days	250 days	234 days

- Provisional measures (injunction claims) have been decided by the courts in 1 or 2 days.
- Appeal duration was 37 days in 1997 before the relevant chamber (11<sup>th</sup> Civil Chamber) of the Court of Appeal, and in 1998 it was 116 days.

In Criminal Actions

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
General Criminal Courts }	320 days	331 days	312 days	337 days

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<sup>8</sup> All the data has been taken from the General Directorate on Judicial Records and Statistics of the Ministry of Justice. See <http://www.adli-sicil.gov.tr>.

Appeal duration was 19 days and 27 days in 1997 and 1998 respectively before the 4<sup>th</sup> Criminal Chamber of the Court of Appeal.

Number of criminal actions<sup>9</sup> brought in 1997 and 1998:

	<u>1997</u>	<u>1998</u>
Patents	49	31
Designs	3	80
Geographical Indications	0	0
Trademarks	889	1550
Cinematographic Works	144	151
Literary and Artistic Works	65	234

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<sup>9</sup> Statistical data for civil actions shall be provided after 1999. (The current method of collecting data for civil actions is not appropriate to categorise the cases brought under the intellectual property legislation.)