

PATENT PROTECTION IN TURKEY

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INTRODUCTION

One can currently obtain patent protection in Turkey via two main types of tools. The first one is examined patent, and it is also possible to apply for a utility model that is not examined essentially. The novel, creative, and industrially applicable inventions, and the novel and industrially applicable utility models that lack the inventive step are protected against unlawful users, by registration. The concept of ‘sufficiency of disclosure’ requires that enough information is provided to enable a person skilled in the related art to perform the invention. When a lack of criteria for registration of an application, a patent will be refused, further a nullity case application is unavoidable.

The first possibility is a Turkish national patent granted by the Turkish Patent Office. The other option is a national utility model granted by the Turkish Patent Office. Your application form must contain a written description of the invention, an abstract, the patent claim or claims, drawings sheet, application fee receipt and. Any deficiency of these elements will be fixed within two months. The patent registration office does, according to the preset legal principles, examine the application it receives, and if these conditions have been met, grant the patent or the utility model certificate. Absolute rights that a patent provides to its owner are, except for some restrictions like public order and health, and time, similar to property ownership law. Absolute rights will be in effect for the term of a patent with a substantive examination, which is twenty years.

Under Turkish patent law, patent registrations cannot be obtained for per se software kind of invention. Patent protection can only be granted to software to the extent that the software forms part of a technical solution that is using the software as a part of said invention. In Turkish patent law software can’t be granted protection unless it has a technical result that provides some kind of technical contribution. The same rule applies to business methods, namely a patent for a business method cannot be granted unless the method includes some sort of technical result.

On the other hand, according to the Industrial Property Code number 6769 (IPC), Article 83(3)-c, it is not possible to obtain a patent for methods for surgical or therapeutic treatment or determination of diagnoses practiced on humans or animals. The reasoning behind this is that they are not regarded as inventions. However, it is possible to obtain patent protection for products, substances, and compounds for use in any of the above-mentioned methods.

Turkey is a member of the European Patent Convention (EPC) since 12.07.2000. The European patent granted by the European Patent Office (EPO) may cover Turkey and be valid in Turkey to the extent that the patent has been validated in Turkey. This kind of patent is also considered a national patent; therefore, only allows enforceable patent protection for the countries where validation is made. The requirements for patentability of a European patent that designated Turkey are fulfilled by the European Patent Office.

Turkey has ratified the Patent Cooperation Treaty in 01.01.1996, making it part of the International Patent System. This has also resulted in a national patent, allowing patent protection for the designated countries. In terms of PCT applications, the Turkish Patent and Trademark Office (TÜRKPATENT) or the EPO have the authority to assess the novelty requirement for the patent applications. Hereafter,

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the application must be transferred to each designated country that performs the patentability assessment. This process is handled by the Turkish Patent and Trademark Office.

When it comes to the prospective Unified Patent system, Turkey will not be a part of the system, and the patent will be issued by the European Patent Office in Munich and apart from the European patent it will have a unified effect. For the time being, a unified patent system is not started which will create a supranational court embodiment.

PHARMA PATENTS

The exclusive right granted by a patent is not indefinite and, although it is restricted to a statutory period of twenty years, it is very difficult, indeed virtually impossible, in certain areas of industry for protection to be made to commence at the same time as the commercialization of the patented product - however much the patent holder may wish for this. In the pharmaceutical and agricultural chemicals sector, the requirement for lengthy testing to determine whether new pharmaceuticals or pesticides and herbicides are effective and safe reduces the effective patent protection period. This lengthy testing and registration process may last as long as eight years. In Turkey, it is not possible for certain types of patents to cover products for which extensive state control is applied, such as pharmaceutical products, through a supplementary protection certificate (SPCs). Within the pharmaceutical sector's competitive research environment, leaving aside the difficulty in obtaining a patent, the administrative problems in ensuring that a patent effectively serves its holder's interests make SPCs necessary. At the same time, according to the Competition Authority's latest reports, it takes an average of seven months for generic medicines to enter the market in Turkey once the patent protection period expires. This period can be as short as four months in the case of commercially successful medicines. As Turkey is not yet a member of the European Union, it is not bound by EU legislation on SPCs. This means that there are no mechanisms in Turkey enabling SPCs to be applied for and obtained. SPCs take place on the boundary between patent law and administrative/regulatory law, but knowledge of patent law principles and local regulatory law is also required. SPCs were created and are governed by the following EU regulations: EU Council Regulation No. 1768/92 concerning medicinal products and EU Parliament and Council Regulation No. 469/2009 of 6 May 2009 concerning the supplementary protection certificate for medicinal products, EU Council Regulation No. 1610/96 concerning plant protection products, EU Council Regulation No. 1901/2006 concerning medicinal products for pediatric use.

It is also legal to use the patented invention in experimental use under article 85(3.C) of IPC. Likewise, it is legally possible to file for market authorization of a generic variation of a patented drug and preparation to go on the market when the patent expires.

