

Copyright

Contributing editors

Andrew H Bart, Steven R Englund and Susan J Kohlmann



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GETTING THE
DEAL THROUGH 

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Copyright 2016

Contributing editors

**Andrew H Bart, Steven R Englund and Susan J Kohlmann
Jenner & Block LLP**

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Turkey

Sıdıka Baysal Hatipoğlu, Gökhan Uğur Bağcı and Benan İlhanlı

B+B Law Firm

Legislation and enforcement

1 What is the relevant legislation?

The main legislation regulating copyright-related issues in Turkey is Law No. 5846 on Intellectual and Artistic Works dated 13 December 1951 and amended from time to time. In addition, several secondary regulations have been published to regulate the issues provided by this law in a more detailed way. Furthermore, Turkey abides by several international agreements and conventions and, in 1995, ratified the Berne Convention for the Protection of Literary and Artistic Works and the Paris amendments of 1979.

2 Who enforces it?

Copyright holders are entitled to request enforcement from civil or penal courts specialised in the protection of intellectual and industrial rights, currently based in Istanbul, Ankara and Izmir, and civil or penal courts of first instance, in other cities in Turkey.

3 Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The additional article 4 of Law No. 5846, inserted in 2001 and amended in 2004, provides specific protection for copyrighted work against digital exploitation. Accordingly, in the event of the violation or infringement of copyrights through visual or acoustic transmission, including digital systems, by information content providers, the rights holders may request the removal of the work from the related content provider within three days. Should the content provider not comply with such a request, the rights holder is entitled to contact a prosecutor, who will then ensure IP address-based blocking of the website until the copyrighted work is removed.

4 Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Turkish intellectual property law provides territorial protection and does not normally extend to extraterritorial application. On the other hand, the procedure regarding digital exploitation of works described above is used against foreign-owned, operated and hosted websites. Access to those websites providing infringing content may be blocked within Turkey upon the application of the copyright holder.

Agency

5 Is there a centralised copyright agency? What does this agency do?

Copyright-related matters are governed by the General Directorate of Copyrights, which is overseen by the Ministry of Culture and Tourism. This agency was founded to aid the development of an intellectual rights system and to conduct legal and administrative actions.

Subject matter and scope of copyright

6 What types of works are copyrightable?

Law No. 5846 sets forth certain criteria for a creation to be copyrightable. Accordingly, the creation shall be a product of an intellectual effort, carry its creator's attributions, and shall further be considered as a work of science and literature, music, fine arts, compilation or cinema.

7 What types of rights are covered by copyright?

Turkish copyright law protects both the moral and the economic rights of the author. Moral rights concern releasing the work to the public, being named as the author of the work and prohibiting any alteration to the work. Economic rights, on the other hand, are the rights that assist the author in economic matters deriving from the work, such as rights of reproduction, distribution, transmission, broadcasting or publishing, adaptation and performance.

8 What may not be protected by copyright?

Copyright protection is subject to the creation of a work as defined in Law No. 5846, and the idea shall have been converted to a work. In other words, ideas and works not falling under the definitions of Law No. 5846 are not subject to such protection.

9 Do the doctrines of 'fair use' or 'fair dealing' exist?

Law No. 5846 provides certain cases of 'fair use', between articles 30 and 41, which are public order (use by governmental bodies), interest of the community (laws, parliamentary speeches, educational uses, citation purposes, newspapers and news) and personal use.

10 What are the standards used in determining whether a particular use is fair?

Apart from the exclusivities determined for each form of work, the rule is that permission must be obtained from the author. On the other hand, a published work of art, a film or a picture can be used and copied without a permit for strictly personal use, provided that this use does not infringe the interests of the rights holder. The main application of this fair use rule is copying copyrighted material, which has already been purchased, for personal use.

11 Are architectural works protected by copyright? How?

Law No. 5846 specifically provides copyright protection for architectural works by distinguishing whether or not a work has aesthetic value. In either case, the created work does have copyright protection, but the protection of architectural projects lacking aesthetic value is determined in article 2(3) under the scope of scientific and literary projects. On the other hand, architectural works with aesthetic value are protected by article 4(3) as they are deemed to be fine art projects. As a result of such differentiation, aesthetic value is sought in order to protect the plan, project and structure all together. Otherwise, the work will be considered under the scope of scientific and literary projects, meaning that the structure will not be protected by copyright.

