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AVRUPA BİRLİĞİ ENSTİTÜSÜ
AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

**COMPARISON OF THE COPYRIGHT LAW IN TURKEY
WITH THE EU ACQUIS COMMUNAUTAIRE IN THE FRAMEWORK OF
FULL HARMONIZATION**

YÜKSEK LİSANS TEZİ

Kemal UYSAL

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Kemal UYSAL'ın "COMPARISON OF THE COPY RIGHT LAW IN TURKEY WITH THE EU ACQUIS COMMUNITAIRE IN THE FRAMEWORK OF FULL HARMONIZATION" konulu tez çalışması ..06.09.2010..... tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği / oyçokluğu ile başarılı bulunmuştur.

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ABSTRACT

In the EU membership process of Turkey, intellectual rights law has been accepted as a separate chapter and this chapter has been opened for negotiation on 17 June 2008. Concept of copyright which concern the rights of authors and related rights owners in accordance with the Law No: 5846 on Intellectual and Artistic Works has an undeniable significance in terms of the contribution of rapidly-growing industry of culture, particularly cinema and music sector into the economy.

Therefore, the purpose of this study is to determine incompliances between the EU legislation and national copyright law and thereby contribute to the harmonization activities conducted in the framework of the Chapter 7 on Intellectual Property Law by means of evaluating Turkish copyright legislation comprehensively in the scope of the Law No: 5846 on Intellectual and Artistic Works and in comparison with relevant EU Directives.

When the amendments made in the course of EU harmonization activities are examined, it is obvious that Turkey has made a considerable progress in the field of the protection of intellectual rights following the Decision No: 1/95 of the EC – Turkey of the Association Council. By the amendments realized in 1995, 2001, 2004, 2006 and 2008, Turkey intended to achieve full harmonization with the EU legislation and fulfil international liabilities. In spite of the positive impact of the concerned arrangements, certain gaps have been determined in terms of some articles.

The focus of this study is the scope of the *Acquis Communautaire*, importance of the intellectual rights for the European Union, origin of the rights of authors and related rights owners and their role within the intellectual law. The study also elaborates on the rights and scope of these rights possessed by the authors and related right owners in Turkey and EU; and tries to develop some recommendations on how to achieve harmonization with the EU legislation by pointing out inconsistencies in the current legislation and necessary changes.

ÖZET

Türkiye'nin Avrupa Birliği'ne üyelik sürecinde, fikri haklar hukuku ayrı bir fasıl olarak kabul edilmiş olup 17 Haziran 2008 yılında müzakereye açılmıştır. 5846 sayılı Fikir ve Sanat Eserleri Kanunu gereğince; eser sahipleri ve bağlantılı hak sahiplerinin haklarını ifade eden telif hakkı kavramı dünyada hızla gelişen kültür endüstrisinin özellikle sinema ve müzik sektörünün ekonomiye katkısı bakımından yadsınamaz öneme sahiptir.

Bu nedenle çalışmada 5846 sayılı Fikir ve Sanat Eserleri Kanunu kapsamında telif hakları mevzuatının kapsamlı şekilde ilgili AB Direktifleri çerçevesinde değerlendirilmesi suretiyle AB mevzuatı ve ulusal telif hakları mevzuatı arasındaki uyumsuzlukların tespit edilmesi ve bu suretle hâlihazırda 7'nolu fikri mülkiyet hukuku faslı kapsamında yürütülmekte olan mevzuat uyum çalışmalarına katkı sağlanması amaçlanmıştır.

AB müktesebatına uyum çalışmalarıyla yapılan mevzuat değişikliklerimize bakıldığında, fikri hakların korunması alanında ülkemiz özellikle 1/95 sayılı Türkiye-AB Ortaklık Konseyi Kararında sonra önemli bir mesafe katetmiştir. 1995, 2001, 2004, 2006 ve 2008 yıllarında yapılan değişiklikler ile gerek AB mevzuatına uyum sağlamaya gerekse uluslararası yükümlülüklerimiz yerine getirilmeye çalışılmıştır. Ancak söz konusu düzenlemeler konusunda ne kadar iyimser düşünülse de yine de belli bazı maddeler açısından eksiklikler göze çarpmaktadır.

Bu amaçla, Topluluk Müktesebatının kapsamı, fikri haklar konusunun Avrupa Birliği için taşıdığı önem, eser sahibinin hakları ve bağlantılı hakların doğuşu ve fikri hukuk içindeki yeri incelenmiştir. Yine ülkemizde ve Avrupa Birliğinde eser sahibi ve bağlantılı hak sahiplerinin sahip oldukları haklar ve kapsamaları, karşılaştırmalı olarak irdelenmiş ve FSEK'te AB mevzuatı ile uyumsuz görünen hususlar belirtilmeye çalışılarak FSEK'te ne gibi değişikliklerin yapılması ile söz konusu uyumun yakalanabileceği hususunda öneriler getirilmeye çalışılmıştır.

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LIST OF ABBREVIATIONS

ALAI	:Association Litteraire et Artistique Internationale
art.	:Article
AÜHFD	:Ankara Üniversitesi Hukuk Fakültesi Dergisi
BATİDER	:Banka ve Ticaret Hukuku Enstitüsü Dergisi
BK	:Borçlar Kanunu
CD	:Compact Disc
CFI	: Court of First Instance
DMCA	:Digital Millennium Copyright Act
DPT	:Devlet Planlama Teşkilatı
DRM	:Digital Rights Management
DTÖ	:Dünya Ticaret Örgütü
DVD	:Digital Versatile Disc/Digital Video Disc
EC	:European Community
ECJ	:European Court of Justice
etc.	:et cet.er. a, and soon on
FMR	:Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi
FSEK	:Fikir ve Sanat Eserleri Kanunu
GATT	:General Agreement on Tariffs and Trade
HD	:Hukuk Dairesi
Ibid	:Ibidem, in the same place
IP	:Intellectual Property
IPR	:Intellectual Property Rights
loc.cit	:locus citare,above mentioned
OKK	:Ortaklık Konseyi Kararı
op.cit.	:opera citato,in the same work cited
p.	:page
RAM	:Random Access Memory
RG	:Resmi Gazete
RMI	:Rights Management Information
TRIPs	:Trade-Related Aspects Of Intellectual Property Rights

UCC	:Universal Copyright Convention
UK	:United Kingdom
UN	:United Nations
UNESCO	:United Nations Educational Scientific and Cultural Organisation
US/USA	:United States (of America)
Vol	:volume
WCT	:WIPO Copyright Treaty
WIPO	:World Intellectual Property Organisation
WPPT	:WIPO Performances and Phonograms Treaty
WTO	:World Trade Organisation

INTRODUCTION

Nowadays, together with the transition from industrial society to information society, phenomenon of intellectual property which bases on information has started to present considerable significance and cultural and economic development of the societies has become closely related to the importance they attach to intellectual property rights. As a matter of fact, today's states cannot ignore the fact that intellectual products are among the most-traded products in the international markets and inadequate level of intellectual property protection affects international trade adversely. There is a strong relationship between the increasing importance of the intellectual property rights in trade and effective intellectual property protection. Therefore, today's developing countries have taken important steps for better protection of intellectual property rights with a view to securing technology transfer and attracting direct foreign investments. Foreign investors pay attention to availability of a good intellectual property protection in their decisions of making investment in a certain country.

Due to the fact that intellectual property rights need to be protected in terms international relations, Turkey signed the Decision No: 1/95 of the EC – Turkey of the Association Council on Customs Union and committed to harmonize intellectual property legislation with the EU legislation and Directives and to protect these rights effectively. Turkey is expected to carry her legislation to the level of the standards of member states and make actual progress thereon. Amendments made to the Law No: 5846 after the year 1995 are the results of this expectation. In parallel with these amendments and as a consequence of international relations, subject of intellectual rights has gained importance in our country. Increasing number of studies which focus on intellectual rights since 1995 is an indicator of the importance attached to the topic.

The European Union process which occupies an important place among political and economic objectives of Turkey over fifty years has attained a different aspect after the status of candidacy was granted in 2003. Negotiations of the Chapter 7 on IntellectualProperty Law have been opened in the Accession Conference held on 17 June 2008. Following the screening meetings, EU Commission has reported that intellectual property rights are in compliance with the community law in general but

some provisions in certain laws (industrial property law and the Law No: 5846) still present incompliance. Turkey has prepared an action plan to ensure that the necessary capacity is built for the implementation of the Acquis regarding each area covered by the intellectual property law chapter and this action plan has stated that Turkey will have achieved full harmonization with the EU Acquis until December 2010. This study which will cover the recommendations to be developed by examining the EU Acquis as well as the relevant Turkish legislation aims at contributing to the fulfilment of our country commitments listed in the Action Plan and strengthening intellectual property system with the help of the activities to be carried out to improve the Law No: 5846.

In that sense, part I of this study provides information about the development of the concept of intellectual property in the world and in Turkey, examines the relevant international agreements, explains characteristic features of the concept of intellectual property and differences of intellectual property rights from the classical property rights. Part II provides brief information on the concept of work which is created as a result of intellectual activities and efforts, types of work, author and economic and moral rights arising from the work. Lastly, Part III focuses on the EU Directives respectively on protection of computer programs, rental and lending of intellectual and artistic works, rights of author applicable to satellite and cable broadcasting, term of protection for author's rights and related rights, legal protection of databases, rights of author in the information society, resale right for the benefit of the author of an original work of art; and consequences of this comparative study are displayed to reflect the results of harmonization activities in relation to the FSEK and aspects which seem inconsistent with the EU Directives.

PART I

HISTORICAL OVERVIEW OF THE INTELLECTUAL PROPERTY LAW

1. DEVELOPMENT OF THE LAW ON INTELLECTUAL AND ARTISTIC WORKS

1.1. INTRODUCTION

Concept of the intellectual property rights used as a general heading encompasses the rights on intellectual and artistic works as well as industrial rights. There has been no unity in terms of the concepts used on this subject. As a matter of fact, WIPO (World Intellectual Property Organization) operating under the United Nations has addressed to the intellectual property dividing the concept into two separate subjects which are industrial property and copyright. According to this division, scientific and literary works, works of fine arts and musical and cinematographic works fall under the scope of copyright while inventions, industrial designs, trademarks, geographical indications, integrated circuit topographies and new plant varieties fall under the subject of industrial property. Concept of the intellectual property rights or copyright as commonly used is generally utilized to refer to the rights of the authors. In this study, concept of intellectual rights has been used in the meaning of rights of the author and related rights.

1.2. HISTORICAL DEVELOPMENT OF INTELLECTUAL RIGHTS

As revealed from the history, purpose of protecting the rights on intellectual products is to fulfil social needs and help people live together. Thus, copyright granted for the books for the first time has been diversified in parallel with the development of social life.¹ In the ancient civilizations, products of intellectual work did not use to be considered separate from the goods in which they were created and these civilizations

¹ Karahan Sami, Suluk Cahit, Saraç Tahir, Nal Temel, “Fikri Mülkiyet Hukukunun Esasları”, Seçkin Yayınevi, Ankara, 2007, p.33

did not feel the necessity of protecting the creator in economic and moral terms.² In the middle ages, the word “plagiarist” was derived from the Latin *plagiarius* (kidnapper) to mean someone who copies the work of another and uses it as his own.³

In Roman Law, there is not any rule which governs the rights of the author regarding his/her own works. The reason for this is that the author had no opportunity of copying and distributing his/her works publicly and the work had no economic value. In other words, the principle adopted on the protection of intellectual products in those days was “a person who owns the original of something owns the details of it as well”.⁴ This dark period for the author caused that many literary works were left without owners and thereby anonymity has been created in literary works. Therefore, most of the time, the works were attributed to different people other than the real authors.⁵

Invention of the printing press and dissemination of the duplicated copies to the public in the 15th century in Europe triggered the protection of works in legal terms and they became the subject matter of a property in economic terms. Before the invention of the printing press, existence of the intellectual rights was not accepted. Although plagiarism was not welcomed and the moral bond between the work and its creator was accepted, receiving one copy from the original work was not regarded as an illegal behaviour.⁶ After the invention of the printing press, the idea that intellectual rights are worth legal protection has gained recognition. The fact that reproduction of the works became easier helped the printers and publishers start to obtain economic profit. It was thought that a certain work to be printed by the printing house for the first time was a very difficult job and reproduction of the same work easily by other printing houses caused unfair competition among other printing houses. Therefore, we can say that initial arrangements on the protection of intellectual rights had targeted to eliminate unfair competition.⁷ In that sense, this period which was started with the privilege of publishing granted to the publishing house which produced the work for the first time is called “period of privileges” in the field of intellectual law. However, these privileges

² Erel Şafak, “Türk Fikir ve Sanat Hukuku”, Yetkin Yayınları, Ankara, 2009, p.36

³ Bainbridge, David I. “Intellectual Property” Fourth Edition, Pitman Publishing, London, 1999, p.31

⁴ Yarsuvat Duygun, “Türk Hukukunda Eser Sahibi ve Hakları”, Güryay Matbaacılık, İstanbul, 1984, p. 18

⁵ Tekinalp Ünal, “Fikri Mülkiyet Hukuku”, Arıkan Yayıncılık, İstanbul, 2005, p.80

⁶ Erel, op.cit. p.36

⁷ Gökyayla Emre K., “Telif Hakkı ve Telif Hakkının Devri Sözleşmesi”, Yetkin Yayınevi, Ankara, 2001, p.31

aimed to protect economic benefits of the publishers but did not take the rights of the author into consideration.⁸ Privileges have gradually attained a point that they have completely eliminated author's rights which were called ownership of the publishing house. Publishing houses which paid for the right to publish a certain work were thought to have got the ownership of the work and they were able to renew the editions as long as the privileges were extended.⁹ Afterwards, this privilege of publishing was softened by private contracts signed between the author and the publisher giving the author the right of ownership within the scope of that agreement.¹⁰ Since the privilege theory could not render sufficient protection for the authors and together with the development of the movement of natural law which adopted the idea that the rights on the work belonged to the person who created it, theory of Intellectual Property was introduced in 1700s. In this context, we can state that "Statue of Anne" which laid the foundation for the current arrangements on intellectual and artistic works was passed in 1710 in the UK.¹¹ Purpose of this legislation is to ensure the economic supervision of the author and encouragement of science.¹² The passing of the Statute of Anne, which was the first Copyright Act in the world addressed to this issue, introduced two new concepts - the author being the owner of copyright and the principle of a fixed term of protection for published works.¹³ The Statute of Anne also required the printer to deposit copies of every book printed in nine libraries: four in England and five in Scotland.¹⁴

French Revolution influenced the whole world in each and every field including the intellectual property law. Following the Revolution, chambers and privileges were abolished, in 1791 it was accepted that the author had property rights on his/her work

⁸ Ateş Mustafa, "Fikir ve Sanat Eserleri Üzerindeki Hakların Kapsamı ve Sınırlandırılması", Seçkin Yayınevi, Ankara, 2003, p.14

⁹ Tekinalp, op.cit. p.82

¹⁰ Dardağan Esra, "Fikir ve Sanat Eserleri Üzerindeki Haklardan Doğan Kanunlar İhtilafı", Betik Yayıncılık, Ankara, 2000, p.15

¹¹ Baysal Yasemin, "Mukayeseli Hukuk ve Uluslar arası Sözleşmeler Işığında Türk Hukuk Sisteminde Eser Sahibi ve Telif Hakları", Unpublished LL.M. Thesis, 1999, p.4; Ateş, "Fikir ve Sanat Eserleri Üzerindeki..." op.cit. p.36

¹² Gökyayla, op.cit. p.33

¹³ Helvacıoğlu Aslı Deniz, "The Copyright Protection On The Internet In The European Union" Unpublished Phd. Thesis, 2005, İstanbul, p.7; Dardağan, op.cit.p.15, Tekinalp, op.cit. p.83

¹⁴ Hofman Julien, "Introducing Copyright" Commonwealth of learning, Vancouver, 2009, p.5

and the author was granted protection during his/her lifetime plus 10 years.¹⁵ In the same period, the year of 1793 is the time when the system of “copyright” was established by the new federal law.¹⁶ The most important factor about this time is that within the newly created bourgeois society, these laws on one hand recognised author’s rights and provided due care for protection and on the other hand they aimed not to present any blockage against dissemination of information.¹⁷

Related rights is a new concept emerged with the improvement of cultural life, technological achievements and particularly with the advancement which made broadcasting recorded voices and images technically possible.¹⁸ From the point of view which argues that the people who have introduced or interpreted the work or made investment for its creation and thereby contributed in intellectualism and art should be granted certain rights although they have not created a work by themselves, certain rights, namely related rights have been granted for the aforementioned people reserving the rights of the author.¹⁹

The first set of legal arrangements on the protection of related rights was introduced at the beginning of the last century.²⁰ By an amendment made in 1910 to the German Law on Intellectual and Artistic Works of 1901, devices used by an artist in recording interpretation and performance of a musical or literary work were deemed as adaptation and performer was regarded as the adaptor.²¹ However, Austria became the pioneer in the field to recognize the concept of related rights in its Law on Intellectual and Artistic Works which was put into effect in 1936.

Germany, on the other hand, introduced a more systematic arrangement regarding the related rights by an amendment issued in 1965.²² In the German Copyright Law, performer was entitled with the right to adaptation and in case the performance of a work was recorded over a mechanical device, this device was regarded

¹⁵ Tekinalp, op.cit. p.83; Erel, op.cit.p.38

¹⁶ Hofman, op.cit.p.7

¹⁷ Güneş İlhami, “Uygulamada Fikir ve Sanat Eserleri Hukuku”, Seçkin Yayınevi, Ankara, 2008, p.24

¹⁸ Arkan Azra, “Eser Sahibinin Haklarına Bağlantılı Haklar”, Vedat Kitapçılık, İstanbul, 2005, p.8

¹⁹ Suluk Cahit, “Yeni Fikir ve Sanat Eserleri Kanunu Telif Hakları ve Korsanlıkla Mücadele”, Hayat Yayınları, İstanbul, 2004, p.108-109

²⁰ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...”,op.cit. p.199, Arkan, op.cit, p.11

²¹ Ayiter Nuşin, “Hukukta Fikir ve Sanat Ürünleri”, S Yayınları, 1981, p.77

²² Sterling J.A.L., “Intellectual Property Rights In Sounds Recordings, Film and Video: Protection of Phonographic and Cinematographic Recordings and Works In National and International Law” Sweet&Maxwell, London, 1992, p.28

as the adaptation of the work and the performer as the adaptor. Therefore, since adaptations were protected just like the works, when the performance was recorded over a mechanical device, the protection emerged had no difference from the ownership of a work; furthermore another arrangement was introduced to allow the performer to transfer his/her right to adaptation to the producer by an agreement.²³

However, in case the people apart from the author were protected according to the provisions of unfair competition, the idea that the moral rights granted to the author could be granted to a legal entity was not accepted. In some systems such as those in the United Kingdom (UK) or United States of America, legal entities accepted as the authors were protected within the framework of the same provisions, in other words, no separation was made between the authors and the owners of the related rights. While the UK, at first, protected performers by means of criminal sanctions, the Copyright, Designs and Patents Act introduced protection by means of legal sanctions only in 1988.²⁴

1.3. INTERNATIONAL LEGAL FRAMEWORK FOR COPYRIGHT PROTECTION

With the help of invention of the printing press, more works were published and their distribution became easier. As a result, a work which was produced in a certain country was able to go beyond the national boundaries easily. That is how the necessity of protecting a work outside its country was considered and afterwards bilateral agreements started to play an important role. However, due to the failure of bilateral agreements to be effective for the protection of intellectual rights and increasing development of the international relations in the 19th century, multilateral agreements were deemed to be more necessary.²⁵ In addition to international agreements, some arrangements have been made in the law of the unions on intellectual and artistic works after the establishment of regional unions. Today, the concept of copyright and related rights has been defined in each country's legislation. However, the basic concepts in

²³ Arkan, op.cit. p.9

²⁴ Ibid. p.11

²⁵ Güneş, op.cit. p.26

almost all laws are largely consistent with the provisions of major international conventions.²⁶

1.3.1. Berne Convention for the Protection of Literary and Artistic Works²⁷

Berne Convention for the Protection of Literary and Artistic Works signed on 09 September 1886 in Berne, Switzerland at the end of an international conference organized with the participation of Germany, Belgium, Spain, the UK, France, Haiti, Italy, Tunisia, Liberia, Switzerland and under the supervision of the USA and Japan is the first international arrangement made in the field of intellectual and artistic works.²⁸ Berne Convention was revised several times in order to catch up with the needs and the developments in copyright protection.²⁹ After the second revision made in 1908 in Berlin, Bern Convention has been referred to as “Revised Berne Convention”.³⁰ Purpose of the Convention is to protect the rights of the author in both his country of origin and other countries in an effective way rather than imposing same rules of intellectual law for all member states.³¹ Berne Union which has a nature of a legal entity was founded as per the Convention and its target was to protect author’s rights both in their own countries and within the borders of other countries included in this Union and to provide equal treatment for the authors.³²

Berne Convention also introduces the “minimum rights principle” to be applied for the cases where the equivalent protection provided falls apart from the minimum standards of protection set by the Convention. In line with the Convention, union states shall protect the rights of the authors in literary and artistic works in an effective and consistent manner. The Convention includes minimum rights such as moral rights of the author (art.6), right of translation (art.8), right of reproduction (art.9), right of broadcast

²⁶ Öztan Fırat, “Fikir ve Sanat Eserleri Hukuku”, Turhan Kitabevi, Ankara, 2008, p.39; Helvacioğlu, op.cit. p.7,

²⁷ For the English version of the Convention, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

²⁸ Ricketson Sam, Ginsburg Jane C. “International Copyright and Neighbouring Rights The Berne Convention and Beyond”, Oxford University Press Inc. New York, 2005, P.88

²⁹ (Amendments: Paris (4.5.1896), Berlin (13.11.1908), Berne (2.6.1928), Rome (26.6.1948), Brussels (4.7.1967), Stockholm (4.7.1967), Paris (24.7.1971 and 28.9.1979)).

³⁰ Tekinalp, op.cit. p.83; Öztan, op.cit, p.39

³¹ Kılıçoğlu Ahmet, “Sınai Haklarla Karşılaştırmalı Fikri Haklar”, Turhan Kitabevi, Ankara, 2006, p.28; Arkan, op.cit. p.13, Erel, op.cit. p.39

³² Ateş, op.cit. p.23, Öztan, op.cit. p.39, Kılıçoğlu, op.cit. p.28

(art.11) and right of adaptation (art.12.14). Protection term has been envisaged as 50 years.³³

Other aspect of Berne Convention; is the reciprocity (national treatment) principle.³⁴ This Convention allowed member states to provide their nationals reciprocally with the protection which they provided for the authors as per their national laws.³⁵ The work and its author are protected in all union states through the reciprocity principle. National treatment principle is governed by the concept of the “country of origin” of the work. Where possible this is the country of first publications, rather than that of any author’s nationality or residence, an approach which provides simplicity, particularly when there is more than one author.³⁶ In case the country of origin is a Berne State, other members must apply to the work the same treatment as they apply to their own nationals.³⁷ At this point, the Convention assumes that the scope of rights will differ from one member to another.³⁸

1.3.2. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations³⁹

In the initial group of international agreements on intellectual law, rights of the author were protected but no arrangement regarding the owner of the related rights was included. Technological advancements have gradually brought the need for the protection of the owners of related rights in addition to the authors. After two ineffective attempts to have performers considered adaptors of underlying musical works at the diplomatic conferences organized to revise the Berne Convention in Rome (1928) and Brussels (1948), delegates to the final conference expressed the wish for performers to be deemed for protection through neighbouring rights outside the

³³ Tekinalp, op.cit p.68

³⁴ Strong, William, “The Copyright Book, Third Edition, The MIT Press, 1990, p. 196.

³⁵ Tekinalp, op.cit. p.68.;Öztan, op.cit.p.51

³⁶ Cornish William, Llewelyn David, “Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights” Sweet&Maxwell, Sixth Edition, London, 2007, p.391

³⁷ Ibid. p.391

³⁸ Ibid. p.392

³⁹ For the English version of the Convention ;http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html

Framework of the Berne Convention, but together with protection afforded to producers of phonograms and even broadcasting organizations.⁴⁰

The Rome Convention of 26 October 1961 is the first important international convention in the field of neighbouring rights.⁴¹ This convention is based on the principle of according national treatment to the works originating in other contracting Member States, and does not stipulate any minimum term in respect of the protection of such works.⁴²

This Convention which categorized the owners of the related rights in three groups included the provisions that the protection granted under this Convention shall not affect the copyright in literary and artistic works and even where the national laws provide lower level of protection by granting certain minimum rights for the owners of the related rights, these individuals shall bear the abovementioned minimum rights.⁴³ Furthermore, the Convention guaranteed protection for a term of 20 years, from fixation performance or broadcast as appropriate.⁴⁴

1.3.3. Universal Copyright Convention⁴⁵ (UCC)

Universal Copyright Convention (UCC) was signed on 06 September 1952 as a result of a conference organized in Geneva with the initiative of UNESCO to facilitate a universal protection for the intellectual and artistic works by eliminating the incompliances in the legal systems of European countries and America.⁴⁶ Another purpose of the UCC was to ensure that the United States of America and South American States which were not covered by the Berne Convention found their places in an international convention.⁴⁷ However, after the USA adhered to the Berne Convention

⁴⁰ Dreier Thomas, Hugenholtz P. Bernt, "Concise European Copyright Law", Kluwer Law International, Netherlands, 2006, p.121

⁴¹ This convention is updated with the WIPO Performances and Phonograms Treaty (WPPT) in 1996 to cope with the technological developments.

⁴² Garnett Kevin, Davies Gillian, Harbottle Gwilym, "Copiger and Skone James On Copyright", Sweet & Maxwell, Fifteenth Edition, London, 2005, p.328

⁴³ D'Amato, Antony, Long Doris Estelle, "International Intellectual Property Law", The Hague, Boston 1997, p.103

⁴⁴ Cornish, Llewelyn, op.cit. p.393

⁴⁵ For the English version of the Convention, Phillips Jeremy, "Butterwords Intellectual Property Law Handbook", London, 1994, p. 433-448

⁴⁶ <http://portal.unesco.org/culture/en/ev.php>, 01.03.2010

⁴⁷ Kılıçoğlu Ahmet, op.cit. p. 29, Öztan, p.49

in 1989, which led to the abandoning of registration as a prerequisite for copyright protection in the USA , the UCC has lost its importance.⁴⁸

The Convention, although introduced a lower level of protection in comparison with the Berne Convention, envisaged much broader standards for the legal protection however it could not establish a complete and sound system for minimum rights.⁴⁹

UCC differs from the Berne Convention in two points. Firstly, since the UCC does not bear the principle of reciprocity, the formalities lied down in the Convention to benefit from the protection provided by the UCC should be realized and secondly, member states do not have to provide protection for the author more than his/her own country provides.⁵⁰

1.3.4. The WIPO Copyright Treaty⁵¹ (WCT) and WIPO Performances and Phonograms Treaty⁵² (WPPT)

World Intellectual Property Organization (WIPO) was established by a convention signed on 14 July 1967 in Stockholm with the participation of the parties of the Paris Convention for the Protection of Industrial Property Rights and Berne Convention for the Protection of Literary and Artistic Works to ensure that the intellectual property rights are protected in a more effective way all over the world.⁵³ On 14 August 1975, Turkey participated in the WIPO based in Geneva, Switzerland and having 184 member states by the Decree of the Council of Ministers numbered 7/10540.⁵⁴

The objective of the WIPO is to introduce the concept of the intellectual property around the world, improve the protection of intellectual property by cooperating with the states and other international organizations and provide technical and legal assistance for the nations which are in need.⁵⁵ The Organization has assumed the roles of taking necessary actions to ensure protection of the universal culture,

⁴⁸ Dreier, Hugenholtz, op.cit. p. 9

⁴⁹ Ateş, op.cit. p.25

⁵⁰ Tekinalp, op.cit. p.68

⁵¹For the English version of the Treaty, http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html

⁵² For the English version of the Treaty, http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html

⁵³ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...”,op.cit. p.44; Başpınar Veysel, Kocabey Doğan, “İnternette Fikri Hakların Korunması”, Yetkin Yayınevi, Ankara p.54; Kılıçoğlu, op.cit ,p. 28

⁵⁴ Kılıçoğlu, op.cit, p.29

⁵⁵ Suluk, Cahit, Orhan Ali, “Uygulamalı Fikri Mülkiyet Hukuku”, Arıkan, İstanbul, 2005, p,49

ensuring integration of the national laws on intellectual rights and carrying out the administrative services of the Berne Union.⁵⁶ There are currently 24 intellectual rights-related treaties in the WIPO which is structured under the United Nations.

As a result of the activities carried out by the WIPO in 1989 regarding the impact of computers and communication networks on copyright, 178 member states adopted WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty⁵⁷ (commonly referred to as the “Internet Treaties”) in 1996 and in 2002 the Treaties have entered into force upon the consensus of 30 countries. The two Treaties, setting up the main framework for the protection of copyrights in the internet environment, serve to the purpose of creating an international outline in the relevant field and protecting the economic value fundamentally.

WIPO Internet Treaties aim to update the existing copyright-focused Berne Convention and the Rome Convention in line with the needs of information society. Internet Treaties do not stipulate any provisions regarding the implementation of the framework arrangements; it is envisaged that the approving states make necessary arrangements in their own legal systems and enable harmonization with the Internet Treaties in terms of their current copyright protection.⁵⁸ In this framework, the EU, by the Council Decision of 16 March 2000, stated that WIPO Treaties are in compliance with the EU Directives and guaranteed that member states shall reflect the provisions of the WIPO Internet Treaties in their national laws.

When the main provisions of the Internet Treaties are examined, it is observed that extending the scope of the existing copyright laws is preferred in case an action occurs in the internet against the productions which are deemed as the subject matters of copyright. However, the most important contribution brought by the WIPO Internet Treaties on copyright is the technological provisions including the management of digital rights. These provisions helped that technological protection of the copyright be brought to agenda in addition to the legal protection and technological protection has

⁵⁶ http://www.wipo.int/about-wipo/en/what_is_wipo.html, 03.03.2010

⁵⁷ Laws stating that participation into the aforementioned Treaties is found appropriate to have been published in the Official Gazette dated 08.05.2007 and numbered 26516. On 28 November 2008, Turkey has become a party to the Treaty.

