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KNOWLEDGE OF CUISINE: INTELLECTUAL PROPERTY PROTECTION IN THE TURKISH FOOD SECTOR

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Basak Bak¹

¹Izmir University of Economics, Faculty of Law, Izmir, Turkey. basak.bak@ieu.edu.tr

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ABSTRACT

Purpose- This paper examines the overall IP solutions/options that are applicable in the Turkish food sector under the new Law on Industrial Property of Turkey which governs so-called industrial property rights, that is to say patents, trademarks, designs and geographical indications, and aims to serve the interests of all relevant stakeholders, ranging from individuals to all scaled companies which seek IP protection in for various reasons. Although it's not considered as one of the conventional IP issues, the relationship between foodstuff, and traditional knowledge (TK) is also discussed in this paper for the purpose of demonstrating the overall IP protection that can be offered under the Turkish law.

Methodology- In this paper, the applicability of the new Law on Industrial Property, and the overall IP solution on the food sector are discussed. For this purpose, some important questions are addressed, and the new Law, the old Decree-Laws and some other jurisdictions are compared. The criteria of this comparison are the goals of the industrial property system, and the needs of the food sector. The study analyses these considerations with the help of some important examples demonstrating IP protection on the foodstuff.

Findings- The findings show that the food industry can be protected by the copyright regime, the recipes can be patented, and the companies can be protected by the new Law concerning geographical signs, designs and trademarks.

Conclusion- The paper claims that the existing IP system in Turkey, i.e. the conventional IP tools along with the TK protection, have important benefits for the companies operating in the Turkish food sector to use IP protection as business strategies.

Keywords: copyright, patent, traditional knowledge, geographical signs, trademark

JEL Codes: K00, K19, K20

1. INTRODUCTION

Food sector in Tukey is considered as having a strategical importance when considering its place in the overall economy, its capacity to create employment, and its share of export. Turkey's capacity to compete in the international markets is closely associated with its diversified and plentiful raw material content, a multicultural and ancient food culture, and the unique geographical position. (ITO, 2006, 21 pp) IP protection in the Turkish food sector is, therefore, never an outdated issue. On the contrary, it becomes more significant as the innovative methods in food industry, and IP sensitive issues have gained importance. The IP protection helps to cultivate the country's potential, and has a positive impact on the economy. It is, therefore, crucial for all stakeholders who would like to participate in the sector to be alert on the latest issues concerning IP regime in Turkey, and their rights in association with the food industry.

This paper examines the overall IP solutions/options that are applicable in the Turkish food sector, and serves the interests of all relevant stakeholders, ranging from individuals to all scaled companies which seek IP protection in Turkey for various reasons. In this sense, this paper also aims to summarize of the existing IP law respecting the food industry. To give a general overview concerning the IP protection over the food sector under the conventional IP laws in Turkey, some important questions should be addressed. These are as follows: how can the food industry be protected under the Turkish

copyright regime, can recipes be patented under Turkish law, in which ways can the geographical signs serve the Turkish food sector, and what are the requirements of having a design or a trademark for a food company as a business strategy etc.? Although it's not considered as one of the conventional IP issues, the relationship between foodstuff, and traditional knowledge (TK) is also discussed in this paper.

In the field of IP law, Turkey has two main laws: The Law on Intellectual and Artistic Works (LIAW),¹ and the New Law on Industrial Property (LIP).² Before the adoption of LIP, Turkey used to have various Decree-Laws, such as the Decree-Law on Patents numbered 551, the Decree-Law on Trademarks numbered 556, The Decree-Law on Designs numbered 554 and the Decree-Law on Geographical Signs numbered 555. However, this had been criticized by many scholars alleging that the rights should be regulated, and restricted by Codes enacted by the legislative organ, not by Decree-Laws enacted by the government. (Bak, 2015, p. 302)

LIP governs so-called industrial property rights, i.e. patents, trademarks, designs and geographical signs. This new law codifies the previous Decree-Laws, and heralds a new era in Turkish IP law. It also sets forth some important amendments in this area. However, this paper does not intend to give an overall analysis of LIP, or aim to introduce all the amendments. Yet, as it is a brand-new law, the information in this paper is given in accordance with this new legislation, and comparisons are made only where it is relevant.