12 Are performance rights covered by copyright? How?

Article 80 of Law No. 5846 provides both moral and economic rights to performances. In this context, with the author's permission, and without prejudice to the moral and economic rights of the author, performers who perform the work have the following neighbouring rights:

- preventing the distortion and amendment of their performance, which may prejudice their reputation;
- authorising or preventing the fixation of their performance and the reproduction, sale, distribution, rental and lease, transmission and representation of such fixation; and

- authorising or preventing the release of the original or reproductions of the fixation of their performance to the public, and the transmission of the performance through wired or wireless devices.

13 Are other 'neighbouring rights' recognised? How?

Phonogram producers, radio and television broadcasters and film producers have also been provided with neighbouring rights including the reproduction, sale, distribution, rental and lease, transmission, retransmission and representation of the fixation.

14 Are moral rights recognised?

Moral rights are defined specifically under the scope of Law No. 5846 and, accordingly, the author is entitled to: release the work to the public, be named as the author of the work, prohibit alterations, and regain possession of the work for a temporary time from the current owner under certain conditions. Unlike economic rights, moral rights cannot be transferred to third parties, but they can be used by the heirs of the author after his or her death, under certain conditions.

Copyright formalities

15 Is there a requirement of copyright notice?

Turkish law does not provide for any form of copyright notice requirements.

16 What are the consequences for failure to display a copyright notice?

Due to the fact that copyright notice is not required by law, there are no consequences for failure to display such a notice.

17 Is there a requirement of copyright deposit?

Turkish law does not provide for the requirement of copyright deposit.

18 What are the consequences for failure to make a copyright deposit?

Due to the fact that copyright deposit is not required by law, there are no consequences for failure to make such a deposit.

19 Is there a system for copyright registration?

Although Law No. 5846 provides natural protection commencing from the time of creation, pursuant to Regulation No. 26171 on Registration of Intellectual and Artistic Works, published in the Official Gazette dated 17 May 2006, cinematographic works and phonograms are subject to registration in order to protect the related rights and facilitate proof in the event of a dispute.

Furthermore, copies of cinematographic, musical and literary works (except for periodicals) to be sold shall bear labels obtained from the Ministry of Tourism and Culture in order to prove the authenticity of the copies.

20 Is copyright registration mandatory?

As mentioned above, according to Regulation No. 26171, cinematographic and phonogram works shall be registered to be protected by copyright. Apart from for such works, there are no other mandatory registration processes. It has to be noted that volunteer registration is possible in order to make revealing the author of the work more convenient. In addition, the author is entitled to issue an acknowledgment through a notary public stating that the relevant work is created by him or her.

21 How do you apply for a copyright registration?

Film producers who make the first fixation of the film and phonogram producers who make the first fixation of the musical work are obliged to register such works. The application for registration shall be made to the General Directorate of Copyrights of the Ministry of Culture and Tourism, with an application form and other relevant documentation set forth in Regulation No. 26171. The producers are obliged to submit a covenant shown in annex 1 of the Regulation. The covenant contains an acknowledgment that the producer undertakes that the ownership of the work belongs to him or her, and that he or she is liable legally and criminally, if proven otherwise.

22 What are the fees to apply for a copyright registration?

Fees to apply for a copyright registration depend on the kind or form of the fixed work. Fees are updated from time to time by the Ministry of Culture

and Tourism through a by-law. For instance, as of 2016, the registration fee for local and imported cinematography is 444.50 Turkish lira, while for local and imported manufacture cinematography (DCP-35 MM-LD) the fee is 89 Turkish lira. In addition, the current fee for volunteer registration is 111.02 Turkish lira.

23 What are the consequences for failure to register a copyrighted work?

Neither Law No. 5846 nor the above-mentioned Regulation No. 26171 provide for consequences or sanctions for failing to register a copyrighted work. However, such registration is important in order to demonstrate proof of ownership against any kind of counterclaim, and also to prevent violation of the previously mentioned rights of the author.

Ownership and transfer

24 Who is the owner of a copyrighted work?

According to Law No. 5846, the owner of a copyrighted work is the person or entity who created, adapted (ie, translated) or compiled the work. Further, article 8 of the Law provides that the director, composer of the original score, screenwriter, dialogue writer and animator (if the work is an animation) have joint ownership of cinematographic works.