⁵⁸ Helvacıoğlu Aslı Deniz, Eraslan İ.Hakkı, Bulu Melih, “Dijitalleşen Dünyada Fikri Mülkiyet Haklarının Ülkeler Açısından Küresel Rekabet Oluşturmadaki Yeri” <http://iibf.ogu.edu.tr/kongre/bildiriler/11-05.pdf>, 03.03.2010

been made legitimate in the internet environment. In economic terms, protection of copyrights through technology has created a new market and competition area.⁵⁹

WIPO Copyright Treaty puts forward the new developments on the rights of the author, the international standards of which have been specified in the Berne Convention. This Treaty provides definitions of computer programmes and databases, specifies that they are under protection and governs the right to distribution, right to rent, right to communicate a work publicly as well as the exceptions that can be applied to the authors' rights. Furthermore, provisions on technological methods and right management data have been regulated and the sanctions to be applied in case of a breach have been defined by this Treaty.⁶⁰

In accordance with the provisions of the WIPO Copyright Treaty on protection of copyright in the internet environment, computer programs are regarded within the scope of the definition of work as specified in Article 2 of the Berne Convention. WIPO Copyright Treaty protects the rights of composers, artists, writers and all authors including the software developers whose works are distributed on the internet or by means of other digital media and provides protection of digital copying and distribution on the internet for the works which are protected by traditional conventions.

WIPO Performances and Phonograms Treaty (WPPT) has been concluded with an aim to providing better adaptation with the changing conditions and more effective protection for the performers and phonogram producers due to the fact that Rome Convention failed to meet the requirements of the said advancements and as a result of the development of information and communication technologies as stated in the introduction part of the Treaty.

The WPPT should not be considered as a revision but rather a special agreement within the meaning of Article 22 of the Rome Convention. As a matter of fact, the Rome Convention needs not be ratified before ratifying the WPPT. However ratification of the WPPT cannot derogate from existing obligations of the Contracting Parties of the Rome Convention.⁶¹

⁵⁹ Ibid, p.490,

⁶⁰ Türkekul Erdem, Turhan Murat, Güçlü Fatih, "Fikir ve Sanat Eserleri Kanunu ve Fikir Haklarının Korunması İle İlgili Temel Bilgiler", DÖSİMM Basımevi , Ankara, 2004, p.27,; Ateş, "Fikir ve Sanat Eserleri Üzerindeki...",op.cit. p.46

⁶¹ Dreier, Hugenholtz, op.cit. p. 167

Similar to the WIPO Copyright Treaty, the WPPT is the first international treaty that focuses on the neighbouring rights issues stemmed from the digital and networking technologies.⁶² The Treaty includes provisions such as the definitions of the performers and phonogram producers, on those who will benefit from the protection granted by the Treaty, moral and economic rights of the performers, and economic rights of the phonogram producers, radio and television broadcasting and use of rights on the internet.⁶³ On the other hand, the Treaty stipulates that the member states shall apply the national legislation which protects anti copying circuitry.⁶⁴

The two Treaties have brought to the agenda the ideas that the computer programmes and databases should be protected within the scope of intellectual property laws under the heading of scientific and literary works and right to communicating the work publicly should contain the electronic methods as well.⁶⁵

1.3.5. Agreement on Trade-Related Aspects of Intellectual Property Rights⁶⁶ (TRIPS)

With a view to liberalizing the international trade and enabling its functioning properly, General Agreement on Customs Tariffs and Trade (GATT) was signed following an international conference held in Geneva, Switzerland in 1947 with the participation of 23 states and it was put into force in 1948. GATT is also the name of the aforementioned structure. Turkey signed this Agreement in 1953.⁶⁷

However, the GATT having operated with a temporary status since 1947 and not having the power of sanction and a sound legal foundation was replaced by the World Trade Organization (WTO) which was founded by the Final Act signed following the negotiations of the Uruguay Round and enacted on 01 January 1995.⁶⁸ As different from the GATT which focused on only the trade of the goods, WTO covered Agricultural Products, Services, Intellectual Property Rights, Trade-related Investment Measures and

⁶² Ibid p. 165

⁶³ Türkekul, Turhan, Güçlü, op.cit.28

⁶⁴ Ralph Oman (March/April 1994, “ Major Revision of Berne Gives New Rights to Creator and Performers”, IP Worldwide (Law Journal Extra), (www.ipwww.com/archive.html)

⁶⁵ <http://www.wipo.int/about-ip/en/copyright.html>

⁶⁶ For the English version of the agreement, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm,

⁶⁷ Turhan Ali, “Dünya Ticaret Örgütü- GATT”, DPT, <http://ekutup.dpt.gov.tr/ticaret/turhana/dto.doc> p.3; Dardağan, op.cit. p.42-44, Tekinalp, op.cit. p.73

⁶⁸ Başpınar, Kocabey, op.cit. p.53; Karahan,, Suluk, Saraç, Nal, op.cit. p.5; Suluk,Orhan, op.cit p.50

Mechanisms on the Review of the Trade Policies.⁶⁹ Number of the WTO⁷⁰ members has reached 153 as of 23 July 2008 after the participation of Cape Verde⁷¹.

Main functions of the WTO are as follows: to direct and execute multi-lateral trade meetings which comprise the WTO, act as a forum of the multi-lateral trade meetings, find solutions for the trade-related disputes, supervise national trade policies and to these purposes, cooperate with the international organizations which take part in the formation of global economic policies.

It is envisaged that any sort of handicaps and different treatments restricting the international trade be eliminated to realize these functions. Elimination of all these handicaps and discrimination in trade will ensure the liberalization of the international trade and thereby trade volume will increase to the benefit of all states.⁷²

Together with the advancements experienced in intellectual and industrial property law in parallel with the developments experienced in the world trade, the necessity of bringing a universal standard for the protection of intellectual and industrial rights which became one of the most significant elements of the international trade emerged. In that context, with a view to determining both the rights entitled to the owners of the intellectual rights and minimum standards regarding the utilization and protection of these rights internationally, Agreement on Trade-Related Aspects of Intellectual Property Rights which is abbreviated as TRIPS was signed in Marrakech on 15 April 1994 as part of the final text of the Uruguay Round held under the General Agreement on Tariffs and Trade GATT⁷³. TRIPS agreement regarded as the “integral part” of the WTO founding agreement and expressed as the most important development of twentieth century in the field of intellectual property law entered into force officially on 01 January 1995.⁷⁴ Since the TRIPS agreement forms an integral part

⁶⁹ Turhan, op.cit. p.3

⁷⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

⁷¹ Turkey which is one of the founding members became a member of the WTO upon the approval granted with the Law No: 4067 dated 26.1.1995 [Official Gazette 26.1.1995/22186]; the liabilities of Turkey have been determined by the Decree of the Council of Ministers numbered 95/6525 [Official Gazette 25.2.1995/22213] and dated 31.12.1994.

⁷² Suluk,Orhan, p.50

⁷³ Ateş Mustafa, “Copyright and Related Rights Protection under the TRIPS Agreement”, Batider, C. XXXIII, S. 4/2006, p. 240

⁷⁴ Yazıcıoğlu Yılmaz, “Fikri Mülkiyet Hukukundan Kaynaklı Suçlar” 12 levha yayıncılık İstanbul 2009 p.41

of the WTO Agreement, it is binding for all WTO members, including the European Union and its member states.⁷⁵

TRIPS is the most comprehensive agreement which has been adopted at international level until today in the field of intellectual property. Main objectives of the agreement are as follows: to determine minimum standards for intellectual property at international level, specify the measures to protect intellectual property rights and ensure their implementation effectively, define rules and principles for the settlement of multi-lateral disputes⁷⁶

TRIPS does not abolish the existing conventions but brings some additional arrangements to the existing ones. The system obliges member states to abide by the minimum standards regarding the protection of intellectual rights not to stay out of the free trade system established by the WTO.⁷⁷

First chapter of the Agreement defines general provisions and basic principles which include the rules of national treatment and most favoured state. In the second chapter, each intellectual property right is elaborated separately. It is envisaged that the parties comply with the main provisions of the Berne Convention regarding the protection of literary and artistic works in relation with the copyright.⁷⁸ TRIPS Agreement has brought major additions to the existing international rules particularly on the right to authorize or prohibit the commercial rental to the public of originals or copies of their copyright works and to use these rights as they wish (art. 11). Furthermore, the conditions under which the computer programmes and databases shall be protected in the scope of copyright have been clarified; computer programmers and phonogram producers have been granted with the right to authorize or prohibit their works to be rented to the public or make it conditional on permission (art. 10). A similar right applies to the cinematographic works. This Agreement protects performers against unauthorized broadcasting by wireless means and live performance and envisages protection term of minimum fifty years. On the other hand, protection term of fifty

⁷⁵ Dreier, Hugenholtz, op.cit. p. 195

⁷⁶ Ateş Mustafa, Fikri Haklar ve Bağlantılı Haklara İlişkin Uluslararası Sözleşmeler ve Türkiye”, FMR, Y.1, S.6, 2006, s. 19

⁷⁷ Türkekul, Turhan, Güçlü, op.cit.24

⁷⁸ Dreier, Hugenholtz, op.cit. p. 196

years has been stipulated to prevent the involvement of phonogram producers in unauthorized recording (art. 14).

TRIPS Agreement stipulates that member states make necessary arrangements in their national laws in order to safeguard intellectual and industrial property rights effectively. These arrangements should introduce effective measures against the violation intellectual rights; should be fair, equal and clear. In addition, they should not exceed reasonable time limits or cause unfair delays. Developed countries have been granted with one year transition period to make their legislations in compliance with the provisions of the Agreement (art. 65/1). This transition period is 5 years for the developing countries which pass from planned economy to the market economy (art. 65/4), and for the least developed countries a 10-year transition period has been envisaged (art. 66).

In this context, the mechanism of dispute settlement should be mentioned. The mechanism of dispute settlement which remained ineffective although it was covered previously under the GATT 47, has been strengthened by setting up a “Dispute Settlement Body” and “Appellate Body” which will be responsible for finding solutions for the disputes. Settlement of commercial disputes within the framework of Dispute Settlement Understanding carries vital importance in terms of guaranteeing the implementation of rules and thereby securing that the trade relations are carried on smoothly. States considering that their rights secured by the Agreement are interrupted convey their problems to the WTO.⁷⁹ The system encourages states to come over the problems arising from their differences by way of consultation.

On the other hand, TRIPS Agreement did not sufficiently emphasize the intellectual property issues regarding digital distribution of the content which comes out in connection with the use of Internet. Technical measures related to protection of digital rights management are not stated in the TRIPS.⁸⁰ The reason is that the agreement had been concluded to a great extent in December 1991 and at that date the implications of the Internet use were not taken into consideration.⁸¹

⁷⁹ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.261

⁸⁰ Cunard Jeffrey P., Hill Keith, Barlas Chris, “Current Developments in the Field Of Digital Rights Management” Geneva: Standing Committee on Copyright and Related Rights, Tenth Session, November 3 to 5, 2003, p. 44.

⁸¹ Helvacıoğlu, op.cit. p.24

1.3.6. Legal Arrangements on Intellectual Property in the European Union Law

Without lifting national borders, it is not possible to secure the principle of free movement of goods which has a significant role in the economic integration of the European Union. Intellectual rights are national rights as required by their nature. Therefore, use of intellectual rights has been accepted to have an impact which might cause prevention of the principle of free movement of goods.⁸²

Although there were international arrangements on intellectual and industrial rights, protection was still provided according to the national systems. Articles 36 and 222 of the Rome Treaty have made references to these rights and primary provisions which have the founding effect at the Community level have not been adopted.⁸³

However, the EU did not wish to be deprived of the economic power created by the intellectual property rights and recognized the need for making joint arrangements and harmonizing national laws.

There are two main reasons lying behind the alignment activities assumed by the EU. First reason is the alignment of the national legislation in the member states with the rules adopted upon negotiations by the authorized bodies of the Union and the second reason is the alignment of the national legislation of the member states with each other regarding certain subjects. In this context, since the national arrangements on intellectual property rights and differences between these arrangements have potential effect to impair functioning of the domestic market and competition, intellectual rights have become one of the most important subjects of the EU and the relevant arrangements have been made by means of decisions, directives and regulations which comprise the secondary legislation. The reason for the intellectual property rights to be regulated under the secondary legislation is that there is no need for additional procedures to ensure adaptation with the national law to be able to implement these disposals in the member states and the said disposals have a binding characteristic for member states.⁸⁴ Furthermore, case laws of the European Court of Justice contributed to the improvement of intellectual property law in the Union. Purpose of the EU to make

⁸² Özcan Mehmet, “Avrupa Birliği’nde Fikri Haklar”, Nobel Yayın Dağıtım, Ankara, 1999, p.60

⁸³ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.51; Arkan, op.cit. p.17

⁸⁴ Türk-AT Mevzuat Uyumlu Sürekli Özel İhtisas Komisyonu “Fikri ve Sınai Haklar Alt Komisyon Raporu, DPT Yayınları, p.4

these arrangements is assuring alignment of the national laws rather than establishing a unified union around the intellectual rights.⁸⁵

The EU had to be more diligent while carrying out its harmonization activities on intellectual rights in comparison with the other harmonization processes. Because, member states had very traditional protection systems which present significant differences and bear long-established historical backgrounds. It would not be possible to change all these systems at once and in a radical manner. It would not be easy to harmonize the Common Law where the economic aspect of the copyright is dominant and the Civil Law in which the moral rights of the authors prevail. Therefore, the Commission analyzed intellectual rights thoroughly and adopted an evolutionary approach rather than a revolutionary approach and spread out the change over time.⁸⁶

In 1988, European Community initiated its alignment activities on intellectual rights which aimed at eliminating legislative differences between the member states. Although the Green Paper⁸⁷ has been drafted, since the agreement could not be sent to various points, a joint text which regulates all subjects could not be drawn up.⁸⁸ On the other hand, the subject has been dealt with by the European Commission in July 1991 within the framework of a comprehensive harmonization programme and following principle decisions have been taken:

- To eliminate negative differences arising from the national arrangements made in the field of intellectual rights and secure harmonization of the single market,
- To find supranational common solutions for the protection of the works in parallel with the technological advancements
- To contribute to the development of the European culture by protecting authors and owners of the related rights.⁸⁹

⁸⁵ Arkan, op.cit. p.18

⁸⁶ Özcan, op.cit. p.150-151

⁸⁷ Green Paper: This document published by the European Commission aims to start the discussion on a certain issue and collect the opinions on the relevant issue. Publication of the Green Paper provides that relevant people and institutions contribute to the issue by their opinion and information.

⁸⁸ Alt Komisyon Raporu, op.cit. p.4

⁸⁹ Tellioglu İhsan, “Avrupa Birliği Direktifleri ve GATT-TRIPS Anlaşması Doğrultusunda Fikir ve Sanat Eserlerinin Korunması; Türkiye’deki Hukusal Düzenlemeyle Mukayeseli İncelenmesi”, Marmara Journal of European Studies, Volume 4, No 1-2, p.93

The initial document prepared regarding this process is the Council Decision of 14 May 1992.⁹⁰ According to this Decision, member states had to sign the last revised texts of the Berne and Rome Conventions before 01 January 1995.⁹¹ The basic step of the EU to harmonize the copyrights is 91/250/EEC⁹² Directive on the legal protection of computer programs which was enacted to provide common standards for the protection of computer programmes. Other directives which follow this one and form the subject matter of our study have been listed by date order as follows:

- 92/100//EEC Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property⁹³
- 93/83/EEC Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission⁹⁴
- 93/98/EEC Directive on the term of protection of copyright and certain related rights⁹⁵
- 96/9/EC Directive on the legal protection of databases⁹⁶
- 2001/29/EC Directive on the harmonization of certain aspects of copyright and related rights in the information society⁹⁷
- 2001/84/EC Directive on the resale right for the benefit of the author of an original work of art⁹⁸
- 2004/48/ EC Directive on the enforcement of intellectual property rights.⁹⁹

1.4. Development of Intellectual Property Law in Turkey

Development of the law on intellectual and artistic works in Turkey has not been different from the other countries. However, since the first printing press in Turkey was used by İbrahim Müteferrika in 1727, developments in the western countries could have

⁹⁰ Council Resolution of 14 May 1992 on Increased Protection for Copyright and Neighbouring Rights, O.J. 1992 C138/1

⁹¹ Tellioglu, op.cit. p.93

⁹² This Directive was codified by the 2009/24/EC Directive on 23 April 2009, Official Journal L 111, 05/05/2009, p.16-22

⁹³ This Directive was codified by the 2006/115/EC Directive on 12 December 2006, Official Journal L 376, 27/12/2006, p. 28-35

⁹⁴ Official Journal L248, 06/10/1993, p.15-21

⁹⁵ This Directive was codified by the 2006/116/EC Directive on 12 December 2006, Official Journal L 372, 27/12/2006, p.12-18

⁹⁶ Official Journal L 077, 27/03/1996, p. 20-28

⁹⁷ Official Journal L167, 22/06/2001 p.10-19

⁹⁸ Official Journal L272, 13/10/2001, p. 32-36

⁹⁹ Official Journal L195, 02/06/2004, p.16-25

been followed up only after 300 years.¹⁰⁰ In the Ottoman Empire, printing presses were owned by the Christians and Jewish until 1727 and the Muslims were prohibited from any activities involving printing press.¹⁰¹ After Abdullah Efendi, the Sheikh Al-Islam issued a fatwa confirming there was no religious harm in setting up a printing press, Ahmed III granted this first privilege to İbrahim Müteferrika in 1727.

The first legal text in the Ottoman Empire related to the law on intellectual and artistic works is “Encümen-i Daniş Nizamnamesi” dated 1850. The word “copyright” was first used in this document and thereby it was accepted for the first time that the person created the work would possess the relevant financial rights.¹⁰²

Hakkı Telif Nizamnamesi which was put into effect in 1857 envisaged a system similar to the privilege of publishing and accordingly no one was allowed to re-publish a certain work unless all of the published copies were sold out. In that sense, the author owned a monopoly which would be valid for lifetime to get his/her works published and therefore the publishers would not be able to publish a privileged work during the lifetime of the author.¹⁰³ However, it was possible to transfer the right to publish to someone else with the permission of the author at a certain charge or free of charge.¹⁰⁴

Afterwards, the most comprehensive arrangement which was “Hakkı Telif Kanunu (Copyright Law)” was enacted on 8 May 1910 and this law remained in force until the Law No: 5846 on Intellectual and Artistic Works dated 01 January 1952 was adopted. Hakkı Telif Kanunu (Copyright Law) defined the rights on intellectual and artistic works as an acquisition and “intellectual and written works” were defined in a way to include any sort of books, copyright works, paintings and drawings, sculptures, plans, maps, technical drawings and musical instruments. Registration of the work was introduced as a pre-requisite for the protection of the rights regarding the works.¹⁰⁵ It was specified that the rights of the author would continue during his/her lifetime plus 30 years. Rights on the paintings and drawings were specified to last for 18 years and counterfeiting any work was regarded as a crime.

¹⁰⁰ Ertuğ Hasan Refik, “Basın ve Yayın Hareketleri Tarihi”, B.2, İstanbul, 1960, p.91

¹⁰¹ Öztan , op.cit, p.57

¹⁰² Arkan, op.cit. p.6; Erel, op.cit. p.47; Kılıçoğlu, op.cit. p.3; Öztan, op.cit. p.58; Tekinalp, op.cit. p.83

¹⁰³ Öztan, op.cit. p.57

¹⁰⁴ Ayiter, op.cit. p.29-30

¹⁰⁵ Turhan Bülent, “Fikri Hakların Uluslararası Boyutu ve Türkiye’de Yapılan Mevzuat Uyumlaştırma Çalışmaları” Unpublished Post Graduate Thesis, 1999, p.54

Treaty of Sevres, signed after the defeat in the World War I, envisaged compulsory the participation of the Ottoman Empire in the Berne Convention. In Article 272 of the Treaty of Sevres, the Ottoman Empire undertakes, within a period of twelve months from the coming into force of the present Treaty, to adhere in the prescribed form to the International Convention of Berne revised at Berlin on 13 November 1908, and the Additional Protocol of Berne of 20 March 1914.¹⁰⁶ As known, the Treaty of Sevres was annulled; however Article 272 of the Treaty was repeated in Article 14 of the Commercial Convention attached to the Treaty of Lausanne.¹⁰⁷

As per Articles 14 and 15 of Section 3 of the Commercial Convention attached to the Treaty of Lausanne of 1923, Turkey was required to take part in international conventions on the protection of industrial, literary and artistic property within a period of twelve months.¹⁰⁸ However, Turkey pointed out her need for translated works and made reservation on Article 14. In case other signatories of the Berne Convention reject the reservation made by Turkey within a period of one year, Turkey reserved the right not to be subject to participating in the Berne Convention.¹⁰⁹ Yet, Austria, Belgium, Czechoslovakia, Danzig, Holland, Spain, Poland and Portugal opposed the reservation made by Turkey regarding the right to translation and Turkey was not accepted in the Berne Union upon the objection of these states.¹¹⁰ Turkey became a party to the Berne Union only on 20 August 1951 by the Law No: 5777.

While Turkey was preparing for taking part in the Berne Convention, it was better understood that Hakkı Telif Kanunu (Copyright Law) could not meet the requirements and the need for a new law in compliance with the provisions of the Berne Convention became more obvious.¹¹¹

In the Congress of Publications (Neşriyat Kongresi) which was held in Ankara in 1939 with the support of the Ministry of National Education, the idea of drafting a copyright law was accepted principally and academicians from the Faculty of Law in the Istanbul University were consulted to initiate the preparation of the preliminary

¹⁰⁶ Kılıçoğlu, op.cit. p.32

¹⁰⁷ Beşiroğlu Akın, “Düşünce Ürünleri Üzerinde Haklar” Acar Matbaası, Ankara, 2004, p.4

¹⁰⁸ Ateş Mustafa, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.53

¹⁰⁹ Kılıçoğlu, op.cit. p.33

¹¹⁰ Beşiroğlu, op.cit. p.4

¹¹¹ Öztan, op.cit. p.60, Ateş Mustafa, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.54

draft.¹¹² The Law No: 5846 on Intellectual and Artistic Works was drafted by Ernst Hirsch who worked as a professor in the Faculty of Law of the Istanbul University. This draft prepared by the German Professor in ordinary E. Hirsch was published with the name of Law on Intellectual and Artistic Works in the Official Gazette dated 13.12.1951 and numbered 7931 and put into effect on 01 January 1952¹¹³. The Law No: 5846 on Intellectual and Artistic Works was revised in the years 1983, 1995, 2001, 2004, 2006 and 2008.

The process of participating into international organizations and signing international conventions has been accelerated after the enforcement of the Law No: 5846. Turkey became a party to the Convention on the establishment of the WIPO in 1974¹¹⁴. The most intensive period for Turkey regarding the international arrangements on intellectual property has been the period of customs union within the EU process.¹¹⁵ As per Annex 8, Intellectual, Industrial and Commercial Property Rights of the Decision of the Partnership Council numbered 1/95 which was approved in 1995 by Turkey - EC Association Council after Ankara Agreement, Turkey was required to harmonize her national legislation with the internal laws of the Community.¹¹⁶ Within the framework of this harmonization process, Turkey approved and put into effect the TRIPS Convention, Paris version of the Berne Convention of 1979 and Rome Convention respectively¹¹⁷.

The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty have been the latest treaties which were approved regarding the subject. The Law No: 5647 approving the WIPO Copyright Treaty and the Law No: 5646 approving the WIPO Performances and Phonograms Treaty were put into implementation upon their publication in the Official Gazette dated 08 May 2007 and numbered 26516.

¹¹² Erel, op.cit. p.48; Kılıçoğlu, op.cit. p.33

¹¹³ The Law No: 5777 Approving Participation in the Berne Union Established to Protect Literary and Artistic Works came into force on the same date.

¹¹⁴ See the decision of the Council of Ministers dated 14.8.1975 and numbered 7/10540 [OG 19.11.1975/15417]

¹¹⁵ Ateş Mustafa, "Fikir ve Sanat Eserleri Üzerindeki..." op.cit. p.54

¹¹⁶ Ibid, p.54

¹¹⁷ Signed and ratified by Turkey. The Law Approving the Rome Convention, dated 7.7.1995, Law No. 4116, RG. 12.7.1995, 22341.

1.5. Characteristics of Intellectual Property Rights

Intellectual property rights differ from classical property rights in terms of their characteristics. Property rights on the assets such as a house or car arise from financial belonging of the asset. The word “property” in the intellectual property is used to express the right ownership regarding the outcome that the person performing an intellectual activity creates.¹¹⁸ That is why intellectual property rights bear sui generis characteristics. These characteristics are as follows:

- a) Intellectual products do not have any material asset as different from the things. Therefore, the owner of an object on which a work is created as a result of the intellectual efforts of any person cannot be defined as the author of that work. For instance, a person who buys a painting has only got the material property of the painting. Copyright regarding this painting belongs to the painter who creates it.¹¹⁹ As a matter of fact, Article 57 of the Law on Intellectual and Artistic Rights stipulates that the transfer of the property right on the original or duplicated copies does not include the transfer of intellectual rights unless otherwise decided.
- b) As intellectual property rights cannot be established on a material asset, it does not require the continuation of the will in this direction. As a result of this fact, even if the item which bears an intellectual property right is seized by someone else, the owner of the right does not change.¹²⁰
- c) As intellectual rights cannot be evaluated as items, rights on these products are not property rights. These are absolute rights which are close to property rights.¹²¹
- d) As different from the material property, intellectual property rights are protected under the principle of territoriality. This means intellectual products are protected by the legislation of the state in which the protection is requested. Therefore, protection of an intellectual property differs according to

¹¹⁸ Kılıçoğlu, op.cit. p.3

¹¹⁹ Karahan, Suluk, Saraç, Nal, op.cit. p.5

¹²⁰ Kılıçoğlu, op.cit. p.4

¹²¹ Tekinalp, op.cit. p.7

the states which require and do not require registration from the birth of protection.

- e) Term for the validity of the classical property right has not been determined. Property of a house, car or oil painting which bears intellectual rights can be transferred along the generations by way of heritage.¹²² On the other hand, intellectual property rights are subject to a certain term. After the Berne Convention, it was accepted that protection continues during the lifetime of the author plus a certain time after death. As set forth in Article 27 of the Law on Intellectual and Artistic Works, the protection period continues during the lifetime of the owner of the work and for 70 years after his/her death. The term envisaged in this Article is the minimum term and can be extended. When this term expires the work becomes a public value anymore.¹²³ Intellectual property rights are non-competitive. These rights, on one hand, present monopoly-type authorities for the author, and on the other hand protection of these rights leads to new activities which, in turn, make the national economy more competitive in long term.¹²⁴

¹²² Kılıçoğlu, op.cit. p.4

¹²³ Öztan, op.cit. p.9

¹²⁴ Karahan, Suluk, Saraç, Nal, op.cit. p.5

PART II

SCOPE OF THE INTELLECTUAL PROPERTY RIGHTS

2. INTELLECTUAL AND ARTISTIC WORKS

2.1. Work

In the law of intellectual and artistic works, work can be defined as “the results having legal value and created by a person only as a result of his/her intellectual activities.”¹²⁵ Although the Berne Convention does not define the concept of “work”, Article 2 where the categories of the work are listed, specifies two important characteristics of the work in different paragraphs. These characteristics are originality and creativity. Definition of the concept of “work” can be found in various national laws. For instance, German Law on Intellectual Rights states that the concept of “work, as envisaged by the law, covers only the creations of the individual thought. In French Law, there is no definition of the work but it is stated that the law protects all intellectual products and categories of the works are listed in accordance with the system used in the Berne Convention.¹²⁶

In subparagraph (b) of Article 1b of the Law No: 5846 on Intellectual and Artistic Works which has been amended by the Law No: 4630, the work has been defined as “all kinds of artistic and intellectual products of science and literary, music, artistry or cinematography, which are carrying the mark of its author”.

For an intellectual and artistic work to be accepted and protected as a work as stated in the FSEK, it should;

1. bear the mark of its author,
2. be shaped in a way to reflect the mark of its author,
3. be covered under one of the categories of the work envisaged in the FSEK,
4. be a product of intellectual effort.¹²⁷

Different views have been put forward in the doctrine regarding the subject of special characteristics. Since the discussion on special characteristics will go beyond the

¹²⁵ Ateş Mustafa, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.55-56

¹²⁶ Karakuzu Baytan Dilek, “Fikir Mülkiyeti Hukuku Kavramlar”, Beta Basım Yayım Dağıtım, İstanbul, 2005, p.17

¹²⁷ Olgaç Senai, “Fikir Hakları ve Yayın Sözleşmeleri”, Olgaç Matbaası, Ankara, 1979, p.99

scope of this study, only the opinions of the Hirsch who drafted the FSEK shall be discussed here. Hirsch explained the requirement of the element of special characteristic as follows: “To be able to attribute the nature of work to intellectual products, a substantial element is required. Products which cannot be created by anybody, namely those which possess a special characteristic deserve protection and only these products can be accepted as the work. If a product is in the nature that can be created by anybody, since it has no special characteristics, the society will have no benefit in protecting such a product.”¹²⁸

According to Turkish Law, for a work to be accepted and protected as an intellectual product, it does not have to be a completed work. It is sufficient when the work is completed to a certain extent and this half-completed part bears the characteristics of its author. In that sense, a sketch, draft or design are regarded as incomplete works.¹²⁹

The formal prerequisite for an intellectual and artistic product to be accepted as the work is that it should fall under one of the categories of works stated in the FSEK. In addition to Article 1 of the FSEK which stipulates the requirement of “bearing the characteristics of its author”, it is required that an intellectual product fall under one of the categories of work listed between the Articles of 2 and 5.¹³⁰

Categories of work governed by the Law are as follows:

- 1) Works of Science and Literature (art. 2)
- 2) Works of music (art. 3)
- 3) Works of fine arts (art. 4)
- 4) Works of cinema (art.5)

As we see, categories of the works have been specified in the Law by listing. These categories have been determined in parallel with the international agreements and national laws of the other states. The key point here is whether the main groups envisaged in the Law and the names of works listed under each group present a restrictive nature or not.