2. IP PROTECTION IN THE TURKISH FOOD SECTOR UNDER CONVENTIONAL IP LAW

The IP regime in Turkey over the food industry can be analysed by examining the following IP issues: copyright law, patent law, geographical signs law, design law and trademark law.

2.1. Protection by Copyright

The Law on Intellectual and Artistic Works (LIAW) sets forth provisions for the works that are protected within the framework of Turkish copyright system. It aims to protect the economic and moral rights of the authors of all intellectual and artistic creations, and of the owners of the neighbouring rights. According to Art. 1/B of LIAW, a work should be original, and fall into the scope of one of the four work categories enumerated between the Articles 2-5. These are literary and scientific works, musical works, works of fine arts, and cinematographic works. In Turkish copyright system a work must fall into one of these categories, and be original in order for copyright to subsist. In this sense, the Turkish copyright system resembles the closed list approach of the UK. However, in each category, the number of the sub-categories or the work types that belong to a specific category may be increased. So, in the Turkish system only the main categories are listed, and the sub-categories are not considered as being exhaustive.

According to Art. 2 of LIAW, the literary and artistic works are "*works that are expressed by language and writing in any form (...)*". As the Turkish copyright law does not require an exhaustive list of sub-categories, recipes fall into the category of the literary and artistic works. However, when it comes to the discussion as to whether the recipes can be protected under Turkish copyright law, the main argument lies within idea of how the notion of 'originality' is perceived.

In UK copyright law, originality means originating from the author (i.e. not copying from another work), and requires skill, labour and judgement of the author (Aplin & Davis, 2017, p. 107-110). However, the test of "*author's own intellectual creation*" has been incorporated into the Section 3A of CDPA³ as a test of originality for the databases.

In US copyright law, for a work to be original it must not be copied from another material, and must be an evidence of creativity. For the creativity criterion, the courts have sought for the presence of a "*modicum of creativity*" since the Supreme Court's decision in *the Feist case* (1991),⁴ instead of the "*sweat of the brow*" which implies the labour alone. (Sterling et. al., 2017, p. 42-43; Schechter/Thomas, 2003, p. 22).

As Turkey is part of the Continental European Law System, the originality threshold is higher than the traditional UK approach, and than the US approach which generally approximates to the civil law concept of originality more than the UK approach. (Schechter/Thomas, 2003, p. 24-26). Under Turkish copyright law being original means that "*bearing the characteristic of the author*" (Art. 1/B of LIAW).

¹ Fikir ve Sanat Eserleri Kanunu, Number: 5846, OJ 13.12.1951-7981. The Law is abbreviated, and hereinafter referred as LIAW.

² Sınai Mülkiyet Kanunu, Number: 6769, Date: 22.12.2016, OJ 10.01.2017-29944. The Law is abbreviated, and hereinafter referred as LIP.

³ Copyright, Designs and Patents Act 1988 is abbreviated, and hereinafter referred as CDPA. For this criterion, also see the important CJEU ruling called '*the Infopaq decision*' where the court set a universal standard of originality, and decided that "the author's own intellectual creation" criterion should apply to any subject matter (*Infopaq International A/S v Danske Dagblades Forening Case C-5/08 C-5/08* [2009] ECDR 16).

⁴ Feist Publications Inc v Rural Telephone Service Co Inc 499 US 340; 111 S Ct 1282 (1991).

In Turkish copyright law these two conditions must be fulfilled for a recipe to be protected as an independent work: the recipe must fall into one of the existing work categories, and must be original. A piece of recipe can be contemplated as an example of "literary and artistic works" as "it is expressed by language and writing in any form". However, a mere listing of ingredients cannot qualify of being original, and therefore protectable under Turkish copyright law due to the lack of 'bearing the characteristic of its author'. In other words, only the recipes that bear the characteristic of their authors are eligible to be protected. As it's only the legal explanation, it makes little sense when it comes to the reality, because it is not very common that recipes meet with this criterion in real life. However, it is much more common that recipes are compiled in cookbooks or as databases.

According to Art. 6 of LIAW, databases are protected as compilations if they are obtained by the selection and compilation of data, and materials in accordance with a specific purpose and plan. If the content of a database consists of selection and arrangements, which are the results of intellectual creativity, then these databases are protected under copyright law.