25 May an employer own a copyrighted work made by an employee?

Article 18 of Law No. 5846 provides that, unless it appears otherwise through a private contract or the nature of the job, the ownership of a copyrighted work belongs to the employer if the work has been created by the employee through the fulfilment of duties. In practice, it is advised that the employment agreement includes an article referring to this issue. It must be noted that the moral rights remain the author's, due to the nature of those rights.

26 May a hiring party own a copyrighted work made by an independent contractor?

As with an employment relationship, the hiring party would own the economic rights of a copyright work made by an independent contractor.

27 May a copyrighted work be co-owned?

In the event that the work is created by more than one author and is divisible, each author is considered owner of the part he or she has created. Should the work be indivisible, the owner of the copyrighted work is the union of all authors involved in the creation process. The commercial provisions in regard to simple partnership are applied to such unions; therefore, if one of the authors refuses to participate in a transaction without valid grounds, the court may allow the other authors in the union to conduct the transaction. In addition, each author is entitled to take action severally if the copyright is violated.

28 May rights be transferred?

While economic rights may be transferred, moral rights shall always remain the author's. Such a transfer shall be conducted through a written contract and each of the rights subject to transfer shall be specified.

29 May rights be licensed?

Copyrights may be subject to a licence through a licence agreement and, accordingly, the author may undertake to transfer his or her rights on the work and, in return, the other party would be obliged to pay the amount determined in the contract. The subject of the licence contract is the usage of economic rights; therefore, the author shall keep his or her moral rights even after the execution of such a contract. The licence may be granted on an exclusive or non-exclusive basis.

30 Are there compulsory licences? What are they?

Law No. 5846 does not explicitly provide for a compulsory licence, although use of the copyrighted work when a union of authors exists, as defined above, may be considered a form of compulsory licence.

31 Are licences administered by performing rights societies? How?

As per Law No. 5846, authors and neighbouring rights holders are entitled to establish professional societies pursuant to regulations issued by the

Ministry of Culture. Such societies are empowered to act and enter into contracts on behalf of their members.

32 Is there any provision for the termination of transfers of rights?

Article 58 of Law No. 5846 provides the principals for the termination of transfer of rights. This article is entitled 'Right of Withdrawal' and provides that the author is entitled to withdraw if the transferee has not duly benefited from the work within a determined or reasonable period and consequently violated the benefits of the author. In such a case, the author is obliged to send prior notification to the transferee and grant an extension via a notary public, unless the benefits of the author are harmfully violated, in which case the notification would not be mandatory. After the extension period, the withdrawal can be completed upon a withdrawal notification being served by a notary public to the transferee. The transferee can file a lawsuit against the withdrawal within four weeks following the notification.

33 Can documents evidencing transfers and other transactions be recorded with a government agency?

There are no specific provisions suggesting that a government agency shall keep records of the transfers and other transactions.

Duration of copyright

34 When does copyright protection begin?

Works protected within the scope of Law No. 5846 benefit from natural protection mechanisms commencing from the time of creation.

35 How long does copyright protection last?

Copyright protection lasts for the lifetime of the author and for 70 years following his or her death, or the death of the last remaining person in a union of authors. If the author is a legal entity, the protection period is 70 years commencing from the release of the work to the public. The protection period regarding works publicised after the death of their owner is 70 years from the date of death. If the identity of the author is uncertain, the protection period is 70 years following the release to the public.

Article 47, amended as of 14 September 2014, has stipulated rights with respect to creations that are considered as significant for the country's culture whereby they can be released to the public through a cabinet of ministers decree following the death of the author, provided that the rights holders reserve their right to demand a reasonable remuneration. In order to enact such decree, the creation shall originate from Turkey or from a Turkish citizen abroad.

The decree shall consist of the following:

- name of the creation and the author;
- seat or institution that will be using such rights;
- method for determining the remuneration to be paid to the rights holders upon the demand and by which entity; and
- the purposes of use of the revenue, if any.