¹²⁸ Hirsch, Ernst; Hukuki Bakımdan Fikri Say, C. II, Fikri Haklar, İstanbul, İktisadi Yürüyüş Matbaası ve Neşriyat Yurdu, 1943 p.12

¹²⁹ Kaplan Yavuz “İnternet Ortamında Fikri Hakların Korunmasına Uygulanacak Hukuk”, Seçkin Yayınevi, Ankara, 2004, p.76

¹³⁰ Gökyayla K. Emre, “Fikir ve Sanat Eserleri Kanunu’nda Yapılan Değişikliklerin Değerlendirilmesi”, DEÜHFD., V.7, No.1, 1993, p.73

Categories of works have been determined in the FSEK according to the rule of *numerus clausus*. This means the works are limited to the intellectual products stated in the Law and it is not possible to add a new main group or work. When the provisions of the Law are examined thoroughly, it is observed that the rule of *numerus clausus* does not apply to one of the works included in one of the main groups.¹³¹ If a product created by intellectual efforts does not fall under one of these four groups, it cannot be accepted as the work and it is protected under some other laws but not this one. The FSEK has introduced special provisions on the protection of such products which do not bear the nature of a work but are created by intellectual efforts by other laws (art.83–87). Unlawful use of these products by the third parties requires the implementation of the provisions of unfair competition only if the conditions in Article 83 take place.¹³²

The doctrine approve that the judge should examine *ex officio* whether an intellectual product is a work or not.¹³³ In terms of the Supreme Court of Appeals, in order for an item to be considered as a work, it is sufficient to state that this work has been created by the author, it is not a copy received from different sources and it is a product of intellectual activity.¹³⁴

2.2. Types of work

Types of intellectual and artistic works have been regulated in the FSEK under separate articles. Article 2 of the FSEK stipulates the works of science and literature, Article 3 works of music, Article 4 works of fine arts, Article 5 works of cinema and Article 6 adaptations and collections. The FSEK envisages 4 main categories of work which are the works of science and literature; music; fine arts and cinema. In the Law, *casuistic method* which lists the categories one by one has been preferred.

No specific criteria have been used in the FSEK to determine the four categories of works. For instance, language (art.2, sub-paragraph 1) and dance (art.2, sub-paragraph 2) and qualifications such as being scientific or technical (art.2, bd.3) have been used in the works of science and literature; in the works of music, means of

¹³¹ Erel, *op.cit.* p.55;Karahan, Suluk, Saraç, Nal, *op.cit.* p.34;Kılıçoğlu, *op.cit.* p.122; Öztan, *op.cit.* p.92

¹³² Kılıçoğlu, *op.cit.* p.122

¹³³ Başpınar, Kocabey, *op.cit.* p.49

¹³⁴ Decision of the Supreme Court of Appeals: 11. H.D. 11.05.2000, E:2000/3250, K: 2000/4072, Suluk, Orhan, *op.cit.* p.126

expression (art.3); in the works of fine arts, means of expression and feature of being aesthetic (art.4); in the work of cinema, content and means of expression have been used as the certain criteria. Distinctive characteristics of adaptations is that they are created by using another piece of work.¹³⁵

2.2.1. Literary and Scientific works

Under this main category, three different works are specified (FSEK, art. 2). As per this article, literary and scientific works are “all works of language and writing in any form of expression and computer programs expressed in any form” and “all types of dance, choreographic works, dumb show and similar theatrical works without dialogue, all types of photographic works of a technical or scientific nature, all types of maps, projects, sketches, drawings and models”.

First group consists of “all works of language and writing in any form of expression”; “computer programs expressed in any form”; and “preparatory designs, provided that the same leads to a computer program at the next stage”.

Works of language and writing in any form of expression do not cover only the expression of the intellectual product by means of words or writing. The language in use does not matter in the works of language and writing. Forms of expressions such as foreign languages, extinct languages, languages of art such as Esperanto, computer language, language of painting, language symbols and mathematical figures and symbols can be considered in the same context. Works created in digital format also fall under the group works of language.¹³⁶) Computer records of the author, his/her ideas entered on a diskette, CD even those written on a stone or cloth are regarded as a work. This is the reason that the law states the provision of “all works of language and writing in any form of expression”.

Other set of works included in this group are the “computer programmes”. Computer programmes which were not included in the original text of the Law of 1951 have been accepted as work after being included in the Law No: 4110 of 1995. As pursuant to subparagraph g of Article 1/B of the FSEK, computer programme is a set of

¹³⁵ Ateş, “Fikri Hukukta...”, op.cit. p.121; Ayiter, op.cit. p. 47; Erel, op.cit. p.57; Suluk, Saraç, Nal, op.cit. p.48

¹³⁶ Kılıçoğlu, op.cit. p.128

computer instructions arranged in a way that will make a computer system carry out a special process or task and the preparatory work that will lead to the creation and development of such set of instructions.

European Council has requested from the member states in 1991 to make some arrangements in their national laws on the protection of computer programmes and determined a framework for these arrangements by publishing a directive.¹³⁷ Paragraph one of Article 4 of the Annex 8 of the Decision No 1/95 of the EC-Turkey Association Council envisages that Turkey, as per the Council Directive 91/250/EEC, shall protect computer programmes under the category of scientific and literary works.

The second group of works are the theatrical works without dialogue. All kinds of dances, written choreographic works, dumb shows and similar works are covered in this group. The distinctive feature of this type is the movements created by the performers rather than the words or writing as an intellectual property and furthermore these kinds of works appeal to the eye. For the protection of a theatrical work without dialogue, the performer does not have to perform his work in a place like a stage.¹³⁸ The law lists a few examples of the theatrical works without dialogue (dance, written choreographic works, dumb show). These works are not limited to those listed in the Law. This fact has been clarified in the Law by the statement of “and similar theatrical works without dialogue”. Competitions and sports contests generally are not regarded as a work since the purpose in these events is not creating a work.¹³⁹

The third group of scientific and literary works consist of “all kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models, industrial, environmental and theatrical designs and projects, lacking in aesthetic quality”. The feature which separates this group from the works of fine arts is whether they have “aesthetic value” or not. This type of works is protected as works of fine arts provided that they bear aesthetic qualification.

¹³⁷ Erel Şafak N., “Fikri Hukukta Bilgisayar Programlarının Korunması”. İlhan Öztrak’a Armağan, Ankara, 1994, p.141

¹³⁸ Çınar Ömer, Fikri Hukuk Açısından Eser Sahibinin Hakları ve Korunması, ” Unpublished Post Graduate Thesis İstanbul, 2002, p.14

¹³⁹ Erel, “Türk Fikir ve Sanat.” p. 60

2.2.2. Musical works

Article 3 of the FSEK describes musical works as “all types of musical compositions, with or without lyrics”. The Law neither describes the musical works explicitly nor provides examples. In the musical works, the subject matter of the protection is the sound as a means of expression and it is sufficient if this sound is the product of the intellectual efforts of the creator. The sounds do not have to be fixated by melody notes or magnetic bands and records to bear the characteristics of a work.¹⁴⁰

For the musical works, the characteristics of the author can be found in the order of sounds, a certain connection, rhythms, instrumentation or orchestral arrangements.¹⁴¹ Performing a musical work cannot be regarded as a new work; however labor of the performer is protected under related rights.¹⁴²

Musical work without lyrics is called composition and the work with lyrics is the composed version of lyrics and both of them shall benefit from the protection stated in the FSEK.¹⁴³ Lyrics is not a musical work but a work of science and literature expressed by means of language as stated in subparagraph 1 of Article 2. As a result of this, when the lyrics of someone (the author) are changed into a musical work without his/her consent, it is a violation against the scientific and literary work. However, when a composition of someone is used without his/her consent, this is a violation of a musical work. When a musical work which is composed without the consent of the owner of the lyrics is performed without the consent of the composer, performer violates the musical work and composer violates the scientific and literary work.¹⁴⁴

2.2.3. Works of fine arts

Works of fine arts have been listed in a detailed manner in Article 4 of the FSEK. Types of works are not limited in number and examples have been increased by an amendment of Law No: 4110. As per this article:

¹⁴⁰ Baysal, op.cit. p.55

¹⁴¹ Karahan, Suluk, Saraç, Nal, op.cit. p.51

¹⁴² Baysal, op.cit. p.56

¹⁴³ Kaplan, op.cit. p.83

¹⁴⁴ Kılıçoğlu, op.cit. p.131

1. Oil paintings or water colors, all types of drawings, patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing;
2. Sculptures, reliefs and carvings;
3. Architectural works;
4. Handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs;
5. Photographic works and slides;
6. Graphic works;
7. Cartoons;
8. All kinds of personifications are works of fine arts with aesthetic value.

For the protection of works of fine arts, not only the characteristics of the author but also aesthetic value are required.¹⁴⁵ On the other hand, the Law limits the works of fine arts to eight items. A work shall not be accepted as a work of fine arts if it does not fall under one of these items, even though it bears aesthetic value. In this sense, principle of uniqueness is applied to the works of fine arts.¹⁴⁶

2.2.4. Cinematographic works

Article 5 of the Law stipulates a list for the cinematographic works. As per this provision, “cinematographic works are works such as films of an artistic, scientific, educational or technical nature or films recording daily events or movies, that consist of a series of related moving images with or without sound and which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices.” This article defines cinematographic works as the sounds and/or images fixed on a film.

The Law provides the most common examples in the movies. The word “such” in the statement of “such as movies” explains that this list does not limit the

¹⁴⁵ Erel, “Türk Fikir ve Sanat..” p. 71; Karahan, Suluk, Saraç, Nal, op.cit. p.53

¹⁴⁶ Ateş, “Fikri Hukukta...”, op.cit. p.219; Suluk, op.cit. p.91

cinematographic works. As it is understood from this provision, films broadcast in the cinema or on television, cultural programmes or documentaries and news programmes are included in this arrangement.

Regarding the protection of cinematographic works, the work is not dependent on the material in which it is fixed, recording technique used in fixing the moving images is not important and a director or scenario do not have to exist. Because, the films fixing daily events are also protected as cinematographic works under the same article. So, the requirements asked for protection are the individuality of the creators of the work and existence of a series of moving images.¹⁴⁷

2.2.5. Adaptations and collections

The Law No: 5846, after listing four groups of works, regulates the “adaptations and collections” by the Article 6. While the heading of the article was “Adaptations” before the amendment made in 2001 by the Law No: 4630, the same heading has been changed as “Adaptations and Collections” after the said amendment.¹⁴⁸ Whereas the law included the definition of adaptation, it did not mention about the collection and its definition. Furthermore, it is not clear which examples listed in the article are adaptation and which of them are collections. Since collections are a type of adaptation, it is not appropriate that they are stated in the heading as if it was a separate type of work.¹⁴⁹

The adaptation has been defined in the Law as the “Intellectual and artistic products created by benefiting from another work but that are not independent of such work”. The fact that the adaptation is another type of work has been clarified by the last paragraph which was added to the article by the Law No: 4630. As per this paragraph, “adaptations bearing the characteristic of the person making the adaptation, which are created without prejudice to the rights of the author of the original work, shall be deemed works under this Law”. For a work to be deemed as an adaptation, four requirements in principle are the existence of the original work, bearing the characteristic of the person making the adaptation, falling under one of the types of adaptations and not prejudicing to the rights of the author of the original work. The

¹⁴⁷ Karahan, Suluk, Saraç, Nal, op.cit. p.56

¹⁴⁸ Tekinalp, op.cit. p.127

¹⁴⁹ Kılıçoğlu op.cit. p.136

formal requirements, on the other hand, are converting a work to another type of such works and stating the relation of the work with the original work.¹⁵⁰

In all of the adaptations listed in the Law, the works are converted to the same type of work. For instance, in translations; novels converted to movies; collections of selected works; collections of all or the same type of works of one author, the original work is not converted to another format but it is protected and another work is created without being changed.¹⁵¹ However, the exception to this rule stated in Article 6 of the FSEK is the regulation in subparagraph three.¹⁵² On the other hand, abridging or extending the work, changing its size or adding new texts to a musical work cannot be deemed as an adaptation.¹⁵³

Article 6 of the FSEK provides examples of adaptations in 11 items. Major types of adaptations stated in the Law are as follows:

1. Translations;
2. Converting a work like novel, story, poem or play, to another type of such works;
3. Making films from musical works, literary and scientific works or works of fine arts, or converting them into a form which is suitable for filming or broadcasting by radio and television;
4. Musical arrangements and compositions;
5. Transforming works of fine arts from one form to another;
6. Making a collection of all or the same type of works of one author;
7. Making a collection of selected works according to a specific purpose and in accordance with a specific plan;
8. Making an unpublished work ready for publication as a result of scientific research and study “editio princeps” (ordinary transcriptions and facsimiles that are not the result of scientific research and study are excluded);
9. Annotating, commenting or abridging the work of another person;
10. Adaptation, editing or any modification of a computer program;

¹⁵⁰ Öztan Fırat, “Fikir ve Sanat Eserleri Hukukunda İşlenme Eserler” Prof.Dr. Ali Bozer’e Armağan, Bankacılık ve Ticaret Hukuku Enstitüsü Yayınları, Ankara, 1998, p.242

¹⁵¹ Kılıçoğlu op.cit. p.136

¹⁵² Arslanlı Halil, “Fikri Hukuk Dersleri II Fikir ve Sanat Eserleri”, İstanbul Üniversitesi Yayınları, İstanbul, 1954, p.34

¹⁵³ Öztan, “Fikir ve Sanat Eserleri Hukukunda İşlenme..” op.cit. 244

In adaptations, existing work is converted to another format. This point distinguishes adaptations from quotation and inspiration.¹⁵⁴ The basis of the adaptations is composed of the works included within the main groups listed in the Law. In adaptations, original work is converted to another work. In other words, no original work other than those stated in the Law as four main groups can be involved in the creation of an adaptation.

2.3. Author

Main rule stating that the creator of the work is the owner of the work shows similarities in the principles of civil law implemented in the countries such as Germany, Switzerland and France. However, there are also exceptions to this main rule. For instance, when the copyright concept first appeared in the common law, it was understood as making copies from the work and at the same time preventing others from doing this. On the other hand, when the French term “droit d’auteur”, and German term “urheberrecht” was translated into English, author rights are defined as the rights of the owner of the work. This division reflects the difference between two law systems¹⁵⁵

While the Common Law protects a work against unlawful copying, civil law protects it since the author has moral rights related to control and benefiting from the work.¹⁵⁶

As per the Law No: 5846, the author is the person who has created the work (FSEK art. 1/B, b). The statement of “the author is the person who creates the work” is universal and it is stemmed from the natural law.¹⁵⁷ The system of law, once the work is created, introduces provisions on the authorship, defines moral and economic rights of the author and protects him/her.¹⁵⁸ Presence of the creation of an intellectual and artistic work and the creator bearing the status of author shall be necessary and adequate for the

¹⁵⁴ Kılıçoğlu op.cit. p.138

¹⁵⁵ Erel, “Türk Fikir ve Sanat..” p. 86; Güneş, op.cit. p.87; Karahan, Suluk, Saraç, Nal, op.cit. p.56 ; Öztan, op.cit. p.235

¹⁵⁶ Phillips Jeremy, Firth Alison “Introduction to Intellectual Property Law”, Butterworth , İngiltere 2001, p.128

¹⁵⁷ Tekinalp, op.cit. p.134

¹⁵⁸ Özderiyol Teknail, “Fikir ve Sanat Eserleri Kanunu’nda Düzenlenen Suçlar”, Vedat Kitapçılık, İstanbul, 2006, p.43

emerging of the rights regarding the work.¹⁵⁹ When an intellectual and artistic work is created, principle which makes the creator entitled with intellectual rights depending solely on the concept of creation is called the fact of creation. (Grundsatz der Schöpfungswahrheit)¹⁶⁰

Because of the principle of fact of creation legal persons cannot be authors.¹⁶¹ Condition of bearing the characteristics of the author is subjective in its nature; including of legal persons their characteristics in a creation does not comply with the principle of fact of creation. However, paragraph 4 of Article 27 of the Law contains a provision which contradicts with this fact. This provision states that “If the first author is a legal person, the term of protection shall be 70 years from the date on which the work was made public”. It is not possible to associate this provision with the fact of creation and the provision that authors can only be the real persons.¹⁶² This ammendment made by the law-maker has disrupted the system of authorship stipulated by the FSEK.¹⁶³

If a work which is created by more than one person can be divided into chapters, it is called joint authors of a work. In this case, each author owns his/her chapter.¹⁶⁴ In case previously created works are brought together, again it is possible to include them under the concept of joint authors of a work. However, to regard the works as joint works, each chapter of the joint work should be able to be evaluated as independent from each other.¹⁶⁵ In joint works, authors are required to be agreed to have a joint work. In case of unauthorized use, the work cannot be deemed as a joint work.¹⁶⁶

If the work which is created by more than one person constitutes an indivisible whole, this concept is called participation.¹⁶⁷ This is such togetherness that contribution of each author cannot be qualified as independent from the whole work.¹⁶⁸ In

¹⁵⁹ Öztrak, İlhan,” Fikir ve Sanat Eserleri Üzerindeki Haklar”, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, Ankara, 197, p.35

¹⁶⁰ Erel, “Türk Fikir ve Sanat..” p. 87

¹⁶¹ Erdil, Engin; İçtihatlı ve Gerekçeli Fikir ve Sanat Eserleri Kanunu Şerhi, Vedat Kitapçılık, İstanbul, 2009, p.348

¹⁶² Kılıçoğlu op.cit. p.162

¹⁶³ Karahan, Suluk, Saraç, Nal, op.cit. p.63

¹⁶⁴ Yazıcıoğlu, op.cit. p.138

¹⁶⁵ Karahan, Suluk, Saraç, Nal, op.cit. p.63

¹⁶⁶ Erel, “Türk Fikir ve Sanat..” p. 94

¹⁶⁷ Güneş, op.cit. p.91

¹⁶⁸ Yazıcıoğlu, op.cit. p.138

participations, the author is the union of those who create the work. The provisions on ordinary partnership shall apply to such union. (FSEK art. 10/2). Since there are contradictions between the togetherness envisaged by the FSEK and ordinary partnership envisaged by the Law on Debts, this provision can be implemented to an extent that is justified by the situation.¹⁶⁹

The feature which distinguishes participating authorship from the joint authorship is that the work of each author can be protected individually in joint authorship. Furthermore the authors do not have individual and independent works in the participation.

2.4. Rights of Author

Economic rights which provide authorities for the utilization of the work and make intellectual rights as the subject of economy are the rights entitled to those who help the author in the processes of reproduction, distribution, rental and lending, adaptation, communicating a work to public. Economic effect emerges with the utilization of these economic rights. Authors also have moral rights. Therefore, we will elaborate on the rights of author in two groups as economic and moral rights. Article 13/1 of the FSEK defines author's rights as economic and moral rights in a restrictive manner. As a result of this, when new types of benefits emerge apart from those stated in the Law, the author shall not be provided with any new benefit.¹⁷⁰

2.4.1. Moral rights

The term "moral rights" is used to define non-monetary benefits of the author.¹⁷¹ Moral rights aim that authors maintain moral and personal relation with their works.¹⁷² Moral right is the right regarding the moral bond between the author and his/her work.¹⁷³ Moral rights are limited in number to those which are listed in the FSEK. However, the person might rely on the rights arising from the personal law when

¹⁶⁹ Arslanlı, op.cit. p.89

¹⁷⁰ Kaplan, op.cit. p.108

¹⁷¹ Ilgaz, Deniz, Üstün Gürsel "Fikri Hakların ABC'si" Pen Yazarlar Derneği, 1994, p.138

¹⁷² Başpınar, Kocabey, op.cit. p.101

¹⁷³ Beşiroğlu, op.cit. p.86

required.¹⁷⁴ Moral rights are not descendible and cannot be transferred by testamentary or inter vivos transactions.

Moral rights are governed in the FSEK in four headings. These rights are Authority to Disclose the Work to the Public (FSEK, art. 14), Authority to Designate the Name (FSEK, art. 15), Prohibition of Modification (FSEK, art. 16) and Rights of the Author against Persons Who Own or Possess a Work (FSEK, art. 17)

2.4.1.1. Authority to disclose the work to the public

According to the right governed by Article 14 of the FSEK, the author shall exclusively determine whether or not his work shall be divulged to the public and the time and manner of its publishing. This right expresses the authority to decide on the disclosure of the information to the third persons and informing the public about the presence of the work, so the said work is not within the confidentiality zone of its author anymore.¹⁷⁵ The act of disclosing a work to public requires that the work is made public in an uncertain and broad framework rather than a limited framework and limited number.

Article 7/1 of the FSEK states that “a work divulged to the public with the consent of the right holder shall be deemed to have been made public” and with this statement, approves that a work is made public when it is disclosed to the public. Making a work public is important in terms of the start of protection. A work which is not made public is not yet within the field of interest of the society and that is why it cannot be the subject matter of an attachment order and pledge and cannot be disposed by contracts.¹⁷⁶ Disclosure to public is realized by way of disclosing or submitting the work to the third parties. The ways for making a work public are not limited to those listed in the FSEK such as publication, reproduction, etc.¹⁷⁷ A piece of work can also be disclosed to the public by performing it on the stage or on TV, exhibiting, dubbing or

¹⁷⁴ Baytan, op.cit. p.44; Erel, “Türk Fikir ve Sanat..” p. 101; Karahan, Suluk, Saraç, Nal, op.cit. p.67 ; Öztan, op.cit. p.287; Tekinalp, op.cit. p.151

¹⁷⁵ Arkan, op.cit. p.27

¹⁷⁶ Güneş, op.cit. p.124

¹⁷⁷ Ayiter, op.cit. p.108

making it accessible via internet.¹⁷⁸ Right to disclose the work to the public, in principle, does not require any formal procedures such as records and registry.¹⁷⁹

While the disclosure to public with the consent of the author means making the work public, disclosure by a different person is a clear violation of moral rights of the author. Disclosing a work to the public is an act of law which occurs suddenly and only once. Once a work is made public, there is no turn back from this position.¹⁸⁰

2.4.1.2. Authority to designate the name

Article 15 of the FSEK entitles to the author the right to designate his/her name or pseudonym. This is called the right to designate the name or right to be introduced as the author. The right to designate the name carries importance in terms of the recognition and career of the author.

The first paragraph of the Article sets forth the authority of the author to decide whether the work shall be disclosed to the public with or without his/her name and the second article stipulates that the name of the original author must be shown on copies of a work of fine arts created by reproduction and on the original and copies of an adaptation.¹⁸¹

This right has been stated in Article 6 of the Berne Convention as one of the minimum rights to be entitled to the authors.¹⁸² The Supreme Court of Appeals has decided that absence of the name of the author on a publication shall constitute basis for financial and moral compensation¹⁸³ and absence of the name in a translated work shall be deemed as violation of rights.¹⁸⁴ Article 15 of the FSEK is a special provision concluded in line with Article 26 of the Civil Law.¹⁸⁵ However, while the name is protected lifelong as per Article 26 of the Civil Law, the right to designate the name is protected for a period of 70 years after the death as per Article 19/2 of the FSEK.¹⁸⁶

¹⁷⁸ Tekinalp, op.cit. p.165

¹⁷⁹ Erel, "Türk Fikir ve Sanat.." p. 94

¹⁸⁰ Hirsch, p.132

¹⁸¹ Kılıçoğlu, op.cit p.226-227

¹⁸² Erdil, op.cit. p.474

¹⁸³ Decision of the Supreme Court of Appeals: 11. HD. E.1979/1183, K.1979/1704, Çevik,Orhan Nuri, "Fikri Hukuk Mevzuatı",Ankara, 1988, p.21-22

¹⁸⁴ Suluk, Orhan, op.cit. p.329, Başpınar, Kocabey, op.cit. p.103

¹⁸⁵ Baysal, op.cit. p.88

¹⁸⁶ Gökyayla, "Telif Hakkı ve", op.cit. p.150

Use of the right to be introduced as the author which is of great importance for the protection of personal and non-economic benefits of the author is more difficult for authors of digital works. The easiness of making changes on the digital works and technological developments make the protection of authors' rights more difficult.¹⁸⁷

Depending on whether the name is designated on the work or not, Article 11 of the FSEK adopts the presumption of authorship which makes the proof of authorship easier. As per 15/3 of the FSEK, the real author of a work may ask the court to establish his/her rights, if the creator of the work is disputed.

Similar to the right to disclose the public, the right to designate the name can also be used by someone else upon the consent of the author. In order to protect the author's rights, this authorization should be in writing and in compliance with the formal requirements envisaged in Article 52 of the FSEK regarding the transfer of financial rights.¹⁸⁸

2.4.1.3. Prohibition of modification

The work is a whole as the format and content. Considering that a work bears the characteristics of its author, it should be accepted that the author has intellectual rights on each and every section, chapter and detail of the work. This point is clarified in Article 13/2 of the FSEK.¹⁸⁹

Article 16 of the FSEK stipulates that "No abbreviations, additions or other modifications may be made to a work or to the name of its author without his consent". This prohibition imposed by the law regarding the modifications made to the work or to the name of its author is related to the qualification of the work and authorship and aims not to modify any of them.¹⁹⁰ It should be agreed that the author has a right to stop any modification provided that this modification impairs his/her characteristics. The Supreme Court of Appeals allows neither unauthorized modification nor performance of the work which will cause to lose its characteristics.¹⁹¹

¹⁸⁷ Kaplan, op.cit. p.144

¹⁸⁸ Erdil, op.cit. p.474

¹⁸⁹ Kaplan op.cit. p.146

¹⁹⁰ Kılıçoğlu, op.cit. p.229

¹⁹¹ Decision of the Supreme Court of Appeals, HGK . E.1981/4-70, K.1983/123, Tekinalp, op.cit. p.313

The authority to allow any change on the work or name of its author belongs to the author. However, article 16/2 sets an exception to this rule. This article sets out that a person who obtains authority from the author to use his/her rights may make modifications that are deemed indispensable due to the technique of adaptation, reproduction, performance or publication, without special permission by the author.¹⁹²

2.4.1.4. Rights of author against persons who own or possess a work

In Article 17 of the Law, three different authorities that the author can address to owner and possessor are governed. The first one of these authorities is regarding the author's access to the original of the work. Where necessary the author may, provided that the conditions for protection are fulfilled, demand the owner or possessor of the original to temporarily avail him of the original of works of fine arts listed in the first and second subparagraphs of article 4 and works that are listed in the first subparagraph of article 2 and in article 3, provided that the latter are handwritten by authors or composers (art. 17/1, FSEK). Persons who trade the work shall disclose such right of the author in auction or sale catalogues or related documents to buyers or acquirers of the work.¹⁹³

The Second authority in the same framework is about the damage to the work. The owner of the original of a work may dispose of it according to the terms of the contract he/she has concluded with the author. However, he/she may not damage or destroy the work or prejudice the rights of the author. This provision restricts property rights of the owner arising from the law of property in favour of the author.¹⁹⁴

The third authority which the author can use against owners and possessors is regarding the exhibition of the work. If the work exists in a single original form, the author may request the work for use in retrospective works and exhibitions covering all of his working periods, subject to conditions of protection and to be returned (Article 17/3, FSEK). In case of a dispute between the author and owner in such circumstances, balance of conflict for both parties should be taken into consideration.¹⁹⁵

¹⁹² Öztan, op.cit. p.331

¹⁹³ Ibid, 334

¹⁹⁴ Karahan, Suluk, Saraç, Nal, op.cit. p.71

¹⁹⁵ Güneş, op.cit. p.129

2.4.2. Economic Rights

Economic rights are absolute rights which give the right to exploit the work in economic terms and determine the way of this exploitation exclusively to the author and grant him/her the authority of allowing the third parties to use the work.¹⁹⁶

Article 20 of the FSEK stipulates that the author shall have the exclusive right to exploit in any manner whatsoever a work which has not yet been made public and the right afforded to the author to exploit a work that has been made public shall comprise exclusively the rights defined as economic rights by this Law. In that sense, author can use each of the economic rights as a subject matter of separate contracts and disposals; transaction on one right does not affect the other.¹⁹⁷

Economic rights are independent of one another. The disposal and exercise of one does not affect the other (Article 20/1, FSEK). Economic rights are descendible.¹⁹⁸

Economic rights are listed between the Articles of 21 and 25 in the FSEK as to the principle of Numerus clausus. As a result of the amendment of Law No: 4630 made to the FSEK, economic rights are “right of adaptation”, “right of reproduction”, “right of distribution”, “right of performance” and in parallel with the recent developments in the field of internet law “right to communicate to public by devices enabling transmission of signs, sounds and/or images” as set forth in Article 25.¹⁹⁹

2.4.2.1. Right of adaptation

Adaptation right which is one of the economic rights of author generally depends on the rules related to other economic rights of the author. The feature which distinguishes adaptation right from other rights is the creativity used in right of adaptation. Because, adaptation is a new intellectual product which is created in another format on condition of sticking to the original work by characteristics.²⁰⁰ Since adaptation requires little or much change on the work, the author shall have the exclusive right to exploit his work by adaptation (art. 21, FSEK). Apart from the special

¹⁹⁶ Ateş, “Fikri Hukukta...”, op.cit. p.157; Baytan, op.cit. p.50; Erel, “Türk Fikir ve Sanat...” p. 159; Suluk, Orhan, op.cit. p.373, Öztan, op.cit. p.550; Tekinalp, op.cit. p.169

¹⁹⁷ Kılıçoğlu, op.cit. p.237

¹⁹⁸ Erdil, op.cit, p.419

¹⁹⁹ Başpınar, Kocabey, op.cit. p.108

²⁰⁰ Erdil, op.cit, p.623

arrangements introduced for computer programmes, it is allowed to adapt works for the purpose of personal use.

The first condition for an adaptation is the existence of a work which has intellectual property protection. The second condition is the creation of a new intellectual product which will be designed according to the characteristics of the adaptation approved by its author.²⁰¹

The person who takes over the right of adaptation from the author shall have economic and moral rights on his/her own adaptation. In addition, the person who takes over the right of adaptation must receive an approval from the author or legal heirs to transfer this right to the third persons.²⁰² Causes which restrict rights of author are also valid for adaptation works.

2.4.2.2.Right of reproduction

The most important economic right on a work is right of reproduction. The reason is that the author cannot obtain the economic benefit he/she wishes unless the copies of the work reach to the third persons. All other rights have been derived from the right of reproduction.²⁰³ Reproduction is acquiring copies through making a work concrete on something which has a physical asset. In a broader sense, concept of reproduction can be defined as producing one or multiple copies of the work by making it directly or indirectly suitable to be perceived by means of sense organs. Today, storage in any electronic environment or saving on a computer memory is accepted as reproduction without requiring the physical asset of the work.²⁰⁴ While the speeches recorded in a meeting by technical means such as magnetic devices are regarded as a reproduction, photographs taken in a play are not accepted as a reproduction.²⁰⁵ Number of the copies does not bear any importance, even only one copy is considered as a reproduction.²⁰⁶

²⁰¹ Güneş, op.cit. p.113

²⁰² Ibid, p.115

²⁰³ Suluk, Orhan, op.cit. p.379

²⁰⁴ Başpınar, Kocabey, op.cit. p.114

²⁰⁵ Ayiter, op.cit. p.128

²⁰⁶ Erdil, op.cit. p.651

Article 22/1 of the FSEK states that “the right to reproduce the original or copies of a work, in any form or method, in whole or in part, directly or indirectly, temporarily or permanently shall belong exclusively to the author”. This article emphasizes that the author has the exclusive right to reproduce a work from its original or copies. In that sense, not only the reproductions from the original work but also those from its copies must be under the scope of economic rights. In consequence, right of reproduction from the original work or its reproduced copies is a right exclusive to the author.²⁰⁷

Pursuant to Article 22/2 of the FSEK “second copy of the original work or recording of the work on all types of devices now known or to be developed in the future enabling the transmission or repetition of signs, sounds and images, all kinds of sound and music recordings as well as the application of plans, projects and sketches of architectural works are deemed reproduction”. The way of reproduction is not important here.²⁰⁸ Because, the law does not set forth any restriction on how to reproduce or on the method of reproduction. This provision has been drafted in a non-restrictive manner deliberately so that it can meet the technological developments possible to occur in the future.