If some recipes are collected randomly in a database without having a specific plan or purpose, this database will not be protected as a separate work under Turkish copyright system although it contains every single dish in the Turkish cuisine. On the other hand, if the recipes are collected in a database (or published in a cookbook) according to a specific plan or purpose (e.g. traditional meat dishes of Turkey or the Ottoman cuisine etc.), it will be protected by copyright law even though the single recipes are not original. (Ateş, 2006, p. 66) Because in the latter, the author of this database or cookbook chooses the recipes according to a specific plan, arranges the compilation, and organizes it according to his or her taste, knowledge and effort. This means the compilation bears the characteristic of its author, i.e. a touch from his or her personality.

2.1.1. Protection by Patents

According to Art. 82 of LIP, technological inventions that are novel, applicable in the industry, and having an inventive step are eligible to be protected by patents unless they are in the scope of non-patentable subject matters.

An invention is considered as 'novel' if it surpasses the State of Art. The invention is deemed as 'having an inventive step' if it is not obviously realizable by an expert in the related field when the State of Art is taken into consideration. The invention is deemed as 'applicable in the industry' if it is produced, and utilized in any field of industry. (Art. 83 of LIP) Upon the entry into force of LIP, the system of granting patent without substantive examination has now been abolished.

Under Turkish patent law, recipes are patentable if the recipe meets with the patentability requirements set forth by LIP. Therefore, if a recipe that is applicable in the food industry is novel, and having an inventive step, it is eligible to be granted by patent protection. It is also not important for a recipe to be a main dish or a regular foodstuff. The type of recipe is also irrelevant. For instance, in 2006 a national patent application with the number of 2006/04113 was filed for the recipe of 'tomato jam with almond', and succeeded to grant patent protection in Turkey (TürkPatent, Patent Search). Thus, in Turkey, granting patent protection even for jams is possible as long as the recipes are in conformity with the patentability requirements prescribed by the law.

The patent holders have some rights on the patented invention, and are able to prevent others from violating their rights. However, before choosing to protect the recipes by patents it should be kept in mind that patenting a recipe would also make it publicly available, and the owners of this recipe would no longer hold it as a secret. It should also be noted that the term of patent protection is a non-renewable period of 20 years from the filing date of the patent application (Art. 101 of LIP), and when the term of protection is elapsed, the patent protection will no longer exist.

2.1.2. Protection by Geographical Signs

Geographical signs which indicate the origins of products that possess a specific quality, reputation or other characteristics attributable to a place, a region or a country of origin can be found in the form of either appellation of origins or geographical indications (GI). (Art. 34/1)

Appellation of origin is the product which originates in a place, a region or (in exceptional cases) a country, whose all or main characteristics are exclusively due to the inherent natural and human factors of that geographical area, and whose production, processing and preparation methods take place within that geographical area. On the other hand, geographical indication is the product which originates in a place, a region or (in exceptional cases) a country, possesses a specific quality, reputation or other characteristics attributable to that geographical area, and whose at least of the activities of production, processing or preparation takes place within that geographical area. (Art. 34/1, a,b)

The non-geographical names that have become customary in the current language may also be used as either appellation of origins, or geographical indications if the products meet the above-mentioned criteria. (Art. 34/2 of LIP)

As the provisions concerning geographical signs also aim to protect natural and agricultural products (Art. 33 of LIP), foods, *inter alia* food companies, are eligible to receive protection if/when the products are registered. With the adoption of LIP, the scope of persons who are eligible to file application for the registration of foodstuffs has been enlarged: *i)* producer groups, *ii)* public institutions and professional organisations with public institution status concerned with the product or the geographical region, *iii)* public interest associations, foundations and cooperatives in connection with the products, operating for the protection of their members, and *iv)* the sole producer if the product has only one producer. (Art. 36 of LIP) Moreover, the protection conferred by LIP are available to Turkish citizens, to all natural and legal persons domiciled or having industrial or commercial establishments within the territory of the Turkish Republic, to persons having application rights deriving from the terms of the Paris or Berne Conventions or the Agreement Establishing the World Trade Organization, or to nationals of other states that accord protection to nationals of the Turkish Republic in accordance with the principle of reciprocity. (Art. 3 of LIP)

By LIP, the registration process has been diminished, and the scope of inspection towards persons who register geographical signs has been extended. As of 10.01.2018, it will also be mandatory for all products to bear a logo to indicate that the products are registered in accordance with LIP. This logo should be used on the product, or on the package, or by other means enabling it to be seen from the outside when it is not possible to put the logo on the product, or on the package due to its nature of the product (Art. 2 and 44 of LIP).