On the other hand, the Turkish Court of Constitution has annulled the first sentence of the amended provision through Case No. 2014/177, Decision No. 2015/49. It has been stated in the said decision that article 35 of the Turkish Constitution, which covers rights on moveable and immoveable assets as well as intangible rights, guarantees the proprietary rights of the citizens. Furthermore, it has been stated that article 13 of the Constitution provides that fundamental rights and freedoms can only be limited through a law and in accordance with the reasons set forth in the Constitution. Therefore, limitations on proprietary rights cannot be conducted contrary to principles of democratic society and principle of proportionality. The Court argued that even though the authority of the cabinet of ministers to release the creation to the public is limited to creations that are deemed significant for the country's culture, such criterion is subjective and providing a basis for the authorities to act and use their powers beyond the scope of such criterion. Furthermore, although a balance is sought between public benefit and personal benefit through reserving the right 'to demand a reasonable remuneration', providing a right instead of paying the remuneration directly is contrary to the guarantees on proprietary rights provided in article 35 of the Constitution.

The Turkish Court of Constitution also provided the annulment of such criterion shall come into force one year after the said decision is published in the Official Gazette in order to allow the legislator time to enact a new rule complying with the provisions of Constitution. The said decision was

published in the Official Gazette dated 11 June 2015; hence, such annulment will be valid as of 11 June 2016, meaning that the cabinet of ministers will not have the authority to release the creation to the public starting from 11 June 2016 unless a new regulation compliant with the Court's decision is enacted.

36 Does copyright duration depend on when a particular work was created or published?

Works protected within the scope of Law No. 5846 benefit from natural protection mechanisms commencing from the time of creation.

37 Do terms of copyright have to be renewed? How?

Terms of copyright cannot be renewed and, following the expiration of the terms defined above, the work enters the public domain.

38 Has your jurisdiction extended the term of copyright protection?

The terms regarding each of the above-mentioned conditions of copyright protection are absolute and cannot be stipulated otherwise.

Copyright infringement and remedies

39 What constitutes copyright infringement?

Since there are two forms of rights, moral and economic, Law No. 5846 provides for infringement of both types. Releasing the work to the public, altering the work without the prior consent of the author and not using the name of the author would constitute an infringement of moral rights, whereas adapting, performing, transmitting, reproducing or distributing the work without the prior consent of the author would constitute an infringement of economic rights.

40 Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Secondary liability exists for indirect copyright infringement for persons who contribute to the infringement, for example, by purchasing an unauthorised reproduction of a work.

41 What remedies are available against a copyright infringer?

As per article 68 of Law No. 5846, rights holders whose moral and economic rights, as mentioned above, are violated through infringement, are entitled to the following remedies:

- to ask that the infringement cease with immediate effect; and
- to claim compensation for three times the amount that would have been stipulated, had a contract been drawn up for the use of the work subject to the infringement.

In addition, if the reproduced copies have not been put on sale, the author may request:

- that the film, patterns or such materials used in the reproduction process be destroyed or given to the author in consideration of a reasonable price, which shall not exceed reproduction costs; or
- to be compensated for three times the amount that would have been stipulated had a contract been drawn up for the use of the work subject to the infringement.

In the event that the reproduced copies have been put on sale, the rights holder may take any of the actions mentioned above, at their own discretion.

An author who requests compensation may also claim fulfilment of any conditions that may have been determined in a contract.

42 Is there a time limit for seeking remedies?

An author whose moral rights have been infringed may file a lawsuit subject to non-pecuniary claims. In addition, if any economic rights have been violated, the author may file a case and request compensation for all damages caused as a result of the infringement. Since Law No. 5846 does not provide a time limit for seeking remedies, general rules provided by the Code of Obligations Law No. 6098 shall be applied for such a limit. It must be noted that such actions are considered torts, and Law No. 6098 stipulates a time limit of two years starting from the date the infringement has been ascertained by the author and, in any case, compensation shall be requested within 10 years of the infringement date.

43 Are monetary damages available for copyright infringement?

As mentioned above, according to article 68 of Law No. 5846, an author whose rights are violated through the infringements mentioned above is entitled to claim compensation for three times the amount that would have been stipulated had a contract been drawn up for the use of the work subject to the infringement. An author whose moral rights have been infringed may file a lawsuit subject to non-pecuniary claims. In addition, if any economic rights have been violated, the author may file a case and request compensation for all damages caused as a result of the infringement and the profits of the infringer, depending on the infringement actions.