Within the scope of Article 22/3 of the FSEK, “the right of reproduction also covers the acts of loading, displaying, running, transmitting and storing a computer program to the extent that such acts require the temporary reproduction of the computer program”. In parallel with this Article, a decision of the Supreme Court of Appeals²⁰⁹ has concluded that using an unlicensed computer database means loading and storing the computer programme into another computer and this presents a violation against the right of reproduction in accordance with Article 22/3 of the FSEK. Any act of printing, copying and transferring requires a reproduction principally.²¹⁰ Content of the concept of reproduction becomes wider day by day in parallel with the developments experienced in the field of computer technologies. Within the scope of this provision,

²⁰⁷ Kılıçoğlu, op.cit. p.239

²⁰⁸ Ibid, p.240

²⁰⁹ Unpublished Decision of the Supreme Court of Appeals 15.05.2001, 11.HD, 1804/4344, Tekinalp, op.cit, p.173-174

²¹⁰ Kaplan op.cit. p.146

even displaying a work saved in a disk on the computer screen temporarily and saving it on the temporary memory which is called RAM is deemed reproduction.²¹¹

In case there is a legal restriction or the right owner regulates the use of rights by a contract or he/she states his/her consent on the use of rights, it is not possible to state there is a breach of right of reproduction.²¹²

The time when the work is reproduced is significant especially in terms of term of protection. To accept a work as reproduction, the work should be fixed with a device which is used for transfer or repetition.²¹³

2.4.2.3.Right of distribution

Right of distribution which is regulated in Article 23 of the FSEK is communicating the work to the public by renting, lending, placing on sale or making commercially available in any manner the original or reproduced copies of the work. Leaving the film copies to the tenant to be displayed or the books to be read or releasing them to the internet with the same purposes is an example of using the right of distribution.

Right of distribution is defined in the doctrine as placing the work on a commercial position for the first time or right of first sale. On the other hand, the work does not have to be introduced with only a commercial purpose to be accepted in the scope of the right of distribution. Distributing a work without any charge or distributing a political article without any charge with the purpose of propagation is considered within the scope of right of distribution.²¹⁴ Right of first sale belongs to the author or the person who is authorized by the author. In principle, right of distribution is exhausted when the first sale is made and no permission is required by the author or the person authorized by the author for the second-hand sale. Disappearance of the right of distribution after the first sale is called “principle of exhaustion”. Principle of exhaustion is national which means it is limited to a country. This right is exhausted in Turkey in terms of the copies sold or distributed in Turkey; right of distribution in

²¹¹ Başıpınar, Kocabey, op.cit. p.115

²¹² Kaplan op.cit. p.114

²¹³ Arslanlı, op.cit p.98

²¹⁴ Erdil, op.cit. p.700

another country again belongs to the author. Principle of exhaustion is applied only in situations such as sale or donation which leads to transfer of property of the work but renting and lending to the public are not covered by the principle of exhaustion.²¹⁵ So, although the right of distribution ends when the work is sold, rights of rental and lending to the public do not exhaust and remain with the author.

Furthermore, principle of exhaustion can be applied only to intellectual products which have physical asset; works having non-physical asset cannot be the subject matter of exhaustion. Since the works released via internet do not bear any physical asset, it is considered that principle of exhaustion will not apply such works.²¹⁶

Rights of distribution and disclosure to the public are closely related. When the work is disclosed to the public, it is made known by people and this is ensured only by distributing the work. In that sense, rights of distribution and disclosure to the public are overlapping rights and one is the consequence of the other.²¹⁷

Right of distribution generally comes after the right of reproduction. Only after the work is allowed to be reproduced, its distribution is made possible. Although distribution is such a kind of right, it is not compulsory.²¹⁸ These two rights are independent from each other and use of one does not affect the other. Author might not use the right of distribution while he/she uses the right of reproduction. Author might not want to disclose reproduced copies to the public or might use this right in the most economic period for himself/herself.²¹⁹ It is possible that the work is only distributed but not reproduced. The composer transferring original copies of the work to the performers is an example for the said situation.²²⁰

Transfer of right of reproduction generally means that the right of distribution is transferred as well. Since reproduction and distribution represent different rights; after the work is reproduced, the author might get the work published in a different place and by a different person.²²¹

²¹⁵ Başpınar, Kocabey, op.cit. p.110-111

²¹⁶ Ibid, p.112

²¹⁷ Kılıçoğlu, op.cit. p.243

²¹⁸ Tekinalap, op.cit. p.178

²¹⁹ Kılıçoğlu, op.cit. p.243

²²⁰ Başpınar, Kocabey, op.cit. p.110

²²¹ Arslanlı, op.cit p.101

Rights of distribution and broadcasting should not be mistaken. Right of distribution stated in Article 23 contains the right of disclosure to the public for the first time and right of providing information on the work. On the other hand, right of broadcasting regulated in Article 25 is the right to communicate a work to public by means of mass media such as radio - television, cable, satellite, digital media without considering whether the work is distributed or not.²²² As per Article 38 of the FSEK, non-profit reproductions made for personal use cannot be regarded as distribution and do not present any violation of intellectual rights.²²³

2.4.2.4.Right of performance

Right of performance is stated as follows in Article 24/1 of the FSEK: ‘The right to exploit a work by performing it in such ways as reciting, playing, acting or displaying on public premises either directly or by means of devices enabling the transmission of signs, sounds or images belongs exclusively to the author’.

Within the scope of right of performance, Article 24/1 of the FSEK covers the acts such as reading a literary or scientific work to the people, playing a musical work, acting a play in front of the audiences, displaying a cinematographic work or displaying a work of fine arts. Transmission of these acts from one medium to another via technical devices is covered in the scope of right of performance in Article 24/2.²²⁴

Right of distribution allows that the design on which the work is shaped is submitted for the use of others but right of performance means disclosure of the work to the public directly or by means of devices enabling the transmission of signs, sounds or images. That is why the methods such as reciting, playing, acting or displaying rather than the subparagraph disclosed publicly are considered in the concept of performance.²²⁵ As a matter of fact, right of performance is communicating a work to the public in a manner which will directly appeal to the senses such as reading,

²²² Kılıçoğlu, op.cit. p.244

²²³ Başpınar, Kocabey, op.cit. p.111

²²⁴ Kaplan, op.cit. p.140

²²⁵ Kılıçoğlu, op.cit. p.246

displaying or playing other than the ways of distributing. The most important requirement in performance is communicating the work to the public.²²⁶

In performances, the way of acting which gives the right to exploit the work is specific to that moment and not permanent. However, it is accepted that the transmission of the performance by means of technical devices to be communicated to the public is also temporary in nature and complies with the definition of performance. Therefore, transfer of performance can be explained as making a theatrical work played in a hall or a concert or a scientific symposium convenient to be listened or displayed in another place, wired or wireless, by means of devices enabling transmission of sound and images. It should also be accepted that live transmission of the work via internet can benefit from legal protection under the scope of right of performance.²²⁷

Right of performance can be the subject matter of pledge of claim, right of detention and compulsory execution and it can be executory.²²⁸

2.4.2.5.Right to communicate a work to public by devices enabling the transmission of signs, sounds and images

Communicating to the public by means of devices enabling transmission of signs, sounds and/or images is also a kind of performance. However, as the number and place of users and beneficiaries are uncertain, this type of performance is subject to different provisions.²²⁹

Article 25/1 of the FSEK amended by the Law No: 4630 states that “the author shall have the exclusive right to communicate the original of a work or its copies to public by way of broadcasting via organizations that broadcast by wire or wireless means such as radio and television, satellite or cable, or by devices enabling the transmission of signs, sounds and/or images including digital transmission, or by way of retransmission by other broadcasters that obtain the work from such broadcasts”. In this provision, right of broadcasting the work by radio - television and right of

²²⁶ Başpınar, Kocabey, op.cit. p.131

²²⁷ Kaplan, op.cit. p.140

²²⁸ Erdil, op.cit. p.732

²²⁹ Güneş, op.cit, p.117

retransmission by other broadcasters that obtain the work from such broadcasting organizations have been envisaged.²³⁰

Article 25/2 of the FSEK which is introduced by the Law No: 4630 stipulates that the author has the right to distribution, supply or communication of the work to the public by making it accessible at the time and place chosen by natural persons and this is a statement which demonstrates that the internet is accepted as a way of communicating the work to the public. The distinctive feature of the internet among other communication media is that internet user can have access to the work in the time and place he/she wishes.²³¹

Law-maker, in addition to the right of performance stated in Article 24, has arranged the right of broadcasting by means of the techniques listed in Article 25 as a separate economic right. Therefore, the difference between the right of performance and broadcasting organizations such as radio – television is the method and technique used for broadcast. While a device enabling the transmission of signs, sounds or images is needed in terms of right of performance, broadcasting via radio – television requires mass communication tools such as radio, television, satellite and cable (internet).²³²

In parallel with the increased use of internet and EU alignment activities and as a result of internet treaties which are WCT and WPPT, digital transmission which is communicating to the public via internet has also been included in the scope of Article 25/1 of the FSEK by the amendment of the Law No: 4630. In this way, right of communicating a work to the public by means of the devices enabling transmission of signs, sounds and/or images has been arranged specifically in the Turkish Law for the first time.²³³

2.4.2.6. Right of resale

Right of resale has not been regulated under the FSEK as one of the economic rights instead it has been defined in Article 45 under the heading of “Limitations”.

²³⁰ Kılıçoğlu, op.cit. p.250

²³¹ Kaplan, op.cit. p.129

²³² Kılıçoğlu, op.cit. p.250

²³³ Başpınar, Kocabey, op.cit. p.129

In case excessive amount of profit is gained in some sales after the first sale, legislator considers that this situation arises from the intellectual efforts of the author and accepts that he/she is to be paid a certain amount in return for these efforts. In case some works change hands, within the protection period, by sale at an exhibition or auction or at a store that sells such goods or in other ways and if a substantial disparity occurs between such sale price and the previous sale price, an appropriate share of the price difference should be paid to the author, or, if the author is deceased, to his/her legal heirs. This provision also applies to some works of manuscripts or fine arts.²³⁴

In case the work is sold at very high prices, right to payment of a share is granted to the author or, if the author is deceased, to his/her legal heirs. The Law does not give the right to payment of a share to each one of the legal heirs of the author; instead it is stipulated that an appropriate share of the price difference is to be paid if the author is deceased, to his/her legal heirs up to and including the second degree and to his/her spouse and if such persons do not exist, to the collecting society of the relevant field.

While the Berne Convention states that right of payment of a share cannot be transferred, there is no provision in the FSEK on this point. However, since the transfer of this right is envisaged as an economic right, its usage by the third persons should be possible.²³⁵

Right to payment of a share is, by law, subject to five year prescription as of the date when the owner of the work is changed by means of sale.

²³⁴ Kılıçoğlu, op.cit. p.251

²³⁵ Ayiter, op.cit. p.162

PART III

COMPARATIVE ELABORATION OF THE EU AND TURKISH LAW ON INTELLECTUAL PROPERTY

3. COMPARISON OF THE LAW NO: 5846 ON INTELLECTUAL AND ARTISTIC WORKS WITH THE EU DIRECTIVES

3.1. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 APRIL 2009 ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

3.1.1. Introduction

Emergence of new commercial goods, industrial processes and inputs concerning the computer in the last years has caused many problems in all different aspects of the intellectual property law. “Computer programmes” which is a product of technological developments accounts for the very important and strategic part of the world economy.²³⁶ Information and computer technologies have now set foot in each house and each workplace and thus relation of the people with the computer programmes has been improved. A part of the potential receivers who wish to benefit from the opportunities provided by the computer programmes at home and workplaces prefers to reach such programmes through involving in “software privacy” instead of getting access in legal terms.

Because of the fact that copying a work is very easy but its creation is much more difficult and with the effect of the rapidly developing technologies, information sector and system of law required serious, efficient and urgent legal arrangements in the field of computer programmes. Arrangements made in the scope of the FSEK met the relevant needs and filled a very important gap. These arrangements made in accordance with the Council Directive of 14 May 1991 on the Legal Protection of Computer Programmes (91/250/EEC) have helped us get closer to the arrangements of the

²³⁶ Keyder Virginia Brown, “Intellectual Property Rights and Customs Union”, İstanbul, 1996, p.53

developed countries. However, as stated below, certain changes have been considered compulsory.

3.1.2. Definition of Computer Programmes

A set off computer instructions arranged in a way that will make a computer system carry out a process is called programming of the computer.²³⁷ Since it is not possible for a computer system to operate unless it is loaded with a programme, a “computer programme” is placed in the hardware and in the computer itself through digital circuits. This information loaded in the hardware which constitutes all mechanical, electrical and magnetic components required to fulfil the functions is called “programme“.²³⁸

When it is considered that the computer programmes are the most important element in terms of the indispensable function of the computer systems in our lives, it will be understood that why this concept is emphasized that much in the national and international legal arrangements. Serious efforts have been spent to provide protection in the field of intellectual rights for such programmes which are designed by using special programming languages and consuming great efforts and considerable amount of financial resources.

Although legal arrangements on the protection of computer programmes were included in our law in 1995, legal definition of this concept has been made in 2002 by an article added to the FSEK by the Law No: 4630.²³⁹ In sub-paragraph g of article 1/B of the FSEK, computer programme is defined as follows: “A set off computer instructions arranged in a way that will make a computer system carry out a special process or task and the preparatory work that will lead to the creation and development of such set of instructions”. On the other hand, the Directive which was taken as the basis while the provisions of the FSEK on the protection of computer programmes were being drafted does not contain any definition. But, recital 7 of the Directive states that “the term computer program shall include programs in any form, including those which

²³⁷ Topaloğlu Mustafa, “Bilişim Hukuku”, Karahan Kitabevi, Adana, 2005, p.4

²³⁸ Beşiroğlu, loc.cit., p.110

²³⁹ Ateş Mustafa “Fikri Hukukta Eser”, Turhan Kitabevi, Ankara, 2007, p.149

are incorporated into hardware”.²⁴⁰ Since the definition in the FSEK is broad enough, there is no incompliance with the Directive. However it is stated that if the term “computer system” is to be interpreted in a way to cover only the computers, the term “computer system” could be replaced by a more general term such as electric device, because a computer programme may function not only by computers but also by the other machines having information processing capacities, such as mobile phones.²⁴¹ Related to the term of preparatory work used in the Article, it has been suggested that the term of preparatory design work be used as stated in the recital 7 of the Directive.²⁴²

There are two more definitions which are not related to computer programmes in Article 1/B of the FSEK. These concepts are “interface and interoperability” which are specified in sub-paragraphs h and i. The term “interface” is defined as “the parts of the program which provide for such interconnection and interaction between elements of software and hardware” in the recital 10 of the Directive. The definition stated in the FSEK is exactly the same with the one in the Directive. Therefore, no problem is observed in terms of compliance with the *Acquis Communautaire*.

The term “interoperability” is again defined in the recital 10 of the Directive “as the ability to exchange information and mutually to use the information which has been exchanged”. The definition of the same term in the FSEK is as follows: “The ability of computer program parts to jointly function, to interact and to mutually use the exchanged information”. Although it generally follows the model of the definition provided by the recital 10 of the Directive, it seems to restrict the necessity for interconnection and interaction only between the parts of the computer program.²⁴³

3.1.3. Object of Protection

Article 1 of the Directive defines the object of protection and paragraph 1 of this article gives copyright protection as literary works within the meaning of the Berne Convention for the protection of literary and artistic works. Similarly, Article 2/1 of the FSEK as amended by the Law No. 4110 indicates that computer programs expressed in

²⁴⁰ Ibid, p.149

²⁴¹ Sinodinou Tatiana Eleni, “Memorandum On The Compliance Of The Turkish Legislation With The Directives 91/250 EC And 96/9 EC” Archive of Ministry of Culture and Tourism, Ankara, 2007, p.2

²⁴² Ibid, p.2

²⁴³ Ibid, p.3

any form together their preparatory designs are covered in the category of scientific and literary works.

Although the category envisaged by the Law concerning computer programs complies with the Directive, we cannot put forward the same comment on the concept of preparatory design. The term preparatory design is defined neither in the FSEK nor in the Directive. However, considering that Article 2 of the FSEK refers to “preparatory designs, provided that the same leads to a computer program at the next stage”, what we need to understand from the term “preparatory design” is something which cannot be regarded as a computer program yet but will be qualified as a program at the next stage.²⁴⁴ Wording of the FSEK on preparatory design makes difficult to have a comment according to the Directive. Because, recital 7 of the Directive stipulates that “the term ‘computer program’ shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage”. However, wording of the FSEK restricts the scope of preparatory design when compared with the definition stated in the recital section of the Directive. In that sense, FSEK states that preparatory designs, for protection, should lead to a computer program at the next stage.²⁴⁵ But the Directive only requires the nature of the preparatory work is such that a computer program can result from it at a later stage.²⁴⁶

To ensure compliance with the Directive, the statement of “provided that the same leads to a computer program at the next stage” in Article 2/1 of the FSEK should be interpreted in accordance with the Directive and requirement for the draft material to be detailed and specific enough and to lead to a computer program or to become a computer program at the next stage should be deemed sufficient.

Lastly, the points which are outside the scope of legal protection for computer programs are defined in the last paragraph of Article 2 of the FSEK. In accordance with this Article, “Ideas and principles on which any element of a computer program is based, including those on which its interfaces are based, are not deemed works”. The

²⁴⁴ Ateş, “Fikri Hukukta...”, op.cit. p.152

²⁴⁵ Tekinalp, op.cit. p.110

²⁴⁶ Ibid, p.110

purpose of the law maker in this arrangement is to emphasize what is protected in computer programs is not the idea but the way of expression.²⁴⁷ Since there is no clarification in the Directive on the relevant subject, no contradiction has been detected between the Law and Directive.

We also need to say that computer programs can be protected by other methods. Pursuant to article 8/1 of the Directive on the legal protection of computer programs which states “the provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trademarks, unfair competition, trade secrets, protection of semi-conductor products or law of contract”, provisions included in the aforementioned Directive shall not effect the validity of the rules arising from patent rights, trademarks, unfair competition, trade secrets, protection of semi-conductor products or law of contract. In that sense, a computer program might be protected in different ways benefiting from the alternative legal branches.

For instance, legal protection provided by the patent and by the copyright brings both advantages and disadvantages to the author. But the rights granted are completely different.

Decree Law on the Protection of Patent Rights stipulates that computer programs cannot be evaluated within the scope of patent protection since they are not qualified as an invention.²⁴⁸ Pursuant to this provision, originality is not sufficient for the emergence of patent rights. Because of the fact that patent protection provides a stronger monopoly than the copyright protection, to be able to obtain patent protection, the program has to introduce an innovation and contribute to the development of the technology in addition to being original.

On the subject of terms of protection, protection of the patent lasts 20 years while this period has been defined as lifetime of the author plus 70 years for the copyright.

There are serious benefits for the author when the computer programs are protected under the copyright. One of the most important advantages of copyright protection is the term of protection and that the copyright protection starts right after the work is

²⁴⁷ Ateş, “Fikri Hukukta...”, op.cit. p.154

²⁴⁸ Kaypakoğlu Serhat, “Bilgisayar Programlarının Hukuki Korunması”, İpekçi Yayıncılık, İzmir, 1997, p.30

created and recorded in any way.²⁴⁹ Other benefits of copyright protection can be listed as follows:

- Creation of the work is sufficient for the initiation of protection, no other formality is needed.
- With the help of copyright, computer programs are protected in a creative manner in terms of the procedures and in an effective manner against occurring violations and can struggle with such violations.
- Rights extended by the copyright law such as right to distribution, performance, reproduction, adaptation and etc. provide the right of prohibiting others from using these rights.²⁵⁰

If the patent protection was chosen, term of protection would be shorter, the new program would have to be qualified as an invention and then the patent institution would have to be convinced on this point. In conclusion, this would mean that most of the computer programs would not be able to be included in the scope of protection.²⁵¹

Rights and authorities granted to the author in the scope of copyright law have an absolute and monopolist nature. In case of the violation of such absolute rights, the way of filing a lawsuit or complaint might be resorted.²⁵²

Copyright protection has also some shortcomings. Currently, process of creating computer programs goes beyond the process of designing long program texts by using programming languages. Because programmers can now design their programs without spending much time by planning, using visual object oriented programming and compiling any function they wish from the prepared codes. This situation emphasizes that written aspect of the computer programs have lessened and programs have changed into information and commands which teach the machines how to take action. Under these conditions, necessity of sui generis protection is being discussed in addition to the copyright protection.²⁵³

²⁴⁹ Ibid, p.25

²⁵⁰ Yusufoglu Fülürya, "Bilgisayar Programlarının Hukuki Korunması" Unpublished L.L.M. Thesis, İstanbul, 2002, p.14

²⁵¹ Kaypakoğlu, op.cit. p.26

²⁵² Topaloğlu, op.cit. p. 28-29

²⁵³ Kaypakoğlu, op.cit. p.26-28

3.1.4. Term of Originality

When we look at the process of designing and using computer programs, we notice that they are different from other intellectual and artistic works. Because of this difference, a discussion has started which focuses on the question whether the criterion of “originality” required by the copyright law can be applied to computer programs as applied to other types of works. Concept of “originality” in computer programs is clarified in Article 1/3 of the Directive. As per this legislation, “a computer program shall be protected if it is original in the sense that it is the authors own intellectual creation. No other criterion shall be applied to determine its eligibility for protection”. In that sense, the Directive does not stipulate any criterion for protecting computer programs as scientific and literary works other than having been created as a result of the intellectual efforts of the author. In the same line, recital 8 of the Directive states that “in respect of the criteria to be applied in determining whether or not a computer program is an original work, no test as to the qualitative or aesthetic merits of the program should be applied”. The Directive keeps the level of originality low and does not seek for any criterion other than having emerged as a result of the intellectual efforts of its creator. Computer programmer is not expected to show more creativity than his/her predecessors; there is also no need for a quality assessment to be performed according to the simplicity or complexity of the program structure.

Two conditions are envisaged in the FSEK to protect computer programs as scientific and literary works. On conditions that it bears the characteristics of its author and it is fixed on a material, computer programs shall benefit from the protection extended by the copyright law. In other words, as long as the program is not copied and it is created as a result of personal and intellectual efforts, each computer program shall benefit from the protection provided in the scope of the FSEK.²⁵⁴

It is not possible to say that concept of originality defined in the Directive and concept of author’s characteristics stated in the FSEK correspond to each other properly. Originality prescribed in the Directive brings more objective standards when compared with the author’s characteristics defined in the FSEK. In this context, depending on the fact that it provides legal certainty and eliminates the probability of

²⁵⁴ Yusufoglu, op.cit. p.31

implementing excessively subjective conditions on originality, it is suggested that the definition used in the Directive be reflected in the Turkish legislation as it is.

3.1.5. Authorship and Ownership of Computer Programs

Authorship of computer programs is clarified in Article 2 of the Directive. Directive stipulates a general principle by which authorship of computer programs is to be determined, but assures Member States considerable flexibility to deviate from this in its legislation. The general principle is that the author shall be the natural person, that is, the human being who has created the program. Two variations of this general principle are permitted. Firstly, in accordance with Article 2/1 of the Directive, member states may alternatively allow for a legal person to be treated as the author. The second variation is that Member states may apply their provisions on collective works to computer programs. The definition of “collective works” is not explained in the Directive and it is to be left to the national law.²⁵⁵

Regarding ownership, firstly, the general rule which states that the author is initial owner of copyright although article 2/2 and 2/3 of the Directive does not say explicitly, Member States should treat the author of a computer program as the initial owner of “exclusive rights” therein. Secondly, article 2/1 requires that where a group of natural persons create a computer program jointly, the exclusive rights shall be owned jointly. Lastly, article 2/3 of the Directive creates a special rule concerning the initial allocation of the right to exercise economic rights. According to this article, a computer program which is created by an employee in the conduction of his/her duties or following the instructions given by his/her employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise stated by contract.

FSEK does not contain any specific provisions on the authorship of computer programs. General provisions provided for Chapter II of the Law No: 5846 (Articles 1B (b) and 8-12) shall be applied. Article 8 of the FSEK approves that initial owner of the work shall be the real person who creates it. Creator of a computer program is the person who makes the preliminary work and writes the codes for the program. When we

²⁵⁵Dreier, Hugenholtz, op.cit. p.218

assume that a work has been created by a single real person, the solution is easy and the author, in this case, is the person who creates the work through his/her personal efforts and intellectual activities.²⁵⁶ In that sense, there is no problem of alignment between the Directive and FSEK.

Where a group of people create a work jointly, this is called joint authorship. Authorship is governed in two ways in the Law No: 5846. Two different authorships are envisaged as joint and participation.²⁵⁷ Computer programs, as required by their mathematical natures, are created as a result of team work. Article 9/1 of the FSEK governs joint authorship. As per this Article: “If a work created jointly by more than one person can be divided into parts, each person shall be deemed the owner of the part he created”. For a work to be accepted as joint work, the part created by each author has to be known and parts on which the joint authors contributed should be able to be differentiated. In this case, if possible, separate parts of the work can be evaluated individually in economic terms.²⁵⁸ There is no requirement of compliance on this point since the relevant provisions in the Directive have been left to the national laws of the countries.

Heading of the Article 10 of the FSEK is “Union of Authors”. Pursuant to this Article “If a work created by the participation of more than one person constitutes an indivisible whole, the author of the work is the union of the persons who created it”. As different from the joint authorship, in participation, there are no separate chapters created by each author. In each bit of the work, you can find the endeavour of the authors. None of the authors can claim that he/she has created a certain chapter of the work.²⁵⁹ For instance, sometimes hundreds of people can work for the software of a computer program and individual parts of the program designed by different people might not mean anything alone. This type of authorship is an example for participation. This computer program can sustain its existence only as a whole; parts of the program designed by different people are just meaningless codes.²⁶⁰ Whether this article corresponds to Article 2/2 of the Directive is not clear because there is no explicit

²⁵⁶ Yusufoglu, op.cit. p.59

²⁵⁷ Kılıçoğlu, loc.cit. p.181

²⁵⁸ Genç Arıdemir Arzu, “Türk Hukukunda Eser Sahibinin Çoğaltma ve Yayma Hakları”, Vedat Kitapçılık, İstanbul, 2003, p.42-43

²⁵⁹ Kılıçoğlu, op.cit. p.183

²⁶⁰ Yusufoglu, op.cit. p.66

reference to the relationship between the authors.²⁶¹ However, this article leads to legal conditions provided for by the Directive in connection with the situation of multiple authors and there is no problem of compliance with the Directive. As a matter of fact, since there is no definition of joint works neither in the *Acquis Communautaire* nor in the Berne Convention (Berne Convention refers to joint works only in the repeated Article 7 but no definition is included), there is no provision requiring compliance with EU standards or international standards.²⁶²

Computer programs created by employees are specified in Article 18/2 of the FSEK. Pursuant to this Article, “The rights in works created by civil servants, employees and workers during the execution of their duties shall be exercised by the persons who employ or appoint them; provided that the contrary may not be deduced from a special contract between such persons or from the nature of the work”. In case the computer program is created under a services contract, author shall be the person who designs the software and owner of economic rights regarding the program shall be the software company.

This article is also in compliance with Article 2/3 of the Directive, however since the wording is not appropriate, it might lead to misunderstandings. Instead of the term “the rights in works” used in the Law, the term “economic rights” should be used.²⁶³

Lastly, Directive directly does not talk about the moral rights of the authors, which means they are not in the scope of harmonization by the Directive, thus one can understand from this approach that non economic rights are left to be governed by the national legislations of Member States. Therefore, general provisions of the FSEK shall be applied on the moral rights and no harmonization shall be required.

3.1.6. Economic Rights of the Author

FSEK does not contain economic rights specific to computer programs. There are common provisions for all authors and the said rights are defined in Articles 21, 22, 23, 24. Although there is no general problem of harmonization, only the parts of the

²⁶¹ Sinodinou, op.cit. p.5

²⁶² Ibid. p.5

²⁶³ Ibid. p.6

articles related to computer programs will be examined and general harmonization of the articles will be elaborated together with the provisions of relevant Directives for the sake of the integrity of the topic.

3.1.6.1.Reproduction

Right to reproduction is defined Article 4/1(a) of the Directive. According to this article, “The author has a right to do or authorize the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the right holder.” This right is provided in article 22 of the Turkish law. In the last paragraph of this article is also stated that the right of reproduction shall also extend to loading, displaying, running, transmission and storage of a computer program where such acts require temporary reproduction of the computer program. It is proposed that the term temporary in the previous sentence is deleted or that it is replaced by the following phrase permanent or temporary.²⁶⁴

3.1.6.2. Translation and Adaptation

This right is stipulated in article 4/1 (b) of the Directive as “translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program”.

Right of adaptation is envisaged in the scope of the same wording in the Directive on the legal protection of the computer programs and 96/9/EC Directive. In both Directives, scope of the adaptation right is comprehensive and translation and any kind of alteration is encompassed. Only in those two areas, harmonization is ensured with the European legislation on the adaptation right. 2001/29/EC Directive does not envisage alignment for all categories of works related to right of adaptation.

Pursuant to article 21 of the FSEK “The right to exploit a work by adapting it belongs exclusively to the author”. Right of adaptation is not defined in the FSEK. In that sense, scope of the right of adaptation bears importance in terms of harmonization with the

²⁶⁴ Ibid. p.7

Directive. On the condition that the term adaptation is broad and includes also acts of translation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, these provisions comply with the relevant provisions of the Directive. If the term adaptation does not cover all the acts mentioned in the Article 4/1 (b) of the Directive, for instance, as there is no explicit reference to the right of translation in Turkish Law it is not clear if acts of translation are also covered by the general right of adaptation, there is no full compliance with the Directive. In such a case, it is recommended that a new provision is added to Article 21 of the FSEK on the adaptation of computer programs.²⁶⁵

3.1.6.3. Distribution Right and Rental Right.

On the protection of computer programs, rental right is a kind of distribution and it is included in the scope of right of distribution. There is no definition for the rental right in the text of the Directive 2009/24 EC. However a definition can be found in the recital 12 of the Directive. In accordance with this definition “the term rental means making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof. This term does not include public lending which accordingly, remains outside the scope of this Directive”

On the other hand, Article 2 (a) of the Directive 2006/115/EC of the European Parliament and of the Council on rental right and lending right, a definition is provided for rental right. As per this Article "rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage". Definitions of the rental right in the computer programs Directive and the Directive 2006/115/EC must be considered as similar and the differing wording does not have any legal signification or legal consequences.²⁶⁶

Rights of distribution and rental are defined in Article 23 of the FSEK. In accordance with this article, a common provision is envisaged for all categories of works and no provision is stipulated as specific to computer programs. In this context, remarks on the alignment of Article 23 will be discussed while the Directive 2006/115 is being elaborated.