As the consumers are paying more attention to specific characteristic of products nowadays, it is important for all stakeholders in the market to protect the food industry by the help of the provisions stipulated for the geographical signs. The geographical signs do not give exclusive rights. However, as they serve the food industry by enabling consumers to distinguish the products with geographical origin-based qualities or characteristics, stakeholders may benefit from this protection by preventing others (free-riders) from using the same indication without meeting the requirements of the indication, or having the special characteristics of that product attributable to a region, in most cases associated with a special production technique.

For instance, 'Baklava' is a well-known sweet pastry in Turkey "*made of layers of filo pastry filled with semolina cream and Antep pistachio and sweetened with syrup*" which is registered as a geographical indication under the name of 'Antep Baklava' by the Chamber of Commerce of the city of 'Gaziantep' (TürkPatent, Geographical Sign Registration). This means that only producers who make Baklava by using the special ingredients, and the specific methods specified in the geographical sign registration certificate are able to call their products 'Antep Baklava'. Thus, these producers may benefit from the reputation of 'Antep Baklava' since having this specific geographical indication may affect the behaviours of consumers substantially. It also helps to prevent the value of Baklava from being diminished, and eventually lost without a proper protection. It also prevents third parties from registering the same indication as a trademark, and limit the risk of becoming generic.

Geographical signs are valuable and intangible assets also for companies as they can bring competitive advantage, more added values, increased export opportunities, and eventually a strengthened brand. (WIPO, GIs) The main problem that the geographical signs face today is the fact that the protection is initially national. However, there are some international systems to hinder this obstacle. Some geographical signs are protected at the EU level by registering the products in EU after their registrations at home. There is also an international system called "The Lisbon Agreement for the Protection of Appellation of Origins and Their International Registration" which provides a wider range of protection at the international level, albeit sets forth provisions only for appellation of origins. Turkey is not a contracting state of the Lisbon Agreement, but the former protection is also applicable in Turkey. In fact, 'Antep Baklava' has received the EU protected status as becoming the first Turkish registered food in the EU (European Commission, Baklava).

2.1.3. Protection by Designs

Design is the appearance of the whole or part of a product or its ornament derived from the features such as lines, shapes, form, colour, material or texture. This product can comprise of any industrial or handicraft item, parts of complex systems, packaging etc. (Art. 55 of LIP) A design must be novel, and have individual character in order for design protection to subsist. Thus, designs that differ only in immaterial details are not 'novel'. Also, their overall impressions on the informed user affect the criterion of '*having individual character*', in other words show its threshold of '*distinctiveness*'. (Art. 56 of LIP)

Registered designs are protected within 5 years starting from the filing date of the design application, and the term of protection is renewable for periods of 5 years each up to a total term of 25 years. (Art. 69 of LIP)

Food companies may benefit from design protection for their products, including the appearance of the packaging because designs make a product more appealing, and have direct effect on consumer's purchase decision. In the food sector, designs are also of importance for all scaled companies. Design protection prevents others from commercially exploiting or copying the same design within the term of protection, and therefore gives exclusive rights to its holder. It helps to

strengthen brands and images of companies, and contributes to obtain return on investments. (World Intellectual Property Organization [WIPO], Designs) For companies in the food industry the design is as important as other IP rights.

Design may also come into question for the appearance of a foodstuff. Any stakeholder including a single individual may protect the appearance of his or her foodstuff if it is new and distinctive, and seek design protection. In this case, it is also important that this person could repeat the same design whenever he or she wants. Moreover, it does not matter whether the food has been made industrially, or “*by craftsmanship where the same prototype is reproduced by hand inevitable with small variations in the shape of the various products*” (European Commission, Green Paper, 5.4.12). Hence, it can also be argued that in order for design protection to subsist the design should not be made randomly, without the ability of being repeated ever again even this requirement is not prescribed explicitly by LIP.