44 Can attorneys' fees and costs be claimed in an action for copyright infringement?

According to Turkish legislation, the party that loses the lawsuit shall bear the judicial costs of the whole litigation and the attorneys' fees of the counterparty. It must be noted that the court determines the payment of attorneys' fees, which are designated and the tariffs published annually by the Union of Turkish Bar Associations. In other words, should the winning party have agreed a higher fee with his or her attorney than that stipulated in the tariff, the court would not make an order on the excess.

45 Are there criminal copyright provisions? What are they?

Criminal copyright provisions are set forth in articles 71 to 75 of Law No. 5846, as follows:

- reproducing, representing, copying, altering, distributing, releasing to the public through any kind of device, publishing, selling, leasing, lending, buying for commercial purposes, importing, exporting, possessing for personal use and storing without the written consent of the author shall result in a prison sentence of between one and five years, or a corresponding judicial fine;
- plagiarising someone else's work shall result in a prison sentence of between six months and two years, or a corresponding judicial fine. In the event that such action has been conducted through distribution or publishing, the maximum prison sentence shall be five years and a judicial fine cannot be applied;
- citing from a literary work without providing reference shall result in a prison sentence of between six months and two years, or a corresponding judicial fine;
- releasing the context of a work, which was not explicit, to the public without the consent of the author shall result in a prison sentence of up to six months;
- giving wrongful or deceptive references regarding a work shall result in a prison sentence of up to six months;
- copying, distributing, reproducing or publishing a work, performance, phonogram or production under someone else's name shall result in a prison sentence of between three months and two years; and
- removing information from the work that identifies its author, importing, distributing or releasing the original or copies of such works, and the unlawful digital exploitation of copyrighted works shall result in content providers who continue to publish the infringing material on their websites being sentenced to between three months and two years in prison, unless the original crime requires a longer sentence.

In accordance with article 72 of Law No. 564, those who produce, possess or sell software or technical materials that are used to block any software aiming to prevent the illegal reproduction of a computer program shall be sentenced to between six months and two years in prison.

Applying the above-mentioned criminal provisions and sanctions is subject to the complaint of the rights holders. In order to issue a valid complaint, the documentation that proves the rights holding or membership of a professional society shall be submitted. Upon receiving the complaint, the public prosecutor can take interim measures to protect the work and rights. The prosecutor can also stop reproduction of the work, if deemed necessary. Such a decision shall be submitted to the judge within 24 hours in order to be approved.

46 Are there any specific liabilities, remedies or defences for online copyright infringement?

There are no specific liabilities, remedies or defences for online copyright infringement provided in Law No. 5846.

47 How may copyright infringement be prevented?

Turkish law and regulations do not provide a specific prevention method for copyright infringements. However authors, through their personal efforts or professional societies, and holders of economic rights, usually monitor their copyrighted work. Should an infringement be caught in the early stages, the author and other rights holders have the possibility of pursuing preliminary measures from the relevant courts to prevent the reproduction, transmission, broadcast or distribution of such work.

Relationship to foreign rights**48 Which international copyright conventions does your country belong to?**

Turkey is a party to several international agreements and conventions. In 1995 Turkey ratified the Berne Convention for the Protection of Literary and Artistic Works and the Paris amendments of 1979. In addition, Turkey is also a party to the TRIPs Agreement, the WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations held in Rome.

49 What obligations are imposed by your country's membership of international copyright conventions?

Turkish law and the Turkish Constitution do not specifically determine the situation of copyright conventions. On the other hand, the Constitution provides a general rule for the implementation of international treaties and conventions in domestic law. In that manner, it must be stated that, according to article 90 of the Constitution, international agreements which Turkey has signed and that have been duly ratified by the Grand National Assembly shall be considered equal to other national laws. In other words, international agreements that have already obtained parliamentary ratification are directly enforceable in Turkey, and any rights arising from such agreements may be claimed before Turkish courts.

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Sıdıka Baysal Hatipoğlu
Gökhan Uğur Bağcı
Benan İlhanlı

sbaysal@bb-legal.com
gbagci@bb-legal.com
bilhanli@bb-legal.com

Cumhuriyet Cad. No:147/1
Harbiye
Istanbul
Turkey

Tel: +90 212 219 16 30
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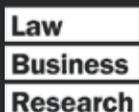
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