²⁶⁵ Ibid. p.8

²⁶⁶ Ibid. p.8-9

Article 4/2 of the Directive 2009/24 EC refers to exhaustion of rights principle. According to this article “The first sale in the Community of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Community of that copy with the exception of the right to control further rental of the program or a copy”.

Since the exhaustion of distribution right within the Community is a point concerning the EU membership; there is, now, no requirement for Turkey regarding harmonization.

3.1.6.4. Exceptions to the restricted acts

Restricting the rights on intellectual and artistic works means either the author is prevented from using these rights partially or completely due to various reasons or authority to use these rights is transferred to another person or institution without the permission of the author. When the restrictions on the intellectual rights are kept at the minimum level and the intellectual labour is encouraged, the number and quality of the works are improved for the society and the people get the maximum benefit thereon.²⁶⁷ Although the restrictions are tried to be kept at minimum level with the help of the legal arrangements, it has become very easy to violate the rights of the author because of the technological developments. These violations are more in number regarding the use of computer programs. Close relation between the computer programs and technological advancements requires a clear identification for the limits of protecting and restricting intellectual rights.

Concept of “fair use” or personal use exception has been approved by the law makers for a long time. This principle is mentioned in both national and international texts. In accordance with this principle, it is allowed to reproduce the work as one copy without seeking profit and for personal use. Pursuant to technological developments, some additions have been made to this principle. Accordingly, the requirement that such reproduction may not prejudice the legitimate interests of right holders without good reason or conflict with the normal exploitation of the work has been introduced.²⁶⁸ The subject of personal use is regulated in Article 38 of the FSEK in line with the

²⁶⁷ Erel, “Fikri Hukukta Bilgisayar..”, loc.cit, p.193

²⁶⁸ Suluk,Orhan, loc.cit p.565

international rules. Paragraph one of the same article governs reproduction of all intellectual and artistic works for personal use. Paragraphs 2 and 8 stipulate reproduction of computer programs for personal use.

As per paragraph 2 of Article 38 of the FSEK “In the absence of specific contractual provisions, the reproduction and adaptation of a computer program by the lawful acquirer is permitted where necessary for the use of the computer program in accordance with its intended purpose, including for error correction.” In the scope of exception of personal use, some legal freedoms have been recognized for the lawful acquirer of a computer program. When this article is examined, “being the lawful acquirer” has been determined as the pre-requisite of this freedom. The program is to be acquired through a lawful transaction or by means of subrogation or as a requirement of the law. The lawful acquirer of a computer program is the person who obtains it in a lawful manner, who takes it over, who has a licence, who is authorized by the aforementioned people and the successor of the said people.²⁶⁹

This provision has adopted the wording of the Article 5/1 of the Directive. The provision complies in general with the provisions of Article 5/1 of the Directive. However the reference to the correction of errors should be abolished in this context because there is a special provision for the correction of errors in the following paragraph of Article 38 and this presents a contradiction.²⁷⁰

Furthermore, another amendment has been proposed for the term of “adaptation” stated in Article 38/2 of the FSEK. It is proposed that adaptation right on the computer programs is governed under a separate provision to indicate that all acts stated in Article 4 (b) of the Directive are included in the scope.

Pursuant to Article 38/3 of the FSEK, “The loading, running and error correction of a computer program by a person who has lawfully acquired the program may not be prohibited by contract”. This provision does not comply with the main body of the Directive however it is based on recital 13. Recital 13 states that “the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract. In the absence of specific contractual provisions, including when a copy of the program has

²⁶⁹ Tekinalp, op.cit. p.194

²⁷⁰ Sinodinou, op.cit. p.10

been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy”.

The contradiction between Article 38/2 and 38/3 of the FSEK is caused by the lack of coherence between Article 5(1) and recital 13 of the Directive. One possible way of correcting the situation is joint interpretation of the relevant article and recital 13. Accordingly, loading, running and error correction may not be prohibited by the contract but other acts may be.²⁷¹

On the other hand, last sentence of Article 38/3 of the FSEK refers to the freedom of making back up copy. Original of the computer program might be distorted or damaged. A contact with any liquid, strong magnetic waves, virus programs or collapse of the computer might damage the program. Back up is a precaution against such potential threats.²⁷² Making of a backup copy which is very ordinary precaution for a computer user cannot be prevented by contract. This provision complies fully with the provisions of Article 5(2) of the Directive. Article 5(2) of the Directive stipulates that the making of a copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

Pursuant to Article 38/4 of the FSEK, “The person who has acquired the right to use a computer program may observe, analyze or test the functioning of the program in order to determine the ideas and principles underlying any element of the program while performing any of the acts of loading, displaying, running, transmitting or storing the program which he/she is entitled to do.” Wording of the article explicitly emphasizes that the person who has acquired the right to use a computer program may analyze the ideas and principles underlying any element of the program and its functioning while performing any of the acts he/she is entitled to do. It is understood that analyzing for the purpose of making a research is not allowed but the person can make analysis on the acts he/she is entitled to do.²⁷³

The equivalent of the Article 38/4 of the FSEK is Article 5(3) of the Directive. The Directive states the same subject as “The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the right holder, to

²⁷¹ Ibid, p.11

²⁷² Topaloğlu, op.cit. p. 39

²⁷³ Yusufoglu, op.cit. p.113-114

observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.” This provision is in compliance with the Article 5 (3) of the Directive. The only difference between the FSEK and Directive is the statement of “without the authorisation of the right holder”. It is suggested to add the same phrase in order to make it clearer that the acts stated in the article can be done without a special permission of the right holder.²⁷⁴

As per Article 38/5 of the FSEK “Where reproduction of the code and translation of its form in the sense of reproduction and adaptation of the computer program are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, the performing of such acts shall be permitted, provided that the following conditions are met.”

This article governs the concept of reverse engineering. Reverse engineering is to reach to the source codes of the program by going reverse the way followed by the creators of the program to be able to obtain information on the interfaces of a computer program prepared by someone else. Interfaces of a program should be consistent to secure interoperability, in other words working together with other programs. To ensure interoperability between various programs, programs similar to those or better ones need to be imitated. For interoperability, program interfaces should be provided. To this end, the version of the source code which is changed into machine code by means of compiler or assembler should again be turned into source code through using reverse engineering methods by means of the programs which are called disassembler.²⁷⁵ The person who will perform the act of disassembling should either be a licensee or another person having the right to use a copy of the program or a person authorized to perform these acts in their name. Secondly, these people are prohibited from using the information they obtain as a result of the act of this disassembling. It is stated that

²⁷⁴ Sinodinou, op.cit. p.11

²⁷⁵ Yusufoglu, op.cit. p.114-115

disassembling can be performed not on the whole program but only on the parts required for ensuring interoperability.²⁷⁶

In case the freedom recognized by the method of reverse engineering is not pointed out clearly, since misuses might emerge through this freedom which arises from a technical requirement, the conditions under which this method can freely be used and concerning restrictions are regulated in Article 38/5 of the FSEK in accordance with the articles of the Directive:

1. That these acts are performed by the licensee or by another person having the right to use a copy of the program or by a person authorized to do so in their name,

This first sub-paragraph regulated as the restriction to freedom of reverse engineering defines who will perform the act of reverse engineering which is known as the translation of code form. There is a restriction for the people who can perform the act of reverse engineering. The people who can perform reverse engineering have been determined; although this looks like a restriction, since reverse engineering requires time, efforts and capital, it can be carried out not only by the right owner but also by the third parties who will be authorized to fulfil this act.

2. That the information necessary to achieve interoperability was not made available to the persons specified in subparagraph one,

If the information concerning interfaces is made available to the persons, reverse engineering cannot be performed. If the information necessary to achieve interoperability was made available by the owner of program to the licensee or another person having the right to use a copy of the program or a person authorized to do so in their name, it will naturally be unnecessary for these people to try to achieve machine code by using reverse engineering. Sometimes, source codes of the program interfaces are published together with the program or made available to the users for a certain fee.

3. That these acts are confined to the parts of the program which are necessary to achieve interoperability.

Freedom of reverse engineering granted for achieving interoperability shall be applied by the person having the right to use the program or persons specified in subparagraph one only to achieve interoperability and on the parts of the program which

²⁷⁶ Topaloğlu, op.cit. p. 39

are necessary to this end. As understood from the provision, reverse engineering cannot be applied to the parts other than those specified here. However, in some cases, interfaces might not be clear enough and might be hidden among other codes. In such cases, it is accepted that people who use the method of reverse engineering might benefit from this freedom only for the purpose of achieving interoperability and without deviating from this purpose.

Article 38/6 of the FSEK states the ways to use the information obtained through reverse engineering. Reverse engineering is granted pursuant to the previous paragraph and restrictions are specified in terms of “positive conditions”. In this paragraph, “negative conditions” of the reverse engineering are defined. It is clearly expressed that the freedom granted cannot be interpreted in a manner to allow the following:

1. To be used for purposes other than to achieve the interoperability of the independently created computer program,

Here, purpose of reverse engineering which is achieving interoperability is reminded and it is stated that such freedom cannot be granted for purposes other than this. The only purpose should be ensuring interoperability with another computer program.

2. To be given to others, except where necessary for the interoperability of the independently created computer program,

It is clearly expressed that the information obtained following reverse engineering is performed by the persons having the right to use a copy of the program or persons authorized to do so in their name and the codes are converted shall not be disclosed to other people.

3. To be used for the development, production or marketing of a computer program substantially similar in its expression or for any other act which infringes copyright.

In case the person uses reverse engineering other than its real purpose, develops, produces and markets a computer program similar to the initial computer program, he/she infringes the rights of the owner of the program.

As per the last paragraph of Article 38 of the FSEK "The provisions of the sixth and seventh paragraphs may not be interpreted in a way that conflicts with the normal exploitation of the program or that unreasonably prejudices the rightholder's legitimate

interests”. It is stipulated that the freedoms stated in paragraphs six and seven shall not be interpreted in a way that conflicts with the normal exploitation of the program or unreasonably prejudices the rightholder's legitimate interests. Since each act of reverse engineering needs to be evaluated according to its own conditions and has a different purpose in its nature, such general provision proves to be well-directed. If an act of reverse engineering results in the creation of a program which will be rival to the initial program, the conclusion should be that there is a violation of copyright. However, if the act of reverse engineering is performed for the purpose of training or making research or to create a second program which can work compatible with the initial program, it is concluded that there is no violation.²⁷⁷

Provisions of the FSEK on converting to source code are compatible with Article 6 of the Directive because these provisions are literal translation of the relevant article.

3.2. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 ON RENTAL RIGHT AND LENDING RIGHT AND ON CERTAIN RIGHTS RELATED TO COPYRIGHT IN THE FIELD OF INTELLECTUAL PROPERTY

3.2.1. Background of the Directive

Concept of “Public Lending Right” has emerged at the beginning of 20th century in parallel with the development of libraries. Particularly after the World War II number of public libraries rapidly increased and considerable amount of materials was lent. Authors whose works lent by the public libraries free of charge claimed that this situation cut their income from the sales of books and therefore their loss had to be compensated. This argument raised the debate among the authors, libraries and publishers.²⁷⁸

In this case, lawmakers did not tend to make legal arrangements, however in time some countries gave to the right-owners exclusive right of authorizing or prohibiting libraries from lending their works, and some countries granted the right of

²⁷⁷ Yusufoglu, op.cit. p.116-118

²⁷⁸ [www.ifla.org/III/clm/p1/PublicLending Right-Backgr.htm](http://www.ifla.org/III/clm/p1/PublicLending%20Right-Backgr.htm) 05.04.2010

charging certain amount in return for the lent works. Public lending right was first regulated in the legislation of Scandinavian countries.²⁷⁹

3.2.2. Need for Alignment of Public Lending Right

European Commission published the first document which states that the alignment should be assured among the member states in the field of copyright and related rights on 07 June 1988.²⁸⁰

This document consists of seven different chapters considered by the Commission to be worked out in terms of harmonization. Chapter 1 deals with place and importance of copyright in the European Community, Chapter 2 focuses on piracy and effects of piracy on different sectors, Chapter 3 is on reproduction of works for the purpose of personal use and copyright fee, Chapter 4 is right of distribution, principle of exhaustion and right of rental, Chapter 5 is computer programs, Chapter 6 is legal protection of databases and last chapter is bilateral and multilateral relations of the Community with the other institutions and agencies. There is no chapter in the document on the right of lending.

Following the publication of the document of 1988, substantial amount of remarks and criticism were submitted to the Commission. These criticisms stated that a legislation which do not contain lending right but regulates only rental right would not be sufficient for alignment activities.²⁸¹ It is a fact that each member state had different perception of lending right in the framework of its economic and social structures and cultural policies and they tended to implement differently. Some countries governed this right in their Laws on Intellectual and Artistic Works while others enacted separate laws regarding this right. In the same way, while some countries assessed this right within the scope of right of distribution as one of the economic rights, some countries regulated the same right as an individual category of economic rights out of the scope of right of distribution.

In line with the main principles of the document and criticism submitted, the Commission accepted to prepare a proposal on the Directive and published this

²⁷⁹ <http://www.plr.uk.com> 05.04.2010

²⁸⁰ Green Paper on copyright and the challenge of technology dated 07 June 1998

²⁸¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri> 06.04.2010

Directive on 05 December 1990. The Directive which includes the right of lending as well was approved by the European Parliament on 19 November 1992.²⁸² This Directive has been amended by the “2006/115 EC Directive on Rental and Lending Right” on 12 December 2006.

3.2.3. Purpose of Harmonization and Definitions of Rental and Lending Rights

Articles 1 and 2 of the Directive first elaborate on the exclusive rights of lending and rental which are the purpose of alignment, then these rights are defined and lastly it is stated that lending and rental rights are not in the scope of “principle of exhaustion”.

Article 1(1) of the Directive stipulates that “In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1)”.

The point which needs attention in this article is the statement of “exclusive right of lending”. During the preparation of the text of the Directive, the two issues which were discussed most by the Commission Working Group were the lending right and whether it should be accepted as an exclusive right or not. Most of the member states did not even want the inclusion of this right in the Directive either because of economic issues or since they did not know how to apply lending right. Some states said that this right needs to be applied compulsorily only for some certain groups of works.²⁸³

In this case, the Commission initially considered to regulate public lending right only as a right to remuneration however later on they decided to recognize this right as an exclusive right. On the other hand, Article 6 of the Directive offers to the member states the opportunity of being able to choose right to remuneration instead of exclusive lending right.²⁸⁴

Article 2(1) of the Directive states that “For the purposes of this Directive the following definitions shall apply: rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage; lending

²⁸² Dreier, Hugenholtz, op.cit. p.239

²⁸³ Reinbothe Jörk, Levinski Silke von, “Directive on Rental and Lending Rights and on a Piracy”, Sweet&Maxwell, London, 1993, p32

²⁸⁴ , Dreier, Hugenholtz, op.cit. p.243

means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.”

What is meant in the Directive by the statement of establishments which are accessible to the public is libraries. Although the definition of public is not included in the Directive, in addition to public libraries, libraries belonging to schools, universities, institutions and agencies which offer services for a certain group are also evaluated as the establishments which are accessible to the public in the scope of the Directive.

Statement of “direct or indirect economic or commercial advantage” in the Directive was discussed very long during the preparation of the text and decided to be the most appropriate statement.²⁸⁵ Accordingly, the main difference between rental and lending is indicated whether making use of a work is reciprocal or not.²⁸⁶ While the rental is related to an economic or commercial benefit, such benefit is not taken into consideration in lending.

Furthermore, in the Directive, the statement of “for a limited period of time” is used in order to show the difference of lending from selling or giving as a present which are acts of offering for use for an uncertain time. No matter it is rental or lending; the material which becomes the subject of one of these two acts has to be given back after a certain period.²⁸⁷

Rights of rental and lending are envisaged within the scope of distribution right in paragraph one of Article 23 of the FSEK. Pursuant to this Article “The exclusive right to rent, lend, put up for sale or distribute in any other way, the original or copies of a work, belongs to the author.” The same right is granted to the performers in Article 80/1A-2 of the FSEK, to the phonogram producers in Article 80/1B-1 and to the film producers in Article 80/2.1 and it is stated that “shall have the exclusive right of authorizing or prohibiting the direct or indirect reproduction, distribution, sale, rental and lending to the public of the fixation”.

As explained in the articles, distribution right of the author and owner of the related rights covers the authorities of “putting up for sale”, “renting”, “lending” and

²⁸⁵ Reinbothe, Levinski, op.cit. p.38

²⁸⁶ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.418

²⁸⁷ Reinbothe, Levinski, op.cit. p.36

“distributing by other means”. “Putting up for sale” means offering intellectual and artistic works for sale to transfer their property in return for a certain fee. “Distributing by other means” is putting original and reproduced copies of the work in circulation by aims and methods other than selling, rental and lending.²⁸⁸ Although “rental” and “lending” are defined in the FSEK, rationale of Article 14 of the Law No: 4630 amending Article 23 of the FSEK states that the article is in line with the Council Directive 92/100.

Although the FSEK looks compatible with the Directive in general, it is suggested that the definitions of rental and lending be included in Article 1b of the FSEK in accordance with Article 2(1) of the Directive 2006/115 and definition of rental is stated as making available for use, for a limited period of time and for direct or indirect economic or commercial advantage; definition of lending is stated as making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.²⁸⁹

In accordance with the Directive, whether rental and lending rights are regulated as a separate category of economic right apart from distribution right of author and owner of related rights is at the disposal of the lawmakers. When copyright laws of the EU states are examined, it is observed that some states govern the rights of rental and lending within the right of distribution whereas others govern these rights as a new financial right apart from the right of distribution. Therefore, the FSEK which regulates lending right within the right of distribution presents alignment with the Directive.

On the other hand, in spite of the fact that lending right is stated as a monopolized right of the author in Article 23 of the FSEK, acts of lending are currently conducted by the libraries without permission of the author and no charge is paid to the right owners.

In this context, it is proposed that Article 23 of the FSEK be revised and provision of “an author does not have the right to prohibit the public lending of copies of his/her work from libraries but the author has the right to obtain equitable

²⁸⁸ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.171

²⁸⁹ Kallinikou, Dionysia. “Memorandum On The Compatibility Of The Turkish Legislation With Directive 92/100 And 93/83 Archive of Ministry Of Culture And Tourism Ankara 2007 p. 2

remuneration for such lending” be added to the last paragraph of the article. It is also suggested that the statement of “the principles and rules related to this article as it concerns the public lending right shall be arranged by a regulation to be issued by the Ministry of Culture and Tourism” be included to facilitate the implementation.²⁹⁰

On the other hand, Article 3(2) of the Directive points out an exception that buildings and works of applied art cannot be the subject matter of rental and lending rights. Article 3(2) of the Directive stipulates that “This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art”.

Pursuant to this Article, two-dimensional works such as an architectural drawing or picture of a building in a book can be deemed as the subject matter of rental and lending rights, however the building itself having three dimensions cannot be deemed in the scope of the said rights. Therefore, no permission from the architecture is required to rent a flat or no fee is charged.²⁹¹

Considering the consequences of not having any provision in the FSEK on this subject, it is suggested that a provision in parallel with the provision in the Directive be added in paragraph one of Article 23 of the FSEK.²⁹²

3.2.4. Exhaustion of Rights

Article 1 (2) of the Directive states that “The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1)”.

The Directive explains that “principle of exhaustion” cannot be accepted in terms of rental and lending rights. “Principle of exhaustion” is defined as follows: When the author gives his/her consent for the first time on the distribution of the original or reproduced copies of the work or fixation of performance by way of sale or other means, the right of sale shall exhaust. “A person who buys a work has a right to re-sale principally but he/she is not authorized to rent and lend. Article 23/II of the FSEK accepts the principle of exhaustion only in terms of publishing the work by means of sale in accordance with the Directive.

²⁹⁰ Ibid, p.4

²⁹¹ Reinbothe, Levinski, op.cit. p.43

²⁹² Kallinikou, op.cit. p.3

Approval of the right owner is required for authorizing the publication of a work by rental or lending after the property of a work is transferred following its first sale. Because, the Law reserves these rights on behalf of the author.

The reason for the law-maker accepts that the first sale of a work does not invalidates the rights of rental and lending is that both legal acts have an intolerable potential to damage the benefits of the right owner. Because when a person having bought a work rents it, this situation might cause a serious decline in the circulation of the work by sale in the market and right owner might suffer from a considerable amount of income loss. In the same way, the libraries lending the works create negative results in terms of economic benefits of the author.²⁹³

3.2.5. Right owners

Article 3(1) of the Directive specifies the right owners concerning the rights of rental and lending and the materials which are subject matters of the same rights.

Article 3(1) of the Directive states that “The exclusive right to authorise or prohibit rental and lending shall belong to the following: (a) the author in respect of the original and copies of his work; (b) the performer in respect of fixations of his performance; (c) the phonogram producer in respect of his phonograms; (d) the producer of the first fixation of a film in respect of the original and copies of his film.”

Pursuant to the Directive, the persons who have a right to authorise or prohibit rental and lending are authors, performers, phonogram producers and film producers. Although radio and television organizations in many states make use of copyright protection as the owners of related rights in the scope of their intellectual rights legislation, they do not have rental and lending rights as per the Directive.

Article 23/I of the FSEK which states “The exclusive right to rent, lend, put up for sale or distribute in any other way, the original or copies of a work, belongs to the author” is in accordance with the Directive.

In article 80/1A-2 of the FSEK, in line with Article 3 of the Directive, it is stated that the performer shall have the exclusive right of authorizing or prohibiting the rental and lending of fixation of his/her performance.

²⁹³ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.171

In article 80/1B-1 of the FSEK, in line with Article 3 of the Directive, it is stated that the phonogram producer shall have the exclusive right of authorizing or prohibiting the rental and lending of his/her fixation.

On the other hand, a film producer granted with related rights as per article 80/2 of the FSEK is a natural or legal person who creates a cinematographic work with his/her capital, power of organization and skills and fixes on a film (film strip). Therefore, the concept of film producer might be misleading. Actually, film producers who have related rights are only the producers of cinematographic works. In other words, producer of a film which is not qualified as a cinema cannot be the owner of related rights as well. People who fix the films which are not qualified as a work are protected as per Article 84 of the FSEK within the framework of unfair competition. In that sense, cinematographic works are only a part of films and they are differentiated and protected due to their nature of being a work. Article 2 (1) of the Directive defines the concept of film as cinematographic or audiovisual work or moving images, whether or not accompanied by sound. So, producers of all films, no matter whether they are qualified as a work or not shall be protected as related right owners. However, in accordance with the FSEK, only the authors of cinematographic works shall be protected as stated above. For the examples of films which are not accepted as cinematographic works, filming a drama or conference only for the purpose of transfer or images recorded by the security camera can be given²⁹⁴ However, this is a controversial issue in the doctrine and it is stated that films which are not qualified as work shall be protected in the scope of Article 80/2 of the FSEK.

Article 2/2 of the Directive states that “The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors”. Article 8/3 of the FSEK which states “In the case of cinematographic works, the director, the composer of original music, the scriptwriter and the dialogue writer are joint authors of the work” accepts the director as one of the authors in accordance with the Directive.

²⁹⁴ Arkan, op.cit. p.24

Article 3/3 of the Directive points out “The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences”. In our legislation, pursuant to the reference of Article 23 of the Regulation on Neighbouring Rights, various provisions of the FSEK on assignment and transfer such as articles 48, 49, 50 and 56 shall also be applied for the related rights owners. However, it is thought that the arrangements made by articles 48 and 49 of the FSEK can be applicable only for performers. The purpose of this arrangement which aims at monitoring and oversight is not to let moral right be interrupted and damaged following the assignment of the economic right. Therefore, it is not deemed possible to be implemented by the other related right owners who do not have moral rights.²⁹⁵

3.2.6. Unwaivable right to equitable remuneration

Article 5 of the Directive regulates unwaivable right to equitable remuneration. In accordance with this Article:

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.
2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.
3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.
4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

According to the Directive, where the work is requested to be rented, author or right owner has a right to obtain an equitable remuneration for the rental and this right cannot be waived authors or performers.

It is suggested that the said right be included in the FSEK since there is no article in the Law regarding the right to equitable remuneration.²⁹⁶ As per paragraphs three and four of Article 5 of the Directive, member states shall regulate the

²⁹⁵ Ibid. p.228.229

²⁹⁶ Kallinikou, op.cit. p.5

implementation limits for the administration of right to equitable remuneration and it is allowed that administration of this right can be governed by collecting societies.

In accordance with Article 42 of the FSEK; authors, related rights holders and publishers may set up collecting societies in order to protect the mutual interests of their members, to ensure the management and pursuit of the rights granted by this Law and the collection and distribution of fees to the right holders. Collecting societies are the legal persons subject to special law and carry on their activities in a non-profit manner. Collecting societies are subject to administrative and financial audit of the Ministry of Culture and Tourism.

As a matter of fact, it will be appropriate if the administration of lending right is regulated by the collecting societies which are established to protect mutual interests of their members and subject to administrative and financial audit of the Ministry. Furthermore, last paragraph of Article 42 stipulates that “The rights granted by this Law to authors and related rights holders may not be pursued by any unions, associations or similar organizations other than collecting societies founded within the country”.

3.2.7. Derogations from the exclusive public lending right

Directive 6 of the Article provides the member states the opportunity of derogations from the exclusive public lending right on condition that at least authors obtain remuneration. Member states are free to determine this remuneration. Member states may also exempt some establishments from paying this remuneration.

Article 6(1) of the Directive states that “Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives”.

This article offers member states the opportunity of making a choice between the exclusive public lending right and remuneration right.

There is no explanation in the article concerning by whom the right to remuneration will be followed. Member states shall leave the administration of this right to collecting societies and be able to exercise it by the Ministry departments or other administrative units. In addition, member states are free to determine who will pay this

remuneration. This remuneration may be paid by the libraries, state or another establishment or institution. Furthermore, the Directive does not prohibit that a certain part of this remuneration is transferred to right holders as social assistance, scholarships or cultural aids.

Second sentence of the article emphasizes that Member States are free to determine this remuneration taking account of their cultural promotion objectives. In our opinion, this provision should not be interpreted in a very broad manner and determination of a remuneration which is not compatible with the purpose of the Directive and copyright protection should be prevented.

Article 6(3) of the Directive says that “Member States may exempt certain categories of establishments from the payment of the remuneration”.

As per the relevant article, a member state who grants the right to remuneration at least for authors instead of exclusive lending right may exempt some libraries from the payment of the remuneration. However, the point to pay attention is that only some libraries may be exempt from the payment of the remuneration. Member states will be able to evaluate school libraries, scientific libraries and public libraries in the scope of this exemption. However, broad interpretation of this article which leads to exempting all libraries from the payment of the remuneration does not comply with the purpose of the article.²⁹⁷ The most obvious example of this implementation is the lawsuit filed by the European Commission against Portugal with the justification that all establishments which make public lending of the works are exempt from the payment of the remuneration to the authors in contradiction with Articles 1 and 5 of the Directive 92/100.

Portugal regulated public lending right by the Decree Law No: 332/97 dated 27 November 1997. Article 6 of the Decree Law states that the author has the right to remuneration for the public lending of the original or copies of the work and the owner of the establishment which makes available to the public the original or copies of the work is responsible for the payment. Last paragraph of article 6 exempts certain categories of establishments from the payment of remuneration such as public libraries,

²⁹⁷ Dreier, Hugenholtz, op.cit. p.251

school libraries, universities, museums, public archives, public institutions or private non profit institutions.²⁹⁸

As it is seen, Portugal made the necessary legal changes to harmonize its national legislation with the Directive 92/100; however they excluded almost all libraries as well as the public libraries from the public lending system.

In this case, European Commission applied to the European Court of Justice on 09 February 2005 on the grounds that Portugal exempted all categories of public lending establishments from the obligation to pay remuneration to authors in contradiction with Articles 1 and 5 of the Directive 92/100.

The rationale of the Commission for the case²⁹⁹ is as follows: According to Article 6 of the Decree-Law, an author is entitled to remuneration for the public lending of the original or copies of his work; the proprietor of the establishment which makes the original or copies of the work available to the public is responsible for payment of the remuneration; and the present Article is not applicable to public, school or university libraries, museums, public archives, public foundations and private non-profit-making institutions. Article 5(3) of the directive, pursuant to which Member States may exempt certain categories of establishments from the payment of the remuneration to authors cannot be interpreted as allowing for total derogation from that obligation of remuneration. The directive seeks to guarantee that authors receive appropriate income against their creativeness and they could recoup their investments and loss of income. However, the Decree-Law contradicts with the Directive on the aforementioned points.

In its defence, the Portuguese Republic argues that Article 5 of the directive, in particular paragraph 3 thereof, is ‘a compromise text’, imprecise, difficult to interpret and open to challenge as regards its meaning and scope. The drafting of that provision was also intended to be flexible in order to take into account the levels of cultural development specific to the different Member States. The effect of exempting certain ‘categories of establishments’ from payment of the public lending right would be that Portuguese citizens would not have access to, and would not be able to enjoy,

²⁹⁸ www.giart.org/.../public_lending/Commission_EU_GDA_answers_july_2003.doc, 10.04.2010

²⁹⁹ Commission of the European Communities v Portuguese Republic Case C-53/05, parag.6 The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

intellectual works under the same conditions. Moreover, the proprietors of the rights should in principle have obtained appropriate revenue in the exercise of their rights of reproduction and distribution. In addition, public lending is of minor importance in the economic area, so that the internal market could not be affected by that situation.

The Court concluded that Portugal could not be successful in harmonizing its national law with Articles 1 and 5 of the Directive. The basis of their judgment is explained as follows: As regards the wording of Article 5(3) of the directive, it should be noted that this refers to ‘certain categories of establishments’. Therefore it clearly follows that the legislature did not intend to allow Member States to exempt all categories of establishments. Exempting all categories of establishments limits authors to create new works, the lending right is not exhausted by the sale or any other act of distribution, whereas the distribution right may be exhausted, furthermore difference between the legislation of intellectual and artistic works impairs the smooth functioning of the internal market and adversely affects the competition environment.³⁰⁰

In the Turkish Law, as a result of the amendment issued by the Law No: 4110, interests of the author are protected better in comparison with the previous law. However, current legislation (Article 23/II, FSEK) is not sufficient. Although it can be said that there is not much problem in our country regarding rental, the subject has to be dealt with again in terms of public lending. Pursuant to the current legislation, authors can legally prohibit public libraries from lending their works to the third parties. However, since there is no provision in the law stating that lending is possible only if the appropriate remuneration is paid to the author, it is not certain whether the author may have such a request or not. Therefore, principles on rental and lending of a work need to be arranged by an amendment in the Law or secondary legislation such as by-laws or regulations. This arrangement should also clarify how to determine the amount and ratio of remuneration to be paid to authors in return for their works, who will make payment requests (authors or collecting societies) and process the payments, which establishments or libraries will be exempt from the payment of remuneration considering cultural and other needs of the country.