LIP has also opened a new possibility for unregistered designs. With the adoption of the new law, the unregistered designs which have been made available to the public are also protected. Making available to the public covers putting in the market by exhibiting or selling etc. (Art. 57 of LIP). Thus, even a single dish created by a chef which has not been protected but made available to the public can be protected under the circumstance where the design of this food is new, and has an individual character.

2.1.4. Protection by Trademarks

Trademarks are the signs that distinguish the goods and services of one undertaking from the goods and services of other undertakings. Manufacturers, wholesalers, retailers, agents and consumers use trademarks to identify, advertise, sell, buy and/or catalogue their products (Firth/Lea/Cornford, 2005, p. 5). If the subject matter of the protection given to the holder of a trademark is shown in the registry explicitly and precisely, all words including personal names, designs, colours, letters, numerals, sounds, shapes of products and packaging may be registered as trademarks. (Art. 4 of LIP) The option to register colours, and sounds is conferred by LIP for the first time.

Trademarks should be distinctive, and not deceptive. Trademarks that conform with these criteria, and other requirements enumerated in the relevant provisions of LIP can be registered, and hence protected. (Art. 4 and 5 of LIP) The term of protection is 10 years with the possibility of renewal for further 10 years in each time. (Art. 23 of LIP)

Trademarks benefit all scaled food companies by distinguishing their products from the products of others. However, the holder of a trademark can be any undertaking, including individuals. This means a person can register the name of a special dish that he or she creates which has an individual character, and prevents others from using the same trademark even he or she does not run an enterprise. Think of a person who creates a distinctive dessert, and names it ‘a thousand and one nights’. If the food conforms with all the requirements that a registered trademark should have pursuant to LIP, then ‘a thousand and one nights’ will be protected. So, the holder of this trademark can prevent others from using the same name for the same purpose without permission. The only problem in this hypothetical case is the requirement of ‘utilization’ stipulated for registered trademarks. Therefore, if ‘a thousand and one nights’ has not been used seriously in Turkey by the person who has created it, or by some other person with the consent of the creator without a justifiable reason within the period of 5 years following its registration, or if its utilization has been suspended for an uninterrupted period of 5 years, the trademark will be invalidated (Art. 9 of LIP). Nevertheless, this trademark would still be in effect if no lawsuit were filed against its invalidity.

3. PROTECTION AS AN EXAMPLE OF TRADITIONAL KNOWLEDGE

Traditional knowledge (TK) is a body of living knowledge that is passed down from generation to generation within a community, in most cases forming community’s cultural identity. It encompasses all kinds of knowledge including know-how, skills, practices, techniques, and the cultural expressions that the knowledge is embodied. The term “tradition” does not mean “antique”. On the contrary, TK lives within the community, and associates the traditional link between the knowledge and the community who holds it. (WIPO, TK)

The protection of food culture or cuisine of a given country can be protected by TK. However, the TK itself is neither properly understood, nor protected. The problem is not only the threats against the preservation of TK in a community but also the shortcomings of the conventional IP tools. Therefore, an urgent need for a *sui generis* protection for TK has been emerged.

Turkey has not a *sui generis* TK law. Having said this, however, there has been an ongoing codification process in Turkey for the adoption of a new law concerning ‘Intangible Cultural Heritage’. When it will be codified, this will serve the need of a *sui generis* protection for TK. Although the terms ‘intangible cultural heritage’, and TK may be used interchangeably, there are still some nuances which might matter when it comes to the types of protection. In UNESCO discussions about safeguarding, the term ‘intangible cultural heritage’ has been favoured, while at WIPO discussions, in an IP context, rather it is used as TK (WIPO, Glossary).

In spite of not having a *sui generis* TK code, Turkey has numerous examples of TK, especially in relation to food. For instance, 'kefir' is a "*probiotic-dairy product with nutritional and therapeutic aspects. It is basically fermented milk only made from kefir grains and kefir cultures, and its grains are the mixture of beneficial bacteria and yeast with a polysaccharide*" (Ötleş&Çağındı, 2003, p. 54). It is believed to be originated from the Central Asia, and the 'Turkish method' of producing kefir, along with the kefir grains and kefir cultures as genetic resources, has been transmitted over for thousands of years.