UTILITY MODELS

Further, the Turkish Patent System enables you to apply for utility model protection. The prominent difference between a patent and a utility model is that a utility model is granted without examining the process whether or not the invention is novel, and the protection time is shorter (10 years from application date). But an application for a search report is a must for registration of utility model tool, in the Turkish Patent and Trademark Office. Utility models are often used to speed up enforcement, as they are issued much more quickly than normal patents. This tool is more convenient for SMEs.

INFRINGEMENT

According to Article 141 of the Industrial Property Code numbered 6769 (IPC), The following acts shall be considered as an infringement on patent or utility model right: (i) to imitate partially or completely the product forming the invention as a result of production without the consent of the owner of patent or utility model shall be considered as an infringement on patent or utility model right. And, (ii) to sell, distribute or release to commercial area the products forming the subject of the

invention with other ways or to import it for these purposes, to keep it for commercial purposes, to use it through making applicable or to make suggestion draw up contract related to the product through infringement action, although it is known or it is required to know that product in question is partially or completely produced through imitation. Also, (iii) To use the method forming the subject of the invention without receiving the consent of the patent owner or to sell the products produced directly by method forming the subject of the invention, to distribute or release to commercial area them or to import them for these purposes, to keep them for commercial purposes, to use them using making applicable or to make the suggestion to draw up contract related to these products, although it is known or it is required to know that this method is used without permission. (iv) To seize the patent or utility model right. (v) To expand the rights granted by the owner of patent or utility model through contractual license or compulsory license without permission or to transfer these rights to third parties. On the other hand, when one incites or assists an infringement it is possible to come across liability for infringement. If a foreign activity has consequences to infringement within Turkey it can be subject to an infringement case. If a director or a board member may be held liable for infringement under, specific circumstances namely when he or she has control over the company. Also, infringement liability occurs if he or she has either initiated the infringement or performed so. Someone who aids in the creation or sale of a patented invention is called a contributory infringer.

Claims are the core issue for evaluating infringement. A patent may have as many patent claims as is justified by novelty inventive steps, and the industrial application. If the invention is producible and usable in any industrial area including agriculture, it shall be considered applicable to industry. Each patent claim defines the scope and boundaries of the patented invention for licensing, design around, and infringement purposes analogous to the way the legal description of a plot of land determines a trespass thereon. Each patent claim serves as legal notice of the scope of the patent owner's right and what others must refrain from. It normally results in an infringement, if someone's act falls within the normal understanding of the scope of the claims. This rule is established case law by referring to Article 69 of the European Patent Convention which states: 'The extent of protection conferred by a European patent or a European patent application shall be determined by the term of the claims. Nevertheless, the description and drawings shall be used to interpret the claims.' The Patentee has reasonable fair protection in Turkish patent litigation. When determining the extent of the protection for the patentee, equivalency should be taken into consideration (IPC Article 89(5)).

In Turkish patent law, an accused infringer to argue for a prior use defense as a defense to infringement claims. The patent applicant or the patentee shall not have a right to prevent the persons who used the invention domestically in good faith on or before the application date; or the persons against whom serious and real measures are taken for their use, from keeping using the invention subject to a patent in the same way or from beginning to use them in accordance with the measures taken.

INVALIDATION

Principles of the EU law on the invalidity of patents and the related treaties on this subject are similar to the provisions of Turkish legislation. But there is no centralized competent court that hears the invalidity disputes. Thus, the ordinary civil courts of the first instance, and the same specialized civil court of the first instance if any, are competent to hear both the invalidity disputes as well as the other civil cases. According to Article 156 of IPC, all patent and other intellectual property disputes mentioned in this Law shall be heard by specialized civil courts of intellectual property. Persons who are adversely affected/prejudiced or interested in official authorities, acting through the Public Prosecutor, may request from the court the invalidation of a patent. Moreover, the validity of a patent may also be challenged by the persons who are entitled to claim the right to the patent.

In Turkish Patent Law, possible grounds for invalidation are as follows. (i) If the subject of a patent does not have patentability conditions in accordance with Article 82 and Article 83,(novelty, inventive

step, and industrial applicability), (ii) If an invention is not sufficiently explained in accordance with first, second and third paragraphs of Article 92 (insufficiency), (iii) If the subject matter of the patent goes beyond the scope of the application, (iv) If an application includes more than one invention that do not realize around the principal inventive idea of general nature, and which are not related to each other by the said principal inventive idea, each one of them may be disassociated inventions might be subject to invalidation case (lack of unity) (v) If it is proved that the patent owner does not have right to demand patent according to the Article 109.

POST - GRANT INVALIDATION

In Turkey, the Turkish Patent and Trademark Office makes decisions on challenges to the validity of patents after the grant decision. According to article 99 of IPC, Third Parties can object, paying the fee, to the subject patent within six months as of the date of the decision of granting the patent is published in the Bulletin.