³⁰⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0053:EN:HTML>, 10.04.2010

3.2.8. Fixation Right

Fixation Right is governed by Article 7/1 of the Directive. This article stipulates that “Member States shall provide for performers the exclusive right to authorize or prohibit the fixation of their performances”. This article provides for exclusive rights for performers and broadcasting organizations including cable distributors to authorize or prohibit the fixation of their performances and broadcasts.³⁰¹

Whereas there is no definition in the EU Directives on the concept of “fixation”, FSEK defines it in Article 1B/e as “The act of recording sounds or representation of sounds or sounds and images in an apprehensible, reproducible and transmittable manner”. Although some international agreements³⁰² limit fixation right of performers only to sound fixations, Directive 2006/115/AT provides for no restriction in this direction. In that sense, FSEK is compatible with the Directive in terms of fixation right of performers.

Fixation right is not envisaged as one of the economic rights in the FSEK, it is evaluated in Article 22/2 under reproduction right. Fixation is a kind of reproduction indeed. Fixation is the first reproduction of a performance or broadcast on a tangible medium and is as such a pre-requisite for any further exploitation of the original performance or broadcast.³⁰³ For a performance to be distributed along large mass of people and to be able to enjoy some of the rights recognized by the FSEK, it needs to be made concrete by way of recording on a device.³⁰⁴ That is why fixation right is not designed as an autonomous right for authors, because of its special importance for performers to generate income after gaining publicity it is envisaged as an independent right for the performers.

80/1A-2 of the FSEK grants for the performers exclusive right of authorizing or prohibiting the fixation of their performances. Article 7/1 of the Directive brings the obligation that Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances. Although the provisions of the

³⁰¹ Dreier, Hugenholtz, op.cit. p.252

³⁰² WPPT a.2/c, TRIPS a. 14/1

³⁰³ Dreier, Hugenholtz, op.cit. p.252

³⁰⁴ Dural Halil Ali, “İcracı Sanatçıların Hakları ve Korunması” Unpublished L.L.M Thesis, İstanbul,1998 p.26

FSEK and Directive seem harmonized, it is suggested that fixation right be included in the FSEK as a separate right for performers.³⁰⁵

Article 7/2 of the Directive encompasses an arrangement pointing out that Member States shall provide for broadcasting organizations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

The equivalent of this article is Article 80/1C-1 of the FSEK. In accordance with this article “Radio-television organizations shall have the exclusive rights on authorizing or prohibiting the fixation of their broadcasts, their simultaneous transmission by other broadcasting organizations, their delayed transmission, their re-transmission, and their distribution via satellite or cable”. So, there is no problem of harmonization between the provisions of the Directive and FSEK.

3.2.9. Broadcasting and Communication to the Public

Broadcasting is a kind of indirect performance. Because, broadcasting possesses two main elements which have to be found in a performance; making use of the performance temporarily and as specific to that moment and performance being addresses to the public. However, this kind of representation right which has been improved thanks to the technology has gained such importance that it is regulated separately from the right of representation in most of the legislation.³⁰⁶

Article 8 of the Directive states that 1) “Member States shall provide for performers the exclusive right to authorize or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.”

2) Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence

³⁰⁵ Kallinikou, op.cit. p.5

³⁰⁶ Erel Şafak, “Komşu Haklar ve Sahipleri” Unpublished FISAUM Unpublished Conference Text, Ankara, 1998, p.157

of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them”.

Pursuant to the FSEK, performer’s consent is required for broadcasting a live or recorded performance by devices permitting transmission of signs, sounds and/or images. This right is stated in Article 80/1A-2 of the FSEK as “A performer shall have the exclusive right of authorizing or prohibiting the communication of such fixation to the public by devices permitting transmission of signs, sounds and/or images

As seen from above, FSEK provides exclusive right to phonogram producers on broadcasting phonograms; but Article 8/2 of the Directive 2006/115/AT provides equitable remuneration instead of exclusive right for phonograms published for commercial purposes. This provision requires that those who use the phonogram for the purposes of broadcasting or communicating to the public shall pay equitable remuneration to be shared between the relevant performers and phonogram producers. Since there is no provision in the Directive explaining which right holder will be paid or how the equitable remuneration will be determined, making necessary legal arrangements has been left to the discretion of the member states. Furthermore, it is stated in the Directive that Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them. FSEK, on the other hand, provides for the phonogram producers exclusive right of authorizing any communication to the public. In Article 80/2 of the FSEK, the statement which says in case fixed performances are communicated to the public, persons using them shall be obliged to pay remuneration evokes the concept of equitable remuneration but Article 80/1B clearly grants exclusive right. Therefore, not to create any ambiguity, Article 80/2 of the FSEK needs to be revised.

Article 80/1B-1 of the FSEK, as different from other provisions, mentions about exclusive right of phonogram producers on giving authority but there is no mention of authority of prohibition. In accordance with another decision by the Supreme Court of Appeals, radio and TV organizations which broadcast musical works have to receive written permission from the music producers who are the owners of related rights in

connection with the sound records they use in their broadcasts.³⁰⁷ However, since exclusive right embodies authorization and prohibition in its essence, this difference does not lead to any consequence. In addition, it is considered that this point should be corrected in order to ensure unity of wording in the Law.

Article 15 of the Neighboring Rights Regulation states that consent of the performer or sound producer is not required to retransmit a performance by radio or television however re-broadcasting organization has to pay remuneration to the relevant right holders. This article cannot be deemed valid because Article 80 of the FSEK clearly envisages this situation as an exclusive right.

In this case, Article 80/1B-1 of the FSEK and Article 8/2 of the Directive 2006/115/EC seem to contradict on publishing the phonograms reproduced for commercial purposes. However, as stated in the recitals of the Directive 2006/115/EC and in Article 6 of the Directive 93/83/EEC, member states should be able to provide for more far-reaching protection for owners of rights than required by Article 8. There are two probabilities in this case: To protect the exclusive right by maintaining the provision in the FSEK or to grant for the performers and phonogram producers the right to equitable remuneration. However, whereas penal sanctions such as imprisonment might be applied in case of violation of the exclusive right, such severe sanctions cannot be implemented when the right of equitable remuneration is violated. In that sense, it is argued that review of the EU directives should not be carried out only by comparing the relevant legislation and implementing the directives as they are but more comprehensive arrangements and more deterrent sanctions should be taken into consideration in line with the specific conditions of our country.³⁰⁸ On the other hand, the theory that phonogram producers see no benefit in prohibiting the publishing of phonograms fixed for commercial purposes and therefore they can get economic benefit only from the use of phonogram reflects the truth. In this context, the best solution as to the right to be granted by the Law should be decided considering country conditions.

³⁰⁷ Decision of the Supreme Court of Appeals: 11. H.D. 11.03.1999, E:1998/9958, K: 1999/3423

³⁰⁸ Yokuşoğlu Yetkin, Türkoğlu Ahmet, “92/100/AET Sayılı Fikir ve Sanat Eserleri Haklarının Kiralanması, Ödünç Verilmesi ve Bağlantılı Haklara İlişkin Konsey Direktifinin, 5846 Sayılı Fikir ve Sanat Eserleri Kanunumuzun İlgili Hükümleri İle Karşılaştırılması” Legal Fikri ve Sınai Haklar Dergisi, X, Haziran 2007, p.10

Article 80/1C-1 of the FSEK contains an arrangement on retransmission right of radio-television organizations. When we look in a detailed manner, we see that “simultaneous transmission”, “delayed transmission”, “re-transmission” and “distribution via satellite or cable” which represent different ways of retransmission are included in the text as if they are separate categories. However, what all these concepts mean is radio-television organizations have a right to retransmission by simultaneous or delayed transmission or distribution via satellite or cable.

In the EU Acquis Communautaire, right to retransmission via wireless means is recognized in Article 8/3 of the Directive 2006/115/EC. As per this article “Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the retransmission....” Article 80/1C-1 of the FSEK states that C) Radio-television organizations shall have the following exclusive rights on the broadcasts they produce: (1) Authorizing or prohibiting the fixation of their broadcasts, their simultaneous transmission by other broadcasting organizations, their delayed transmission, their re-transmission, and their distribution via satellite or cable.

As seen from above, broadcasting organizations are granted with an exclusive right on re-transmission of their broadcasts in both Turkish Law and EU Acquis Communautaire. However, the concept of retransmission used in the Directive means broadcasting simultaneously by another broadcasting organization. Also, the Directive limits the right to re-transmission by wireless means.³⁰⁹ In that sense, protection provided by the FSEK is more comprehensive than the one provided by the Directive. However, as it is stated before Article 8 of the Directive governs minimum protection and states may ensure more comprehensive protection in their national laws.

3.2.10. Distribution Right

Article 9/1 of the Directive on distribution right is as follows:

1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated here, including copies thereof, hereinafter ‘the distribution right’:

- for performers, in respect of fixations of their performances;

³⁰⁹ Dreier, Hugenholtz, op.cit. p.255

- for phonogram producers, in respect of their phonograms;
- for producers of the first fixations of films, in respect of the original and copies of their films;
- for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).

FSEK does not include any definition on the distribution right of the related right owners. In accordance with Article 23 of the FSEK which defines distribution right of the author, distribution right of the performer may be defined as renting, selling, lending or distributing in any other way, the original or copies of a fixed performance. Article 80/1A-2 of the FSEK states that a performer shall have the exclusive right of authorizing or prohibiting the fixation of his/her performance, sale, distribution, rental and lending of such fixation.

80/1A-3 of the FSEK states that a performer shall have the right of authorizing or prohibiting the distribution by sale or any other way, of the original or the copies of his/her fixed performances which have not yet been put up for sale or distributed in any other way in the domestic market.

Although Article 80 of the FSEK regulates right of distribution in a disorganized and complicated way, it is in accordance with Article 9 of the Directive. (ARKAN s.84)

Article 80/1B-1 and 2 of the FSEK, in harmonization with Article 9 of the Directive, says that the right of authorizing or prohibiting the sale and distribution of the fixation by any other means shall belong exclusively to the phonogram producer.

Both the Directive and 80/1B-2 of the FSEK require consent of the phonogram producer to distribute the original or copies of his/her fixations.³¹⁰ As a matter of fact, distribution right is regarded as a separate right also as to the decisions of the Supreme Court of Appeals. Such decisions state that distribution right is a stage which mostly follows reproduction; a reproduction work also possesses the right of being submitted for commercial use such as distribution, sale, rental therefore when the system used in the FSEK is taken into consideration it is obvious that distribution and reproduction is two

³¹⁰ Tekinalp, op.cit.p.265

different rights and compensation arising from the violation of distribution and reproduction rights has to be calculated separately³¹¹

The wording of subparagraphs 1 and 2 of Article 80/1B of the FSEK is different. In subparagraph one, sale and distribution of fixations are separate rights and in subparagraph two, in parallel with Article 23 of the FSEK and the Directive, sale is stated as a type of distribution.

Articles 80/2.1 and 80/2.2 of the FSEK, in harmonization with Article 9 of the Directive, states that the right of authorizing or prohibiting the sale and distribution of the fixation by any other means shall belong exclusively to the film producer.

Same as the distribution right of phonogram producers, subjects of distribution concerning the film producers are again concrete products such VCDs, DVDs.³¹² Distribution of films via internet which are not made concrete cannot be evaluated in the scope of right of distribution.

Article 9/2 of the Directive stipulates that the distribution right shall not be exhausted except where the first sale is made by the right holder or with his consent. In other words, “principle of exhaustion” or “principle of first sale” shall not be accepted without the consent of the author.

As per the principle of exhaustion, where the right holders of related rights approve the first sale of their performances, fixations and their copies, this permission shall be valid for the following sales as well. For example, a performer who offers to a phonogram producer his right of distribution of the sound conveyers which contain his/her performance cannot stop the sale of the said conveyers (tapes, CDs, etc.) to the main dealers, dealers and customers alternately. In this case, only the right of sale is exhausted. The author still has the rental and lending rights.³¹³

Although it is not stated clearly in the FSEK, as stated in the Directive, the distribution right is not exhausted until the first sale is made to the third persons by the right holder or with his consent. Because, Article 7/2 of the FSEK deems a work to have been published, if copies obtained by reproduction of the original are supplied to the public by way of selling, distributing or otherwise putting into commercial circulation

³¹¹ Decision of the Supreme Court of Appeals: 11. H.D. 07.12.2000, E:2000/7797, K: 2000/9773

³¹² Ibid, p.265

³¹³ Arkan, op.cit.p.91

with the consent of the right holder. Even if this provision is not taken into consideration, since paragraph one of Article 23 of the FSEK provides exclusive right for the author regarding publication regardless of its method, publication of the work without the consent of the author does not result in forfeiture of the right to publication envisaged in paragraph two. First sale made out of the consent of the author is realized without his/her will and that is why right to publication by sale is not exhausted.

Article 9/3 of the Directive states that the distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2) and points out “principle of exhaustion” or “principle of first sale” cannot be applied in terms of rental and lending rights as an exception. In other words, a person who buys the original or copies of any fixed performance has a right to re-sale it without the consent of the performer but he/she has no authority of rental.³¹⁴ Articles 80/1 A (3) and 80/1 B (2) of the FSEK put forward that “performers and phonogram producers shall have the right of authorizing and prohibiting the distribution by sale or any other way, of the original or the reproduced copies of their fixations which have not yet been put up for sale or distributed in any other way in the domestic market” and these articles imply that principle of exhaustion cannot be applied in terms of rental and lending rights.

Lastly, Article 9/4 of the Directive states that “the distribution right may be transferred, assigned or subject to the granting of contractual licences”. Article 9/4 is similar to 2/4, in that it provides that distribution rights may be transferred, assigned or licensed. It is left to the member states to implement this provision into their national laws in a way that fits their respective law systems.³¹⁵

As per the reference of Article 23 of the Regulation on Neighbouring Rights, provisions of the FSEK on assignment and transfer such as Articles 48, 49, 50, 56 shall be implemented by the holders of related rights comparatively. However, it is considered that the arrangements included in Articles 48 and 49 are comparatively applicable only for performers. Purpose of this monitoring and evaluation arrangement is not to interrupt and damage moral rights as a consequence of the assignment of economic rights. Therefore, we think that it cannot be applicable for the other related

³¹⁴ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.418

³¹⁵ Dreier, Hugenholtz, op.cit. p.257

right-owners who do not have any moral rights.³¹⁶ In that sense, there is no inconsistency between our legislation and the Directive.

3.2.11. Limitations to rights

In modern law systems, no right is considered to be unlimited and absolute. Because, in a society having unrestricted rights, you cannot have a peaceful life without conflicts.³¹⁷ That is why restriction of intellectual rights is of great significance in terms of social life and development.

As a matter of fact, limitations have been envisaged for the rights of related rights owners just like the rights of author. Thanks to these limitations, it has been made possible for the third persons to utilize the rights of the related rights holders without asking their permission.

In the European Union Law, arrangements for limitations specific to related rights are explained in Article 10 of the Directive 2006/115/EC. Furthermore, all exceptions and limitations applied for reproduction rights in Article 5 of the Directive 2001/29/EC are also binding for related rights owners. In accordance with Article 10 of the Directive 2006/115/EC:

1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

³¹⁶ Arkan, *op.cit.*p.230

³¹⁷ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” *op.cit.* p.237

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Limitations specified in the directives is concerning the rights regulated in their own contents. In other words, Directive 2006/115/EC is related to the utilization of distribution, performance and broadcasting rights regulated in Chapter II of this Directive; exceptions on the rights of reproduction and communication to the public are governed in the Directive 2001/29/EC.

It has to be pointed out that member states are free to or not to introduce the limitations specified in the Directive 2006/115/EC.

In Turkish legislation, limitations on related rights are stated in Article 80/7 of the FSEK and Article 24 of the Regulation on Neighbouring Rights. Pursuant to Article 80/7 of the FSEK The written permission of the related rights holders and the film producer shall not be necessary in the cases set out below;

1. Performance and communication of intellectual and artistic works to the public for purposes of public order, education and instruction, scientific research or news without aiming for profit;

2. Reproduction of intellectual and artistic works and radio television programs for broadcasting and personal use without aiming for profit;

3. Ephemeral fixations made by radio-television organizations by means of their own facilities and for their own broadcasts;

4. The cases specified in Articles 30, 32, 34, 35, 43, 46 and 47 of this Law.

In Article 80/7 of the FSEK, cases in which rights of related right owners are limited are specified under four sub-paragraphs. The first three sub-paragraphs are the limitations specific to the owners of related rights; sub-paragraph four makes reference to some articles which limit the rights of the authors and stipulates that these limitations shall also be applied to the owners of related rights. In these cases, owners of related rights shall not oppose to utilization of their rights by the third persons. However, as per Article 80/8 of the FSEK, such application may not prejudice the legitimate interests of the rightholders without good reason or conflict with the normal exploitation of the work.

As regards the limitations defined under Article 24 of the Regulation on Neighbouring Rights, it can be said that they are generally derived from Article 211-3 of the French Copyright Law.³¹⁸ However these limitations are not in compliance with the FSEK. It is noticed that some limitations not defined in the Law are stipulated in the Regulation. As a matter of fact, provisions of the concerned Regulation on limitations need to be re-evaluated considering the requirements of the Law.

3.3. COMPARISON OF THE TURKISH LAW WITH THE COUNCIL DIRECTIVE 93/83/EEC OF 27 SEPTEMBER 1993 ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION

3.3.1. Background of the Directive

The Satellite and Cable Directive has its roots in the Green Paper on Television without Frontiers that was published by the European Commission in 1984. The Green Paper proposed to eliminate legal barriers to trans-frontier television services within the European Community, especially in the area of broadcasting regulations and copyright law. The Green Paper eventually led to the Television without Frontiers Directive of 1989 which however did not contain any rules on copyright. The current Directive is the direct result of a Discussion Paper on The Broadcasting and Copyright in the Internal Market that was issued by the European Commission in November 1990.³¹⁹ After this and as a result of technological advancements in the field of broadcasting, when previously made arrangements did not suffice in settlement of copyright problems encountered in trans-frontier broadcasts, the Commission gives a proposal for a Directive in 1991 which after a discussion in the European Parliament was amended and subsequently adopted in the course of 1993.

Some of the purposes of the European Commission on this subject are as follows: To create a common television (TV) broadcasting market in the European Union, remove the borders for trans-frontier TV broadcasting and particularly harmonize copyright provisions of the member states to implement in such

³¹⁸ Dural, op.cit. p.40

³¹⁹ Dreier, Hugenholtz, op.cit. p.263

broadcasts.³²⁰ It also regulates free movement of the services within the European Union in parallel with the provisions regulating free movement of the goods.

3.3.2. Aim and Scope of the Directive

This Directive is related to satellite broadcasting of a work that has copyrights and its specific situation concerning cable retransmission. Pursuant to the Directive; an author shall have exclusive right to prohibit or authorize the satellite broadcasting (art. 2) and cable retransmission (Article 8) of his/her works.³²¹

As regards to any TV broadcast, in case all the operations of sending, transmission and reception of the signals happen only in one country, there is no problem in terms of the applicable law. As a natural fact, the law of the state in which all these operations are realized will be valid. The problem occurs when one or some of these operations are realized within the borders of different states. The recital of the Directive sets forth that cross-border TV broadcasting is currently obstructed by a series of copyright rules and the only way to overcome this problem is to define the notion of communication to the public by satellite at a Community level. This definition should also specify where the communication takes place legally. Article 1(2) of the Directive states “‘communication to the public by satellite’ means the act of introducing, under the control and responsibility of the broadcasting organization, the programme carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.” This country is mostly the one where the headquarters of these TV companies concentrate. In the light of this definition, it is assumed that communication to the public by satellite is made through only one country. And the legal system of that country is the only system to be referred to in the settlement of copyright problems.³²²

In this case, it is accepted that only the law of the state in which satellite broadcasting is made, namely the law of the state which sends programme carrying signals to the satellite will be applied. Whereas the Directive requires that retransmission made from other states takes place on the basis of individual or

³²⁰ Özcan, loc.cit. p.160

³²¹ “Fight Against Piracy Practical Manual” Ministry of Culture and Tourism Archive” Ankara, 2007, p.194

³²² Özcan, op.cit.p.165

collective contractual agreements between authors, holders of related rights and cable operators, it does protect this principle of freedom of contract in terms of cable re-transmission made in the same country. Furthermore, the Directive states that authors and holders of related rights may use these rights only through collecting societies and where no agreement is concluded, mediation system shall be implemented.³²³

Directive 93/83 contains four chapters and fifteen (15) articles. Chapter I contains only one article comprising of the definitions of "satellite", "cable re-transmission" and "collecting society". Paragraph 5 of Article 1 has been constructed in the light of paragraph 2 of Article 2 of the Directive 92/100 clarifying that the principal director of a cinematographic or audiovisual work is considered as its author or one of its authors allowing also other contributors to be considered as co-authors.³²⁴

Chapter II elaborates on broadcasting by satellite and contains articles 2, 3, 4, 5, 6 and 7. Article 2 provides for the exclusive right for authors to authorise the communication to the public by satellite of copyright works. Article 3 states that the authorisation for the broadcasting right may be acquired only by agreement, laying down the possibility of extended collective licence. Article 4 refers to the rights of performers, phonogram producers and broadcasting organisations as it concerns the communication to the public by satellite, Article 5 deals with the relation between copyright and related rights, Article 6 stipulates the minimum protection for right holders of related rights as it concerns Article 8 of the Directive 92/100, Article 7 contains transitional provisions.

Chapter III concerns cable retransmission and contains articles 8, 9, 10, 11 and 12. Article 8 ensures the protection of copyright and related rights in case of cable retransmission. Article 9 provides for the exercise of the cable retransmission right only through a collecting society and article 10 exempts from the provision of article 9 the exercise of the cable retransmission by broadcasting organisations. Article 11 refers to the assistance of mediators where no agreement is concluded on authorisation of the cable retransmission of a broadcast. Article 12 includes a provision regarding the prevention of the abuse of negotiating positions.

Chapter IV contains general provisions (Articles 13, 14, 15). Article 13 provides

³²³ Türkekul/Turhan/Güçlü, loc.cit. p.33.

³²⁴ Kallinikou, op.cit. p.6

that the Directive shall be without prejudice to the regulation of the activities of collecting societies by Member States. According to paragraph 3 of Article 14 a report on the application of the Directive was submitted by the Commission to the European Parliament, the Council and the Economic and Social Committee on July 2002.

3.3.3. Right to communication to public

Concept of communication to public was introduced in the FSEK in 2001 by an amendment made to the Law³²⁵ and this right has been granted for authors in Article 25 of the FSEK, for performers in Article 80/1A-2 and 4, for phonogram producers in Article 80/1B-1 and 3, for radio and television broadcasters in Article 80/1C-1, 4 and 5 and for film producers in Article 80/1.2.1 of the FSEK.

In the light of Article 25 of the FSEK, concept of communication to public in Turkish law may be defined shortly as communicating to public by devices enabling transmission of signs, sounds and/or images. Accordingly, three different ways of communication to public can be set forth: 1-Broadcasting, 2- Re-transmission and 3- Providing access in the time and place decided by the real persons. So, communication to public is actually a superior concept which encompasses all three concepts.³²⁶ Therefore, these three concepts should be regulated together in Article 80 of the FSEK in terms of related rights.

In the EU Acquis Communautaire, provisions on communication to public are divided into 3 different directives. The right on retransmission by wireless devices is set out in Article 8 of the Directive 2006/115/EC, arrangements on cable re-transmission are provided for in the Directive 93/83/EEC and the right of making available to the public is stated in Article 3 of the Directive 2001/29/EC. The reason that the same subject is dealt with in so many different directives is the comprehensiveness of the right of making available to the public.

With a view to elaborating on the subject in a more understandable and systematic manner, it is considered more helpful if the right to making available to public be examined by dividing the whole subject into its sub-concepts.

³²⁵ Before the amendment of the Law , it was referred to “Right of broadcasting by radio”.

³²⁶ Arkan,op.cit. p.102

3.3.3.1. Right to communication to public of performers, phonogram producers and film producers

3.3.3.1.1. Right to broadcasting

Before getting into the details regarding the utilization of this right, focusing on the definition of broadcast will be helpful to fully understand the scope of the right. Concept of broadcast which is not defined in the FSEK is stated in Article 4/g of the Regulation on Neighbouring Rights as “radio broadcast”, “TV broadcast” and “satellite broadcast”; other types of broadcast are defined in Article 3 of the Law No: 3984 on Establishment and Broadcasts of Radios and Televisions. Directive 93/83/EEC does not contain a general definition of broadcasting, but it defines only the satellite broadcasting. As per Article 4/g of the Regulation on Neighbouring Rights “broadcasting means communicating the sounds, images or both to the public for their interest by wire or wireless through the devices of radio or TV”.

3.3.3.1.2. Right to retransmission

For performers, Article 80/1A-2 of the FSEK and for phonogram producers Article 80/1B-1 provides for the right of authorizing or prohibiting the communication and re-transmission to the public of their performances and fixations. The Directive 2006/115/EC recognizes retransmission right only for broadcasting organizations. In addition to this, Article 8 of Chapter III of the Directive 93/83/EEC contains arrangements on cable retransmission. The Directive requires that cable retransmission made from any member state has to take place on the basis of permission secured by contractual agreements between authors, holders of related rights and cable operator.

As regards to definition of concept ha retransmission, FSEK contains no definition of retransmission. On the other hand, Article 3 of the Law No: 3984 defines retransmission; Article 1 of the Directive 93/83/EEC defines cable retransmission.

Article 3/r of the Law No: 3984 states that retransmission is reception and then transmission of the whole or a part of television or radio programmes intended for reception by the public simultaneously or afterwards regardless of the technical devices used by the authorized broadcasting organization.

As per Article 1/3 of the Directive 93/83/EEC, cable re-transmission means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

It should be stated that the scope of retransmission mentioned in the Directive is limited only to those which are retransmitted from one member state to the others. The Directive recognizes autonomy for retransmissions taking place fully within the borders of the country. As required by the Directive, broadcasting programmes has to be simultaneous, unaltered and unabridged to be assessed within the scope of protection. Namely, retransmissions which are abridged or take place afterwards are not in the scope of the Directive.³²⁷ In the definition included in the Law No: 3984, transmissions taking place afterwards is also considered to be in the scope of retransmission in addition to simultaneous transmission. Another difference between two definitions is related to the device used for retransmission. Whereas the Directive approves retransmissions realized by a cable or microwave system; the Law No: 3984 does not differentiate between the devices to be used for retransmission.

Article 4/h of the Regulation on Neighbouring Rights defines simultaneous broadcasting as “broadcasting simultaneously a broadcast which is made by another broadcasting organization”. In parallel with these definitions, retransmission in the Turkish Law can be evaluated as reception and then transmission of the whole or a part of the broadcast by another broadcasting organization and communication to public simultaneously or afterwards.³²⁸

Paragraph 1 of Article 8 of the Directive concerns cable retransmission and stipulates that Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable.

³²⁷ Dreier, Hugenholtz, op.cit. p.273

³²⁸ Arkan, op.cit. p.104

As per Article 9/1 of the Directive, “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society”.

Article 9/2 of the Directive stipulates that “Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

As understood from the aforementioned articles, the Directive does not grant any exclusive right for the authors, performers or holders of other rights on cable retransmission. Member states are required to abide by the rules on intellectual rights.³²⁹ Two rules are envisaged by the Directive on the utilization and assignment of retransmission right. The first rule is that cable operators who will carry out retransmission shall rely on contractual agreements concluded with holders of related rights and second rule is that retransmission right shall be managed only through a collecting society. Collective administration of rights which is not regulated in any other directive is envisaged by the Directive 93/83/EEC in order to assure functioning of cable retransmission in practice.

In this sense, we need to mention about a decision taken by the ECJ³³⁰. The reference was made in the course of proceedings between Uradex SCRL (‘Uradex’) and Union Professionnelle de la Radio et de la Télédistribution (‘RTD’) and Société Intercommunale pour la Diffusion de la Télévision (‘BRUTELE’), in which Uradex

³²⁹ Dreier, Hugenholtz, op.cit. p.279

³³⁰Uradex SCRL v Union Professionnelle de la Radio et de la Télédistribution (RTD), Société Intercommunale pour la Diffusion de la Télévision (BRUTELE), C-169-05, The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

seeks an order that the members of RTD, and BRUTELE in particular, be ordered to cease retransmission by cable of performances included in its catalogue.

Uradex, a collecting society for the related rights of performers, brought an action before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) seeking a ruling that, by retransmitting by cable the performances of artists within its catalogue without their permission and therefore in breach of Articles 51 and 53 of the Law, the member cable operator companies of RTD, and in particular BRUTELE, infringe the related rights managed by Uradex. It further sought a ruling that each of the companies in question be ordered to cease retransmission by cable of the performances.

Uradex lodged an appeal before the Cour d'appel de Bruxelles (Court of Appeal, Brussels) with regard to performances both audiovisual and non-audiovisual, the Cour d'appel first took the view that although the collecting societies managing the related rights have the exclusive right to authorise or prohibit their retransmission by cable ('the retransmission right'), that right is, nevertheless, limited to the rights whose management has been transferred to the societies. According to the Cour d'appel, Article 53(2) of the Law, which transposes Article 9(2) of the Directive, does not provide that the collecting society exercises the right of artists who have not mandated it to manage their rights to authorise or prohibit cable retransmission, as is the case, given Article 53(1) of the Law, for artists who have done so.³³¹

In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society does not have the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable

³³¹ ECJ, C-169/05, Para. 16-17

retransmission, since it is mandated only to manage the pecuniary aspects of that rightholder's rights?'

The Court stated that in order that the cable operators may be sure that they have actually acquired all the rights linked to the retransmitted programmes and in order that external persons holding rights over certain elements of those programmes cannot, by asserting their rights, challenge the smooth operation of the contractual arrangements authorising the retransmission of those programmes, the Directive provides, in Article 9(1), that those rightholders may exercise the retransmission right only through a collecting society. In that way, the Directive restricts the number of parties with which the cable operators have to negotiate in order to obtain authorisation for retransmission, particularly for remuneration, whilst observing the copyright and related rights of all rightholders.³³²

It is in that context that Article 9(2) of the Directive provides that where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category is to be deemed to be mandated to manage his rights. Thus, that provision merely gives concrete expression to the rule stated in Article 9(1) with regard to the particular situation of such a rightholder.