Nevertheless, the lack of a *sui generis* protection for TK, and the loss of traditional methods make foodstuffs impossible to be legally protected by TK. Today, much TK is protected by geographical indications. That is to say, there is a distinct overlap, and intersection between the subject matters of GIs, and TK in most cases. In Turkey, there are 203 registered GIs (TürkPatent, Registered GIs, 2017). Most of them are food products that are also made by special production methods, and practices passed down from generations to generations within communities who live in specific regions surrounded by endemic genetic resources that are closely associated with the production of these foods.

The distinction between GIs, and TK has become even more vague after the adoption of LIP. LIP has introduced a new concept into Turkish IP law, called "traditional product". The term itself resembles the term what is called "traditional speciality guaranteed (TSG)". TSG is a EU food designation. According to the Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed, a foodstuff is registered if "*i) it is produced using traditional raw materials; ii) it is characterised by a traditional composition or by a method of production/processing that corresponds to a traditional production/processing method. In order to be registered, i) the name must be specific in itself; ii) indicate the specific character of the agricultural product or foodstuff.*" (European Commission, TSG)

Under Art. 34/3 of LIP, names which cannot be considered as geographical indications or appellation of origins, and are proved to be used traditionally for at least 30 years in the relevant market are defined as "*traditional products*" under the circumstance where they are derived from traditional production or processing methods or traditional composition, or if they are produced using traditional raw materials. For instance, 'Aşure' or so-called Noah's pudding which is a Turkish porridge-like dessert made of a mixture of grains, dried fruits and nuts, and served at a specific month of the year called 'Muharrem month', can be perceived as an example of traditional products. Although the name is originally Arabic, it is also a part of culinary tradition of Turkey with having some religious and cultural meanings, especially when considering that the mountain Agri (Ararat), where it is believed that the Prophet Noah had landed on with his ark, is within the territory of Turkey. As having historical and traditional meanings, the preparation method of this food has been known, used, and transmitted through ages. Moreover, 'Aşure' is made by traditional production methods. It can be, therefore, seen as a traditional product of Turkey. It is also a good example of TK because 'Aşure' is associated with the cultural, and spiritual identity of its specific holders.

As discussed above, the term "traditional product" has been introduced into Turkish IP law with the adoption of LIP. The traditional product resembles what is called TSG with some nuances. The most obvious of these nuances is that the TSG is a designation for foodstuff, whereas according to LIP traditional products can comprise of any products as there is no limitation regarding the types of traditional products in the relevant articles. However, it is not clear how these articles will be interpreted in the future, and which products will be deemed as "traditional".

4. CONCLUSION

The conventional IP tools such as patents, trademarks and designs give exclusive rights to their holders to prevent third parties from using the formula, the name or the same appearance without permission. Although geographical signs do not give exclusive rights, the holders may also prevent others (free-riders) from using the same sign without meeting the requirements. Copyright may also play an important role in the protection of the exclusive economic and moral rights of all economic operators in the food business. (International Chamber of Commerce, 2017, p. 7-11) Furthermore, even though it does not offer protection in a conventional IP context, traditional products, and products produced by traditional methods with the help of traditional practices may comprehend a great public interest.

The food industry would benefit from all the above-mentioned IP tools by using the IP regime practically. To create an awareness on the subject is not only an updated issue in Turkey due to the enactment of the new law called the Law on Industrial Property, but also very crucial for the enhancement of the industry, *inter alia* the overall economy.

The introduction of applicable rights, solutions and options offered to stakeholders doing business at the market helps to boost the sector and the innovations, and to increase the market value of the products belonging to all operators. It also serves a moral purpose by guaranteeing the preservation, and the introduction of traditional and local foodstuffs. Moreover, it is of great importance for consumers when making informed choices for specific products. Likewise, it encourages every individual in the society to make innovations. It, therefore, instigates all scaled companies to make profit-making investments for further economic growth and wealth creation. (International Chamber of Commerce, 2017, p. 1-2)

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