Furthermore, where it provides that the collecting society which is deemed to be mandated to manage 'his rights', Article 9(2) of the Directive does not contain any limitation with regard to the scope of that management of the rightholder's rights. Thus, it does not follow from its wording that that management should relate only to the financial aspects of the rights in question and exclude the retransmission right.

Thus, the answer to the question referred must be that Article 9(2) of the Directive is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightholder's right to grant or refuse authorisation to a cable

³³² ECJ, C-169/05, Para. 20-21

operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights.³³³

In addition to Article 80/1A-2 of the FSEK which grants exclusive right of retransmission for the performers and Article 80/1 b-1 which grants rights for phonogram producers on retransmission of their fixations, Article 43 defining the rules on retransmission of performances and other products of intellectual rights should also be mentioned. In accordance with paragraph two of this Article, for works, performances, phonograms and productions other than staged works, these organizations are obliged to obtain permission from the collecting societies of the relevant field, by concluding a contract to make the payments for such broadcasts and/or transmissions to such societies. Article 43/2 of the FSEK which was amended in 2004 by the Law No: 5101, because of its wording, seems to introduce the requirement of contractual agreements and collective administration of rights. However, in Article 37 of the Law No: 3984 which was amended by the Law No: 5101, it is stipulated that radio and television organizations may conclude contracts with the authors, owners of related rights or collecting societies to which these people are member in order to use works, performances, phonograms or productions in their broadcasts and transmissions. In this case, when Article 43/2 of the FSEK and Article 37 of the Law No: 3984 are examined together, it may be concluded that Turkish law does not envisage any system of collective rights on broadcasting or retransmission. Since the FSEK does not contain additional provisions in terms of those who are not member to any collecting society, it is not possible to make a contractual agreement only with the collecting societies. Therefore, it is suggested that Article 43 of the FSEK be assessed again to bring clarity to the subject.³³⁴

Article 11 of the Directive provides for where no agreement is concluded regarding the cable retransmission of a broadcast, mechanism of mediation shall be used. In parallel with the Directive, Article 41/7 of the FSEK which is applicable for broadcasts and re-transmissions due to the reference made in Article 43/5 of the FSEK requires the establishment of a conciliatory commission in case no agreement can be reached.

³³³ ECJ, C-169/05, Para. 25

³³⁴ Kallinikou, op.cit. p.7

Lastly, in accordance with Article 80/1.2.1 of the FSEK, film producers shall have the exclusive right of authorizing the communication of their fixations to the public by devices permitting the transmission of signs, sounds and/or images. In the EU Law, in Article 8 of the Directive 2006/115/EC which regulates the rights on broadcasting and communication to the public of the holders of related rights, there is no provision on film producers. Furthermore, there is no explanation in the recitals concerning the reasons not to make any arrangement on the rights of the film producers. Similarly, there is no arrangement in Article 4 of the Directive 93/83/EEC on the right of broadcasting by satellite for film producers. In this case, it can be said that the EU Acquis Communautaire does not contain any arrangements on broadcasting rights of film producers and relevant arrangement is left to the initiative of each member state.

3.3.3.2. Right to communication to public of radio and television organizations

3.3.3.2.1. Broadcasting right

Broadcasting is the distribution of political, social, cultural and sports news, conversations, comments, concerts, entertainment and culture programs, sports competitions and games through radio and television or similar organizations. Rights of the broadcasting organizations on their broadcasts are available on the programmes they transmit by various signals or cables.³³⁵ In accordance with this definition, the broadcast may or may not bear the characteristics of a work. However, in the doctrine, it is accepted by the majority that radio-TV organizations shall have related rights on each programme regardless of the fact it is a work or not in terms of its content. As stipulated by one of the decisions of the Council of State, articles 43, 25 and 80 of the Law No: 5846 have been elaborated and it is stated that permission must be asked from the authors and owners of the related rights for using radio and TV broadcasts without making any discrimination on intellectual and artistic works and the rights entitled to the author should also be entitled to the owners of related rights in the same context.³³⁶

³³⁵ Tekinalp, op.cit.p.266

³³⁶ Decision of the Council of State: 10. D. 28.10.2003, E:2001/4688, K: 2003/4168

But, the opposite group argues that in case there is no work, it is not correct to mention about the rights related to author's rights.³³⁷ It is also discussed that evaluation of all television programmes under the category of cinematographic works is more practical and helpful in order to determine the law which will be applied to the programmes which are not accepted as works such as football games, news bulletins and etc. and furthermore it should be taken into consideration that each programme has its own specifics.³³⁸

Definitions of broadcasting in the Turkish Law are as follows:

As per Article 4/g of the Regulation on Neighbouring Rights "broadcasting means communicating the sounds, images or both to the public for their interest by wire or wireless through the devices of radio or TV".

Pursuant to Article 3 of the Law No: 3984:

b) Radio broadcast: means the sound transmission made via electromagnetic waves, data networks and other means for direct reception by the general public,

d) Television broadcast: means non-permanent transmissions, whether accompanied by sound or not, of moving or still pictures made via electromagnetic waves, data networks and other means for direct reception by the general public,

1) Cable broadcast: means the type of broadcast that provides the transmission of radio, television and data broadcasts via cable, fiber optic or a similar physical medium for reception of subscribers,

p) Satellite broadcast: means the initial broadcast for radio or television programs by the competent broadcaster or the person or the organization that is to provide the service, via any medium that can transmit encoded or unencoded signals through space.

International arrangements on broadcasting are as follows:

As per Article 3/f of the Rome Convention, "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds.³³⁹

Article 3/2 (a) of the Directive 93/83/EEC states that communication to the public by satellite means the act of introducing, under the control and responsibility of the

³³⁷ Arkan, op.cit. p.175

³³⁸ Kuşkonmaz Sabri, "FSEK Açısından Televizyon Programlarının Niteliği", Legal Fikri ve Sınai Haklar Dergisi, I, Mayıs 2005, p.160

³³⁹ http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=b41eac9a-bc39-4213-91f3-0d39931c1f1d
22.04.2010

broadcasting organization, the programme carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

In accordance with Article 1/3 of the Directive 93/83/EEC, cable retransmission means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

Broadcasting is both the name of the product of the radio-TV organization and its transmission.³⁴⁰ As seen from above, almost the same definition of broadcasting stated in the Rome Convention has been integrated in Article 4 of the Regulation on Neighboring Rights. In the EU Directives, types of broadcasting are defined and some certain rights are provided for in that sense. FSEK which does not contain the concept of broadcasting recognizes rights regardless of the way by which the broadcast is made.

Turkey signed the European Convention on Trans-frontier Television of the Council of Europe (07.09.1992). This Convention came into force in Turkey on 01.05.1994. It is suggested that the concepts of “satellite”, “communication to the public” and “cable retransmission” be integrated in the FSEK in accordance with the definitions stated in Article 1 of the Directive. Furthermore, Articles 25 and 80 should be re-evaluated and their wording should be arranged in accordance with the Directive.³⁴¹

3.3.3.2.2. Right to re-transmission

In the EU Acquis Communautaire, Article 9 and 10 of the Directive contain arrangements on cable retransmission.

Paragraph one of Article 9 of the Directive states that “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.”

³⁴⁰ Tekinalp, op.cit, p.266

³⁴¹ Kallinikou, op.cit. p.7

Article 10 of the Directive stipulates that “Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights”.

FSEK regulates the same subject in Articles 43/2 and 43/5. As per Article 43/2 of the FSEK, “For works, performances, phonograms and productions other than staged works, these organizations (radio-television organizations, satellite and cable broadcasting organizations) with the collecting societies of the relevant field are obliged to conclude a contract in accordance with article 52, to make the payments for such broadcasts and/or transmissions.”

As per Article 43/5 of the FSEK, “Paragraphs four to thirteen of article 41 of this Law shall apply to the notification obligation of collecting societies regarding their members and works, performances, phonograms and productions that they represent, the determination, announcement and negotiation of tariffs, conclusion of contracts, settlement of disputes and other matters. However, the application of the last sentence of paragraph six of article 41 is not compulsory with regard to organizations that carry out broadcasting and/or transmission”.

As stated before, concerning cable retransmission, the Directive requires concluding a contract with the collecting societies. However, Article 10 of the Directive brings an exception for broadcasting organizations on the practice of mandatory collective management of rights and it is envisaged that broadcasting organizations may conclude individual contracts for the retransmission of their own broadcasts. The reason to make this exception is that although it is very difficult for cable operators to reach all right-holders one by one in the first transmission, no problem is faced in reaching to broadcasting organizations.³⁴²

There is an arrangement in the last sentence of Article 43/5 of the FSEK which is in parallel with the exception stated in the Directive for the broadcasting organizations. This provision states that the requirement of concluding a negotiation or contract with the collecting societies as envisaged by Article 41/6 of the FSEK shall not

³⁴² Altunç Fatoş, “Fikri Mülkiyet Hukuku Çerçevesinde Eser Sahibinin Hakları İle Bağlantılı Haklara İlişkin AB Müktesebati ile Türk Mevzuatının Karşılaştırılması” Unpublished Expertise Thesis, Ankara, 2008, p.76

be applied to broadcasting organizations. However, as stated before, the requirement of concluding a contract with the collecting societies contains certain contradictions in the Turkish Law and it is not possible to turn it into action since no additional provisions are envisaged for those who are not member to collecting societies.

3.4. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 2006/116/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 ON THE TERM OF PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS

3.4.1. Background of the Directive

Existence of different protection terms within the EU has remained for a long time as a factor preventing the trade among the Member States. Since differing protection terms is a phenomenon which disrupts free movement of the goods, the necessity of harmonization was felt in the relevant area and a directive has been approved. One of the major aims of this directive is to be able to determine a protection term in all member states which starts and ends at the same time concerning all the works protected in the scope of copyright and related rights. As per the Directive 93/98/EEC³⁴³ which is known as term directive and accepted by the Council on 29 October 1993, term of protection has been determined as 70 years post mortem auctoris in all Member States. Once the term of protection in relation to a certain work starts in one member state, same term shall be applicable for all other member states. The Commission, through this Directive, provides maximum protection to the authors and holders of related rights.

3.4.2. Aim and Scope of the Directive

The objective of the Directive is to harmonize the term of protection for authors' rights and related rights in the European Union. Recital one of the new Directive 2006/116/EC stipulates Council Directive 93/98/EEC of 29 October 1993 harmonising

³⁴³ Directive 93/98/EEC of 29 October 1993 was amended by the Directive 2006/116/EC of 12 December 2006.

the term of protection of copyright and certain related rights has been substantially amended. In the interests of clarity and rationality, the said Directive should be codified. Substantial provisions (Article 1-9) of the two texts of the Directives are identical. The Directive of 2006 contains some new recitals, some older recitals are deleted and some recitals are designed in the new wording. In a new added recital 9, reference is given to 1996 WIPO Performances and Phonograms Treaty (WPPT). It is noted that “this treaty took the form of a substantial up-date of the international protection of the related rights”. Recital 16 concerning photographs is edited and the new text is as follows: “The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.”

New recital 26 is added and it states that this Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives, as set out in Part B of Annex I. The new directive contains two annexes. Annex II is a correlation table of the two texts of the directives.

The Directive aims at high level harmonization. It provides for minimum and maximum harmonization. As the terms of protection must be identical throughout the EU, the member states are not allowed to introduce shorter or longer terms of protection than those prescribed by the Directive (Recital 3). The clear difference between authors' rights and related rights is confirmed in the Directive.

The Directive confirms that the principles of equality of treatment and non-discrimination of the European Court of Justice shall be valid also for the duration of copyright and related rights. Recital 10 of the Directive refers to the principle of legal certainty. In accordance with this recital, due regard for established rights is one of the general principles of law protected by the Community legal order. Therefore, the terms of protection of copyright and related rights established by Community law cannot have the effect of reducing the protection enjoyed by right-holders in the Community before the entry into force of Directive 93/98/EEC. In order to keep the effects of transitional

measures to a minimum and to allow the internal market to function smoothly, those terms of protection should be applied for long periods.

Article 1 of the Directive deals with the duration of authors rights. According to this article, the general term of copyright in a literary or artistic work is 70 years after the death of the author (*post mortem auctoris*). This term concerns all the literary and artistic works which are protected by copyright. According to Article 2 of the Berne Convention, in the case of joint authorship, the term 70 years is calculated from the death of last surviving author.

Article 2 concerns authorship in cinematographic (or audiovisual) works and the term of protection of these works. The principle director of such a work is considered as its author or one of its authors.

Article 3 deals with the duration of related rights. Directive sets the general term of protection for 50 years; for performers, after the date of protection; for producers of phonograms, after the fixation is made; for broadcasting organizations, after the first transmission of a broadcast; for producers of the first fixation of the film, after the fixation is made.

In practice, these terms are exception more than a rule. According to the provisions of this article, if the fixation of the performance, phonogram or the film is lawfully published or communicated to the public, whichever the earlier shall be deemed as the applicable term.

Article 4 contains a related right on previously unpublished works.

Article 5 includes non-mandatory related rights on critical and scientific works. It is not a mandatory provision for the Member States to introduce this right in a national law.

Article 6 focuses on the protection of photographs. This article sets the originality standards for photographs.

Article 7 contains provisions about the protection of copyright and related rights in relation to other jurisdictions. It is about the comparison of terms between different jurisdictions. The general principle is that if the work originated in a third country or the author is not a European Union national, the protection granted by the Member States expires on the same date as the protection granted in the country of origin of the work,

but this term must never exceed the term laid down in the Community by the Directive. The same principle is established for the related rights.

Article 8 elaborates on the calculation of terms. The term is calculated from the first day of January of the year following the event which initiates it (the term).

Article 9 reads that the Directive does not regulate moral rights. Thus, the provisions on moral rights in the Berne Convention and FSEK remain unaffected by the Directive. The establishment of a term of protection for moral rights is an issue for national legislation.

Article 10 deals with the scope of protection and implementation of the Directive.

Article 11 contains provisions of former article 12 and 13 (1) third subparagraph. The Commission should be notified about the plans of Member States to introduce new related rights and their duration as well as the text of national legislation should be communicated to the Commission.

Article 12 repeals former Directive 93/98/EEC. It also contains an important provision that references made to the repealed Directive shall be construed as being made to the new directive and should be read in accordance with the correlation table in Annex II.

3.4.3. Protection terms on economic rights

One of the most important features which differentiate intellectual property rights from the property rights is that the first one is protected for a limited term.³⁴⁴ First copyright law of the UK which is accepted as the first legal arrangement in the relevant field had limited to 14 years the rights of authors arising from their works.³⁴⁵ However, limitation of intellectual rights to a certain time period, duration and start of the term created controversies and some people defended that intellectual rights, just like the property rights, should be protected for an unlimited time. On the other hand, it is argued that intellectual products is not only the products of those who create them but also of the culture in which they are created, exclusive right on a work should be lifted

³⁴⁴ Kılıçoğlu, loc.cit. p.356

³⁴⁵ Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.242

after a certain time and thereby the debt against the society should be paid because intellectual products are already created for the interest of the society.³⁴⁶

In this scope, most of the countries including Turkey made intellectual rights subject to a limited term of protection in their laws. In accordance with this rule, after protection terms expire, performances, publication and products can be used by anyone as they wish.

3.4.3.1. Protection terms on the rights arising from authorship

Paragraph one of Article 26 of the FSEK states that the economic rights granted to the author are limited in time and the works shall belong to the public following the expiry of the term of protection. The Supreme Court of Appeals took a decision for the termination of economic rights owned by the person who takes over the work after its protection term is finalized.³⁴⁷ Although no relevant provision is included in the Directive, abovementioned statement does not lead to any problem of harmonization. However, the references made to Article 46 “Authority of Use by the State” and Article 47 “Expropriation” needs attention. Pursuant to Article 46 of the FSEK “Works that have not yet been published or made public and whose author has not expressly prohibited reproduction and publication and which are preserved in public libraries, museums or similar institutions, shall belong to the public institution or organization in which they are kept, provided that the term of protection of economic rights has expired.” Article 47 states that the authority to exercise economic rights on a work which is deemed important for the culture of the country may be expropriated before the expiry of the term of protection through the payment of an appropriate fee to the rightholders and by issuing a decree. It is controversial whether expropriation of economic rights of the authors is in compliance with the EU law and moreover this subject is not directly related to the Directive numbered 2006/116.

Paragraph two of Article 26 of the FSEK points out terms of protection granted for the original of a work and its adaptations are different from each other. This statement is generally based on copyright principles and has no direct connection with the Directive. The original and adaptation of a work are different pieces of work, they

³⁴⁶ Arkan, op.cit. p.123-124

³⁴⁷ Decision of the Supreme Court of Appeals: 11. H.D. 04.12.2007, E:2006/7876, K: 2007/15295

have different rights and their authors may be different. Therefore, authors of the original work and adaptation work shall use the term of 70 years plus his/her lifetime independently and separately.

Paragraph 3 of Article 26 of the FSEK which makes reference to Article 9 on Multiple Authors is not a provision regarding the Directive. Furthermore, the relation between the first and second paragraph of the article could not be established properly. On the other hand, relation of the said paragraph with paragraph 6 of Article 26 on calculation of terms that begin on the date of author's death requires further explanation.

Paragraph 4 of Article 26 which determines the date of publication of the works that are published in sections or fascicles stipulates that for works that are published in sections or fascicles, the publication date of the last part or fascicle shall be deemed the date on which the work was made public. For works that are composed of several volumes published at intervals and for works such as bulletins, pamphlets, periodicals and annuals, the date on which the work is made public shall be the date of publication of each volume or each such work. However, it is suggested this provision should be changed in accordance with paragraph 5 of Article 1 of the Directive and the provision of “where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately” should be added.³⁴⁸

Lastly, it will be helpful to focus on paragraphs 5 and 6 of Article 26 of the FSEK. Paragraph 5 states that terms that begin from the date on which the work is made public shall be calculated starting from the first day of the year following the year in which the work is first made public or is deemed to have been made public under paragraph four and the first sentence of paragraph 6 states that terms that begin on the date of the author's death shall be calculated from the first day of the year following the year of the author's death. In both paragraphs, there is no problem of harmonization with Article 8 of the Directive which stipulates “The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which

³⁴⁸ Pisuke Heiki, “Memorandum On Council Directive 2006/116 EC Of Harmonising The Term Of Protection Copyright And Certain Related Rights” Archive Of Ministry Of Culture And Tourism, Ankara, 2007, p.6

give rise to them.” Although the second sentence of paragraph 6 of Article 26 which specifies the time when the term of protection starts for joint authorship is not regulated in the right place in the Law, it is in parallel with paragraph 2 of Article 1 of the Directive which sets out that the protection term starts after the death of the last surviving author and in conclusion, there is no incompliance.

Article 27 of the FSEK, as a continuation of the general provisions stated in Article 26, mentions about the duration of protection terms regarding authors’ rights. Paragraph one of Article 27 states that the term of protection shall last for the lifetime of the author and for 70 years after his death and if there is more than one author, this period shall end upon the expiry of 70 years after the death of the last surviving author. As per paragraph 2 of Article 27, no special arrangement is provided for the term of protection for works that have been first made public after the death of the author and this term is envisaged as 70 years after the date of death. These two paragraphs are in compliance with the first and second paragraph of Article 1 of the Directive and there is no problem of harmonization.

Paragraph 3 of Article 27 of the FSEK refers to paragraph one of Article 12 which contains provisions on anonymous works. Accordingly, so long as the author of a published work cannot be established under article 11, the rights and authorities belonging to the author may be exercised by the publisher, and, if the publisher can not be determined, by the person making the reproduction, in his own name. In such cases, protection term is specified as 70 years after the work is made public. The relevant paragraph states that in case the name of the author is made public before this term ends, general provisions shall be applicable. The equivalent of this provision in the Directive is paragraph 3 of Article 1. As per this provision, “In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.” Although, at first stage, it seems that two provisions

envisage parallel arrangements, it is considered that pseudonym works should be added and the term lawfully made available to the public is suggested.³⁴⁹

Pursuant to paragraph 4 of Article 27 of the FSEK, if the first author is a legal person, the term of protection shall be 70 years from the date on which the work was made public. Paragraph 4 of Article 1 of the Directive states that “Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply”. Although there are similarities between the FSEK and Directive, it is suggested that the provision on collective works be added and the term lawfully made available to the public be included.³⁵⁰

Although there are no big differences between the provisions of the FSEK and Directive on protection terms in terms of authorship, it is observed that the equivalent of some provisions of the Directive is not contained in the FSEK. For instance, paragraph 2 of Article 2 of the Directive which sets out protection terms for cinematographic or audiovisual works is as follows: “The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.” The article evaluates the principal director, author of the screenplay, author of the dialogue and composer of music altogether regardless of their being co-author or not and it states that the term of protection shall start after the death of the last surviving one. There is no relevant provision in the FSEK.

Another problematic area on this subject is Article 4 of the Directive which deals with the unpublished works. The article states that “Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to

³⁴⁹ Ibid, p.7

³⁵⁰ Ibid, p.7

the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public”. This article relates to a right separate from copyright for the owner or “honest finder” of an unpublished work, which would have qualified for copyright protection as an original work of authorship, but of which the term of protection lapsed.³⁵¹ FSEK does not contain any provision on this subject either.

Another article of the FSEK which lacks compliance concerns Article 5 of the Directive which focuses on non-compulsory critical and scientific publications. Pursuant to this Article “Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published”. This article is not a mandatory provision. It simply permits Member States to retain or introduce special protection for critical and scientific publications of work which have fallen into the public domain. Such special protection can be seen as a related right. If however a critical or scientific publication qualifies as an original work of authorship, normal copyright protection applies.³⁵²

The last article which requires mentioning about lack of harmonization is article 85 of the FSEK. As per Article 85 of the FSEK, even if they do not qualify as works, letters, memoirs and similar writings may not be published without the consent of their authors or, in case of their death, without the consent of the persons referred to in the first paragraph of Article 19; consent shall not be necessary once ten years have elapsed after the death of the author. But in other jurisdictions as a rule “letters, memoirs, and similar writings” are regarded as works protected by copyright under article 2 of Berne Convention, and the term of protection shall be life +70 years. This may lead to controversy with paragraph 2 of article 10 of the Directive.³⁵³

Article 10/2 of the Directive states that “The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State, on the date referred to in Article 13 (1), pursuant to national

³⁵¹ Dreier, Hugenholtz, op.cit. p.297

³⁵² Ibid p.298

³⁵³ Pisuke, op.cit. p.9

provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100 EEC. According to this article, protection terms prescribed in the Directive shall be applied for the works which were protected in any of the member states before the date of 1 July 1995. As a matter of fact, this provision was brought in front of the ECJ³⁵⁴ by a preliminary ruling and it was sought for remarks too.

The reference has been made in the context of proceedings between Sony Music Entertainment (Germany) GmbH ('Sony') and Falcon Neue Medien Vertrieb GmbH ('Falcon') concerning the protection of certain rights related to copyright.

According to the order for reference, Falcon distributes two phonograms containing recordings of performances by the artist Bob Dylan. The first CD is entitled 'Bob Dylan – Blowin' in the Wind', the second 'Bob Dylan – Gates of Eden'. Those phonograms include songs which feature on the albums 'Bob Dylan – Bringing It All Back Home', 'The Times They Are A-Changin'' and 'Highway 61 Revisited'. Those albums were released in the USA before 1 January 1966.

Sony applied to the competent Landgericht (Regional Court) for an injunction prohibiting Falcon from copying and distributing the phonograms 'Bob Dylan – Blowin' in the Wind' and 'Bob Dylan – Gates of Eden', or from having others copy and distribute them on its behalf. Further, Sony asked the court to make an order for discovery against Falcon and to determine Falcon's liability for damages. Falcon submitted that no phonogram producer owns the rights in Germany to Bob Dylan albums recorded prior to 1 January 1966.³⁵⁵

The Landgericht dismissed Sony's application. Upon appeal by Sony, the appellate court stated that there was no doubt that the rights in the recordings at issue in the main proceedings belonging to the producer of the phonograms had been effectively transferred to Sony. Nevertheless, that court dismissed Sony's appeal, considering that, under the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, signed at Geneva on 29 October 1971, in force both in Germany and the United States, such producers of phonograms are entitled to copyright protection pursuant to Paragraph 85 of the UrhG only in relation to

³⁵⁴ Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH, C-240-07, The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

³⁵⁵ ECJ, C-169/05, Para. 10-13

activities which took place after 1 January 1966. Moreover, the appellate court considered that music recordings produced prior to that date were also not entitled to protection under Paragraph 137f of the UrhG, a transitional provision drawn up to bring national law into line with Directive 93/98. Paragraph 137f(2) of the UrhG did not apply to phonograms produced prior to 1 January 1966, as these had at no time been protected in Germany.³⁵⁶

It was in those circumstances that Sony applied for ‘Revision’ of the judgment of the appellate court to the Bundesgerichtshof (Federal Court of Justice) which, taking the view that the outcome of the proceedings before it depended on the interpretation of Article 10(2) of Directive 2006/116, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Does the term of protection granted by Directive 2006/116 ... under the conditions set out in Article 10(2) thereof apply also in the case of subject-matter that has not at any time been protected in the Member State in which protection is sought?

The Court stated that according to Article 10(2) of Directive 2006/116, the terms of protection of phonogram producers, provided for in Article 3(2) of that directive, are to apply to the subject-matter at issue if, on 1 July 1995, it was protected in the territory of at least one Member State, pursuant to national provisions on copyright or related rights, or if it met the criteria for protection provided for in Directive 92/100.

Thus, according to the wording of Article 10(2), the first alternative requirement under that provision concerns the prior existence of protection for the subject-matter at issue in at least one Member State. That provision does not require that Member State to be the State in which the protection for which Directive 2006/116 provides is sought.

Moreover, it should be pointed out that recital 3 in the preamble to Directive 2006/116 states that differences between national laws are liable to impede the free movement of goods and freedom to provide services and to distort competition in the common market. With a view to the smooth operation of the internal market, that directive is intended to harmonise the laws of the Member States so as to make terms of protection identical throughout the Community.

³⁵⁶ ECJ, C-240/07, Para. 15

In those circumstances, to interpret Article 10(2) of Directive 2006/116 as meaning that application of the first alternative requirement of that provision is conditional on the prior existence of protection under the national legislation of the Member State in which the protection for which the directive provides is sought, even though such prior protection has been granted in another Member State, would comply neither with the terms of the provision at issue nor with the purpose of that directive.

Accordingly, the answer to the question is that the term of protection laid down in Directive 2006/116 is also applicable, pursuant to Article 10(2) of that directive, where the subject-matter at issue has at no time been protected in the Member State in which the protection is sought.³⁵⁷

3.4.3.2. Protection term for related rights

Protection terms for related rights are regulated by Article 82 of the FSEK and Article 3 of the Directive. As per Article 3 of the Directive 2006/116/EC, the said protection terms are specified as 50 years. In Article 82 of the FSEK, the same term is 70 years.

Article 82/5 of the FSEK states that the rights of performers shall last for 70 years from the date of first fixation of the performance. If their performances have not yet been fixed, the term shall begin with the date on which the performance is first made public.

Paragraph one of Article 3 of the Directive 2006/116/EC stipulates that the rights of performers shall expire 50 years after the date of the performance; however, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. It is obvious that these two arrangements indicate differences in terms of both durations and the starting date of the protection term.

Article 82/6 of the FSEK sets forth the rights of producers shall last for 70 years from the date of first fixation. Since the text mentions only about the producers it is not clear whether the phonogram or film producers are meant. However, considering that

³⁵⁷ ECJ, C-240/07, Para. 23-25

the holders of related rights are listed in limited number and both film producers and phonogram producers are accepted as related right holders in Article 80 of the FSEK, it would not be wrong to conclude that both of the producers are meant in Article 84. On the other hand, the Directive includes two separate definitions of the phonogram producers and film producers in paragraphs 2 and 3 of Article 3. In accordance with this Article, the rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. As seen from above, arrangements stated in paragraphs 2 and 3 of Article 3 contain more comprehensive provisions in comparison with Article 82/6 of the FSEK. Therefore, it is suggested that Article 82/6 of the FSEK be revised considering aforementioned paragraphs.

Rights of Radio-TV organizations are specified in Article 82/7 of the FSEK. The term of protection is 70 years from the date of first broadcasting as per this article. Apart from the duration, a parallel provision is noticed in paragraph 4 of Article 3 of the Directive. This article stipulates that the rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

From the recitals of the Directive 2006/116/EC it is understood that the harmonization on protection terms is minimum and maximum harmonization. In other words, since prescribing longer or shorter protection terms than stipulated by the Directive will disrupt the trade in the Union, full harmonization have been aimed for the terms and starting date and calculation of these terms. In that sense, there is incompliance between the term specified in the Directive and FSEK which is 70 years.

The working paper prepared by the EU Commission in order to review the legal position of the EU concerning copyright and related rights states that there are requests to extend the terms for the related rights. And in the continuation of the same working paper, it is concluded that there is no need to change the existing situation now however the sector will be kept under monitoring and relevant activities will be able to be sustained.³⁵⁸ Similarly, majority of the members of the legislation committee set up in the scope of the Twinning project carried out by the Ministry of Culture and Tourism, General Directorate for Copyright and Cinema has stated that the protection terms of 70 years prescribed in the FSEK should not be changed at this stage.

3.5. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MARCH 1996 ON THE LEGAL PROTECTION OF DATABASES

3.5.1. Background of the Directive

Database is a trial organized systematically (methodic) and consisting of data or other materials which are accessible individually by electronic or other means.

There are two main approaches which provide an explanation for the legal protection of databases. According to one thought, databases are intellectual products although they contain data and materials which are not in the nature of a work, because these data and materials are collected and analysed as to a certain system and then submitted for the use of the people. Without considering whether the content of a database is a work or not, if any sign of creativity is present in terms creation and submittal for the use of the people, such products need to be protected like other intellectual and artistic works.³⁵⁹

Second thought on databases attributes the protection of databases to the justification of being a “demanding job”. According to the supporters of this thought

³⁵⁸ “Commission Staff Working Paper On The Review Of the EC Legal framework In The Field Of Copyright And Related Rights” Brussels, 2004, p.10

http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf 30.04.2010

³⁵⁹ Ateş Mustafa, “Veri Tabanlarının Hukuki Korunması”, AÜHFD, C. 55, S. 1/2006, p.49

which is also called “sweat of brow” doctrine, the reason for protecting databases is that creation of these products is a demanding and difficult job. To this end, serious physical and intellectual effort may be exerted; in addition, a lot of time and money may be spent. Therefore, even if a database is not a product of set of creative efforts, it should be protected legally just for the sake of efforts and money spent on it.³⁶⁰

There were significant differences among the EU member states on the protection of databases. In some member states, Germany being in the first place, only the databases having high level of originality were protected whereas the UK, Holland and Northern Europe countries provided protection even for sui generis databases with the influence of the approach of the sweat of brow. 17 In order to eliminate this situation which affects adversely free movement of goods and services in the Community, activities were initiated to draft a directive.

The Directive has its roots in the European Commission’s Green Paper on Copyright and the Challenge of Technology in which the Commission first suggested that copyright might not be sufficient to protect database producers and a special protection regime might be needed. On 13 May 1992, the Commission presented an Initial Proposal to the Council and this proposal was accepted by the European Parliament in first reading subject to a large number of amendments. This led to an Amendment Proposal, which was presented by the Commission on 4 December 1993. In July 1995, the Council adopted a Common position, which was markedly different from the amended proposal and accepted by the European Parliament in second reading on 14 December 1995. On 11 March 1996, the Directive was finally adopted.³⁶¹

3.5.2. Aim and Scope of the Directive

The definition of database is as follows in paragraph one of Article 1 of the directive: “database shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”. Indexes required for using the database or systems for getting access to or present the information are in the scope of this protection or

³⁶⁰ Ateş, ” Fikri Hukukta...”, op.cit.p.339

³⁶¹ Dreier, Hugenholtz, op.cit. p.308

indexes. However, protection under this Directive shall not apply to computer programs used in the making or operation of databases.

Basing on this definition, although it is considered that for a performance to be protected as database, it has to be made by electronic means and; information and collection which are not stored or organized by electronic means cannot be accepted as database as per the directive, it is obvious from Recital 14 that the directive covers also non-electronic databases.

Recital 17 of the directive states that the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed.

By the directive, not only the original databases get the benefit of being protected but also the databases which do not comply with the originality criteria are protected as a distinctive intellectual property because of the difficulty of their preparation stage and high cost. This directive takes the structure of databases in the scope of copyright as long as they are original. As regards to the content of databases, it also introduces a new exclusive right that can be defined as a related right which is actually a sort of sui generis right in a sense.³⁶² The current directive envisages two types of protection for databases. The first one is copyright protection in the scope of literary works which is also in compliance with the international agreements.³⁶³

This type of protection is applied to databases which are in the nature of an original work as the intellectual creation of its author and fulfil the requirements wanted for normal literary works. However, as stated above, a majority of databases do not fulfil the criteria of originality.

As one of the most important developments introduced by the directive, the second type of protection is sui generis protection which is improved to protect financial expenditures made for the preparation of databases that are not original enough to qualify for copyright protection.

³⁶² Fight Against Piracy Practical Manual”, p.201

³⁶³ Özcan, op.cit. p.158

However, level of protection granted by the directive for original and sui generis databases are not same. Original databases are subject to general provisions in terms of protection term whereas protection term for sui generis databases is 15 years. Furthermore, the directive provides for sui generis protection only for databases which belong to EU citizens and those who have a permanent residence in the EU. Reciprocity principle is applicable for third country citizens.³⁶⁴

The first appearance of databases in our legislation is with sub-paragraph 11 of Article 6 of the FSEK which was included as a new item in 1995 by the Law No: 4110. Pursuant to this article, databases bearing the characteristic of the person who creates it, shall be deemed works of adaptation under this Law (FSEK Article 6/b.11).). The Supreme Court of Appeals has accepted databases as work of adaptation pursuant to Article 6/11 of the FSEK and decided that the content of the “Istanbul Stock Exchange Data Transmission Contract” signed between the parties has the characteristics of database, therefore the concerned case should be dealt with by the specialized courts as per Article 76 of the FSEK.³⁶⁵

Protection set out in the FSEK is much weaker than this envisaged by the EU directive. FSEK accepts databases as adaptation rather than work and moreover, data and materials included in the database are kept completely out of the scope of protection.³⁶⁶

In fact, a database does not always correspond to the definition of the adaptations given in article 1b of the legislation neither to the description of article 6 of the Law. Article 1b(c) defines the adaptations as intellectual and artistic works created on the basis of another work which bear the mark of the processor and which are comparatively not independent). A similar definition is provided by article 6 of the Law. Article 6 provides that intellectual and artistic works created on the basis of an existing work and which are not independent of such work shall be deemed as adaptations. A database can also be a collection of not protected elements, information or data and therefore it may not be dependent on previous works. At the same time the definition

³⁶⁴ Ateş, “Veri Tabanlarının...” op.cit. p.55

³⁶⁵ Decision of the Supreme Court of Appeals: 11. H.D. 14.12.2006, E:2005/9637, K: 2006/13262

³⁶⁶ DPT Sekizinci Beş Yıllık Kalkınma Planı; Fikri Haklar Özel İhtisas Komisyonu Raporu, Ankara 2000, p.88.

for databases provided in article 6(11) does not fully comply with the definition of databases provided in article 1 of the Directive. 6(11) of the FSEK is strange combination of articles 1(2) and 3 of the Directive.

The definition of article 6(11) is narrower than the definition of the Directive and fails to integrate the basic elements of the definition of the database provided by article 1 of the Directive (independence of the works, data or other materials, individual access to the data, systematic or methodical way of arrangement). Another difference is that it doesn't make any reference to the possibility that databases may contain protected works. Existing definition should be excluded from the category of adaptations in parallel with the definition envisaged in the directive and governed as a separate article.

On the other hand, databases intended to be regulated under 6 (11) are only the original databases. It is not possible that sui generis databases are protected and assessed in the scope of Article 6. Because, this article in principle regulates only the products which bear the characteristics of the adapter and collector and therefore which are subject to copyright protection. Sui generis databases cannot be evaluated in the scope of sub-paragraph 11 since they are subject to sui generis protection.³⁶⁷ This fact should be taken into consideration when the required amendment is discussed. If it is not considered to design a separate article on databases, wording of the current articles needs to be expanded in a way to cover sui generis right-owners.

Lastly, the concept of originality which is expressed in paragraph 1 of Article 3 of the directive as author's own intellectual creation is not envisaged in the FSEK. Therefore, general originality concept of the FSEK is valid. As a consequence of this, database must bear the characteristics of its author.

Since the standard of EU definition of originality is not high, it is stated that in case the current definition is interpreted by the courts as a high standard, this situation might pose a problem in terms of the protection of databases. As the definition for originality of the Directive 96/9/CE is the same as the definition of the Directive on the

³⁶⁷ Ateş, "Fikri Hukukta...", op.cit.p.355

legal protection of computer programs, legal coherence should be achieved better if the definition is implemented in both cases.³⁶⁸

3.5.3. Database Authorship

Article 4 of the Directive explains the database authorship which is a very crucial part of the copyright protection.³⁶⁹ According to article 4 of the Directive, “(1) The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation. (2). Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.(3). In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly”.

There are no specific provisions concerning database authorship in the FSEK. Therefore, the general provisions concerning all kinds of works are applicable. These are articles 1b(b), 8, 9, 10 of the Law. In that sense, problems of coherence regarding authorship found out in the elaboration of the Directive 91/250 EC on computer programmes are available also for this directive.³⁷⁰

3.5.4. Rights of Author of Databases

Article 5 of the Directive enumerates the economic rights protected under database copyright. These are the right of reproduction, the right of translation, adaptation, arrangement and any other alteration, the right of distribution, the right of communication, display or performance to the public, the right to prevent or authorize any reproduction, distribution, communication, display or performance to the public of the results of acts of adaptation, translation, arrangement and any other alteration of the database.³⁷¹

Because of the lack of special provisions for database copyright protection in the FSEK, the general provisions about economic rights apply also for database economic

³⁶⁸ Sinodinou, op.cit. p.18

³⁶⁹ Helvacioğlu, op.cit. p.88

³⁷⁰ Ateş, “Veri Tabanlarının...” op.cit. p.65

³⁷¹ Sinodinou, op.cit. p.21

rights. The option of applying the general regime of economic rights doesn't conflict with the database copyright regime of the Directive provided that the existing general provisions correspond to all the economic rights awarded to the author of the database by the Directive.³⁷²

With a view to eliminating the repetitions in this study, problems of harmonization concerning the aforementioned rights shall be elaborated on together with the Directive 2001/29 on Information Society. At this stage, only the right to adaptation which is not foreseen to be harmonized by the Information Society Directive will be discussed.

Right to adaptation stipulated in sub-paragraph b of Article 5 of the directive is implemented through Article 21 of the law. Wording of Article 5 (b) of the directive is same with that of 4 (a) of the Information Society Directive.

Right to adaptation is not prescribed by the FSEK. At this point, two options should be discussed. On condition that the term adaptation is broad and includes also acts of translation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, this provision complies with the relevant provisions of the Database Directive. If the term "adaptation" doesn't cover all the acts mentioned in article 5(b) of the Directive, there is no full compliance with the Directive. For example, as there is no explicit reference to the right of translation in Turkish law, it is not clear if acts of translation are also covered by the general right of adaptation of article 22 of the Law. In order to avoid restrictive interpretations of the term "adaptation", it may be preferable to implement article 5(b) of the Directive literally as stated in the Turkish law.³⁷³

As far as concerns moral rights they are not harmonized by the Directive and left to the discretion of the Member States. General provisions of the Turkish law shall apply and there is no audit of compliance because there are no relevant European Community rules.

³⁷² Ibid p.20

³⁷³ Helvacioğlu, op.cit. p.90

3.5.5. Exceptions to restricted acts

Article 6 of the directive which provides for restrictions for the author's rights are as follows:

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.
2. Member States shall have the option of providing for limitations on the right set out in article 5 in the following cases:
 - (a) in the case of reproduction for private purposes of a non-electronic database;
 - (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved
 - (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
 - (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

These exceptions are not implemented as specific exceptions related to databases; general provisions shall apply as far as they correspond to the relevant exceptions. This situation causes some problems because some exceptions are specific to databases and not included in the list of general exceptions on copyright.³⁷⁴ More specifically:

The exception stated in article 6.1 of the Directive is not implemented in the FSEK. This exception is very important and obligatory for member states as article 15

³⁷⁴ Ibid. p.91

of the Directive provides that any contractual provision contrary to Articles 6 (1) and 8 of the Directive shall be null and void.³⁷⁵

Therefore, it is suggested that exact wording of the article 6/1 of the directive should be implemented. It is also stated that this subject may be integrated with the law by a special article on database copyright exceptions or by a more general article divided into database copyright and at the same time including provisions on economic rights of the author of the database.³⁷⁶

On the other hand, exception of reproduction for personal use which is applied to the works also applies to databases. This exception is set out in paragraph one of Article 38. As per this paragraph, “It is permitted to reproduce all intellectual and artistic works for personal use without pursuing profit. However, such reproduction may not prejudice the legitimate interests of rightholders without good reason or conflict with the normal exploitation of the work.”

However, in accordance with the directive, this exception can be applicable only for non-electronic databases. Provision of the FSEK on the exception of reproduction for personal use is not in compliance with the directive because paragraph one of Article 38 does not encompass all conditions stipulated under Article 5.2 (b) of the directive and due to this fact this paragraph should be re-designed. As there is no specific provision in the Turkish law about exclusion of electronic databases, there is no conformity with the Directive at this point. Therefore, it is suggested that the relevant provisions of the law should be amended and electronic databases should be kept outside the scope of reproduction for personal use.

Wording of article 6/2 (b) of Database Directive (exception of teaching or scientific research) is almost same with article 5/3 (a) of the Directive 2001/29/CE. And, wording of article 6/2 (c) of Database Directive (exception of public security, administrative or judicial procedures) is similar to the wording of article 5/3 (e) of the Directive 2001/29/EC. Therefore, harmonization of existing general exceptions with the articles of 6/2 (b) and 6/2 (c) should be examined together with the harmonization of relevant exceptions of the directive 2001/29/EC.

³⁷⁵ Sinodinou, op.cit. p.24

³⁷⁶ Ibid, p.25

3.5.6. Sui Generis Database Protection

It is not possible for the contents of databases which are not deemed as works to benefit from the protection granted for the works in the framework of the provisions on intellectual rights.³⁷⁷ That is why it is considered that the contents of databases which are not accepted as works should also be protected taking into consideration their economic, social, cultural and scientific functions. This is such a kind of protection that it is called sui generis database protection or sui generis protection.³⁷⁸

In accordance with article 7 of the Directive 96/9/EC:

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents

³⁷⁷ Philips, Firth, op.cit. p.170

³⁷⁸ Ateş, "Veri Tabanlarının..." op.cit. p.67

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

According to additional article 8 of the FSEK, a database author who made considerable investment as regards quality and quantity in the creation, verification and presentation of a database and is entitled to exercise economic rights in the ways and conditions prescribed in this Law will also be entitled to the right to permit or prohibit the temporary transfer to another medium via any means and in any matter, the sale, rental and being made to public in any manner of a portion or the whole of the database contents with the exceptions specified in this Law and necessitated by purposes of public safety and administrative and judicial procedures.

At this point, some explanations should be made on the content of sui generis databases.

The most important feature of sui generis database is that there has to be an investment thereon. Both the directive and FSEK stipulate that such investment is required to be made in obtaining, verifying or presenting the contents of a database.

The term of “obtaining” has been defined neither in the Law nor in the directive. However, European Court of Justice has defined what should be understood from this concept by way of interpreting the directive provisions.³⁷⁹ In accordance with this interpretation, obtaining is bringing together and collecting individual data and materials rather than creating the data and materials which will constitute the content of the database. And the substantial investment necessary for obtaining the content of the database means the resources spent with this purpose.³⁸⁰

Also the term “verifying” is not defined both in the directive and law. However, as understood from the remarks of the Court of Justice³⁸¹, “verifying the database content” means the data and materials constituting the content are correct and reliable.

³⁷⁹ The British Horseracing Board Ltd and Others v. The William Hill Organization Ltd; Case C-203/02, parag. 97/1 The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

³⁸⁰ Çolak Uğur, “Topluluk ve Türk Hukukunda Veri Tabanlarına Sağlanan Sui Generis Koruma ve Spin Of Teori”, FMR, 2005/1, p.48

³⁸¹ ECJ, C-203/02, Para. 76

In parallel with this, substantial investment made to verify the content is the investment made to test the accuracy of individual data and materials forming the content of an existing database.³⁸²

As a matter of fact, as stated by the decision of the Court of Justice on British Horse Racing Board and William Hill, statement of “investment in verification of the contents of the database” stipulated by Article 7(1) of the directive “must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition”.³⁸³

Although the term “presentation of the content” is not defined specifically in the legislation, it can be said that this term means “presentation or arrangement of the content of the database”. And, when it comes to the investment in presentation of the contents of the database, it is the investment made to organize or arrange the data and materials in a way to serve to the achievement of a particular purpose.³⁸⁴

There are three other decisions taken by the ECJ on databases³⁸⁵ Fixtures Marketing cases are about the exploitation of the fixture lists for the top English and Scottish football leagues outside the United Kingdom. The fixture lists are drawn up at the start of each season by the organizers of the leagues; they are stored electronically and set out in printed booklets. The preparation of those fixture lists requires a number of factors to be taken into account, such as the need to ensure the alternation of home and away matches, the need to ensure that several clubs from the same town are not playing at home on the same day, the constraints arising in connection with international fixtures, whether other public events are taking place and the availability of policing.³⁸⁶

The infringement occurred when three defendants in the Fixtures Marketing

³⁸² Ateş,” Fikri Hukukta...”, op.cit.p.380

³⁸³ ECJ, C-203/02, Para. 97/1

³⁸⁴ Ateş,” Fikri Hukukta...”, op.cit.p.381

³⁸⁵ Fixtures Marketing Ltd v. Oy Veikkaus Ab; Case C-46/02, Fixtures Marketing Ltd v.Svenska Spel AB; Case C-338/02, Fixtures Marketing Ltd v.Organismos Prognostikon Agonon Podosfairou AE (OPAP) C-444/02 The decision is available at http://curia.eu.int/en/content/juris/index_form.htm

³⁸⁶ Helvacioğlu, op.cit. p. 108

Cases organized pools betting in Finland, Sweden and Greece and used data about English and Scottish football league matches without license from Fixtures Marketing.

In each of these three cases the ECJ analyzed the scope of database right and explained the terms ‘obtaining, verifying or presenting’ and had come to the conclusion that protection of databases promote and protect investment in data storage and processing systems which contribute to the development of an information market.

And the Court of Justice made a ruling similar to the *British Horseracing Board Ltd v William Hill Organization Ltd* and stated that the expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of Directive 96/9/EC must be understood to refer to the resources used to seek out existing independent materials and collect them in the database and it does not include the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organizing football league fixtures, does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.³⁸⁷

When article 7 of the directive and additional article 8 of the FSEK are compared, it is suggested that a series of amendments are made to the FSEK and the gaps in terms of harmonization are as follows:

First of all, the implementation of the sui generis database regime in additional article 8 in the section E of the part named “Applicable law” in Part six of the FSEK (called “Miscellaneous provisions”) is not correct. Sui generis protection is a distinct kind of protection which has been implemented in various ways by Member States. It is suggested that sui generis database protection is implemented as a new section or part of the copyright law.³⁸⁸

The only applicable criterion for the sui generis protection is the “substantial investment” in either the obtaining, verification or presentation of the contents of the database. The substantial investment must be shown alternatively in either the obtaining, verification or presentation of the contents of the database and not cumulatively in all these activities. It is sufficient that the substantial investment is shown in one of the three activities.

³⁸⁷ Ibid, p.110

³⁸⁸ Sinodinou, op.cit. p.29

In accordance with the FSEK, public lending has not been excluded from the scope of right to re-utilization. Therefore, the sentence that “public lending is neither an act of extraction or re-utilization” may be considered as an appropriate statement to be included in the FSEK.

FSEK does not contain any provision equivalent to paragraph 5 of Article 7 of the directive which is on the repeated extraction and reutilization. This is a significant gap and the relevant provision should be implemented as follows: “The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted”.³⁸⁹

Also concerning paragraphs 3 and 4 of Article 7, it is suggested that exact wording of the directive is taken and integrated with the relevant part of the FSEK.³⁹⁰

3.5.6.1.Rights and obligations of lawful users

As per Article 8 “Rights and obligations of lawful users” of the directive,

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.
2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database”.

³⁸⁹ Ibid. p.31

³⁹⁰ Ibid. p.32

There is no equivalent in the FSEK also for article 8 of the directive. This lack of harmonization presents importance in terms of securing balance in the regime of database sui generis protection.

The right of the database user provided in article 8.1 of the Directive is a superior right, as article 15 of the Directive provides that any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.³⁹¹ At the same time, the European authorities chose to place this “user right” under a control similar to the control of the three-step test. This is provided by article 8.2 of the Directive. It is suggested that the content of the relevant article should be included in the FSEK.³⁹²

3.5.6.2.Exceptions to Sui Generis Database Protection

Article 9 of the directive which is on “Exceptions to Sui Generis Right” is as follows: “Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Although exceptions to sui generis protection are not specified particularly in our legislation, EU directive regulates this subject in a detailed manner. Since the implementation of the exceptions stated in article 9 of the Directive is not mandatory this situation does not present any problem in terms of harmonization with the EU Acquis Communautaire.

On sui generis protection, FSEK states that concerning the exceptions that may be imposed on the rights of the database producer or right-owners, the person who has a

³⁹¹ Helvacioğlu, op.cit. p.95

³⁹² Sinodinou, p.34

right on the database may allow or prevent “with the exceptions specified in this Law and required by purposes of public security and administrative and judicial procedures”. In that sense, provisions of exceptions envisaged by the FSEK for intellectual and artistic works shall also be applied to the content of databases. This situation is considered to be problematic because it might lead to confusion between database copyright protection and sui generis protection.³⁹³ On the other hand, our law makes no distinction between electronic and non-electronic databases in terms of the exceptions to the rights on databases. It can be said that this aspect of the law presents a problem of harmonization.³⁹⁴

3.5.6.3.Duration of Sui Generis Protection

Article 10 sets the provisions regarding the term of protection provided by the sui generis right.³⁹⁵ The first two paragraphs of article 10 of the Directive determine the term of the sui generis protection as follows: “1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion. 2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public”.

According to additional article 8 of the FSEK, the duration of the protection shall be 15 years from the day of being made available to the public of the database. This way of calculation of the duration of the sui generis right is not correct and doesn't comply with the Directive. Therefore, this provision should be replaced by the relevant provision of the directive.³⁹⁶

As per paragraph 3 of article 10 of the directive “Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new

³⁹³ Ibid. p.34-35

³⁹⁴ Ateş, “Veri Tabanlarının...” op.cit. p.73

³⁹⁵ Helvacioğlu, op.cit. p.96

³⁹⁶ Sinodinou, op.cit. p.35

investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection”. This provision is stated in additional article 8/3 without leading to any problem of harmonization. However, the statement of “own protection conditions- kendi koruma kosulları” in the FSEK is wrong. This statement should have been “its own term of protection” and its Turkish translation should be “kendi koruma suresine hak kazanır”. Because “term of protection” does not mean conditions of protection but duration of protection with its specific meaning.³⁹⁷

3.6. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001 ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

3.6.1. Background of the Directive

Proposal submitted by the European Commission in 1997 to the Parliament and Council is the initial stage of the preparations of the Directive 2001/29. The proposal was approved and enacted in 2001 after a thorough scrutiny by the parliament.³⁹⁸

The purpose of Information Society Directive is to ensure the implementation of the provisions of two international agreements which were completed in December 1996 at the EU level. These agreements which are referred to as WIPO Internet Treaties are WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The Commission does not welcome that member states have different approaches on the protection of authors’ rights at technological aspect and introduces a single arrangement on the subject.³⁹⁹ However, in many aspects, the directive gets ahead of these two

³⁹⁷ Ateş, ” Fikri Hukukta...”, op.cit.p.386

³⁹⁸ Bayamlioğlu İbrahim Emre, “Fikir ve Sanat Eserleri Hukukunda Teknolojik Koruma”, XII Levha Yayıncılık, İstanbul, 2008, p.195

³⁹⁹ Ibid.p.196

treaties. Therefore, this directive is also called “the most lobbied directive in the European history”⁴⁰⁰

Also the ECJ drew attention to this directive in one of its decisions and the concerned decision concluded that the Member States are not required to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.⁴⁰¹

Scope of the directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society (art. 1/1). However, this special emphasis on “information society” does not mean the directive shall be applicable only in connection with the internet. Moreover, the directive does not regulate all the subjects of copyright on information society. For instance, scope of this directive does not cover moral rights.⁴⁰²

3.6.2. Relation of the Information Society Directive with Other Directives

Pursuant to Article 1/2 of the Directive, this Directive shall leave intact and shall in no way affect existing Community provisions relating to;

- the legal protection of computer programs;

⁴⁰⁰ Dreier, Hugenholtz, op.cit. p.374

⁴⁰¹ *Productores de Música de España (Promusicae) v Telefónica de España SAU*, C-275-06, Para,71 The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

⁴⁰² Kılıç Bilge, “5846 Sayılı Fikir ve Sanat Eserleri Kanunu’nun 2001/29 Sayılı Ve 22 Mayıs 2001 Tarihli Bilgi Toplumunda Eser Sahibinin Hakları Ve Bağlantılı Hakların Uyumlaştırılması Hakkında Parlamento Ve Konsey Direktifi İle Karşılaştırılması” Unpublished Expertise Thesis, Ankara, 2008, p.31

- rental right, lending right and certain rights related to copyright in the field of intellectual property;
- copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- the term of protection of copyright and certain related rights;
- the legal protection of databases.

This paragraph concerns the relationship between the Directive and earlier European Copyright Directives as much as possible.

3.6.3. Right to reproduction

Reproduction is the creation of the copies of a work by means of any materials in a way to ensure its utilization without requiring the original.⁴⁰³ Method of reproduction is not important Cassettes, CDs, computer hard disks, DVDs and books can be given as the examples of means of reproduction.⁴⁰⁴

As regards to reproduction right, acts of uploading or downloading⁴⁰⁵ fixed performances on and from web pages should be accepted as reproductions as these acts are qualified as recording the fixation of a performance over a device which is used to transfer and repetition of sounds and/or images.⁴⁰⁶

Until the Information Society Directive was put into implementation, no legislation of the Community included the definition of reproduction right. “Reproduction right” that caused serious controversies during the discussions of WIPO Treaties was not provided for in neither of the treaties since no agreement was reached.⁴⁰⁷

Article 2 of the Directive stipulates reproduction right of the authors and related-right-holders. As per this article, “Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;

⁴⁰³ Öztürk, op.cit, p.62-63

⁴⁰⁴ Gökyayla, “Telif Hakkı ve”, loc.cit. p.163

⁴⁰⁵ Decision of the Supreme Court of Appeals: HGK, 20.03.2002, E.11-176/124 K. 2002/214, Erdil, op.cit, p.236

⁴⁰⁶ Arkan, op.cit. p.83

⁴⁰⁷ Kılıç,op.cit. p.35

- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.”

The definition stated in the Directive is quite comprehensive. Article 2 of the Directive distinguishes reproductions into three categories: direct or indirect, temporary or permanent and whole or partial.⁴⁰⁸

Direct or indirect reproduction: The Directive clarifies that indirect copying can also be regarded as reproduction in some mandatory cases. Reproductions made by sound and/or image transmitters which contain the fixation are called direct reproduction; reproduction made by recording through the devices such as radio, television or internet which transmit the fixation are indirect reproduction.⁴⁰⁹ A controversial example about this subject is the reproductions via internet. The actual provisioning of a hyperlink on a webpage A pointing to webpage B does not constitute a reproduction of the webpage B. However, the end users who click on the hyperlink create a copy of the webpage B on their local computer. Therefore, the provider of the hyperlink could be liable under the doctrine of contributory infringement.⁴¹⁰

Temporary or permanent reproduction: The Directive provides for that the act of reproduction covers both methods of reproduction considering the digital technology.

In whole or in part reproduction: In general, the right of reproduction covers partial reproductions of works, no matter how small the part is. Therefore even copies as they occur in routers in the internet or in music and video sampling may constitute a reproduction covered by Article 2. However, the exceptions envisaged by the Directive concerning this right shall be reserved.⁴¹¹

In addition to reproduction of a work through the fixed media (permanent reproduction) such as a book or CD, the copies saved to the operating memory of a computer (temporary reproduction) but which cannot be seen are evaluated under the

⁴⁰⁸ Dreier, Hugenholtz, op.cit. p.358

⁴⁰⁹ Arkan, op.cit.p.82

⁴¹⁰ Dreier, Hugenholtz, op.cit. p.358

⁴¹¹ Ibid. p.359

scope of reproduction right. This comprehensive framework has been subject to very harsh criticism in theory and practice. The reason is that numerous temporary reproductions take place everyday via computers which use digital technologies. Due to this inconvenience, exclusion of temporary reproduction from the scope of reproduction right has been regulated under the heading of exceptions and restrictions and it will be elaborated in the coming sections.⁴¹²

At this point, it would be significant to talk about a EJC decision⁴¹³. The reference was made in the context of proceedings between Infopaq International A/S ('Infopaq') and Danske Dagblades Forening ('DDF') concerning the dismissal of its application for a declaration that it was not required to obtain the consent of the rightholders for acts of reproduction of newspaper articles using an automated process consisting in the scanning and then conversion into digital files followed by electronic processing of that file.

Infopaq operates a media monitoring and analysis business which consists primarily in drawing up summaries of selected articles from Danish daily newspapers and other periodicals. The articles are selected on the basis of certain subject criteria agreed with customers and the selection is made by means of a 'data capture process'. The summaries are sent to customers by email.

DDF is a professional association of Danish daily newspaper publishers, whose function is inter alia to assist its members with copyright issues. In 2005 DDF became aware that Infopaq was scanning newspaper articles for commercial purposes without authorisation from the relevant rightholders. Taking the view that such consent was necessary for processing articles using the process in question, DDF complained to Infopaq about this procedure.⁴¹⁴

Infopaq disputed the claim that the procedure required consent from the rightholders and brought an action against DDF before the Østre Landsret (Eastern Regional Court of Denmark), claiming that DDF should be ordered to acknowledge that Infopaq is entitled in Denmark to apply the abovementioned procedure without the

⁴¹² Kılıç, op.cit. p.36

⁴¹³ Infopaq International A/S v Danske Dagblades Forening, C-5-08, The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

⁴¹⁴ ECJ, C-5/08, Para. 13-16

consent of DDF or of its members. After the Østre Landsret dismissed that action, Infopaq brought an appeal before the referring court.

According to the Højesteret (supreme Court of Denmark), it is not disputed in this case that consent from the rightholders is not required to engage in press monitoring activity and the writing of summaries consisting in manual reading of each publication, selection of the relevant articles on the basis of predetermined search words, and production of a manually prepared cover sheet for the summary writers, giving an identified search word in an article and its position in the newspaper. Similarly, the parties in the main proceedings do not dispute that genuinely independent summary writing per se is lawful and does not require consent from the rightholders.

Nor is it disputed in this case that the data capture process described above involves two acts of reproduction: the creation of a TIFF file when the printed articles are scanned and the conversion of the TIFF file into a text file. In addition, it is common ground that this procedure entails the reproduction of parts of the scanned printed articles since the extract of 11 words is stored and those 11 words are printed out on paper. There is, however, disagreement between the parties as to whether there is reproduction as contemplated by Article 2 of Directive 2001/29.⁴¹⁵

In those circumstances, the Højesteret decided to stay the proceedings and asked the following question to the Court of Justice: Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction which are protected (s)Article 2 of [Directive 2001/29]?

The Court stated that copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation. This means the various parts of a work thus enjoy protection under Article 2(a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.

In accordance with the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even

⁴¹⁵ ECJ, C-5/08, Para. 22-25

certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.⁴¹⁶

It must be remembered also that the data capture process used by Infopaq allows for the reproduction of multiple extracts of protected works. That process reproduces an extract of 11 words each time a search word appears in the relevant work and, moreover, often operates using a number of search words because some clients ask Infopaq to draw up summaries based on a number of criteria.

In so doing, that process increases the likelihood that Infopaq will make reproductions in part within the meaning of Article 2(a) of Directive 2001/29 because the cumulative effect of those extracts may lead to the reconstitution of lengthy fragments which are liable to reflect the originality of the work in question, with the result that they contain a number of elements which are such as to express the intellectual creation of the author of that work.⁴¹⁷

In the light of the foregoing, the answer to the question is that an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

As a conclusion, the Court of Justice had a broad interpretation on the reproduction right stated in Article 2/a of the Directive and decided that storing and printing out an extract of a protected work although it is not considerable in quantity has to be regarded as a breach of reproduction right since it is the expression of the intellectual creation of the author.

On the other hand reproduction right is stipulated in Article 22 of the FSEK. As per Article 22/I of the FSEK, “The right to reproduce the original or copies of a work in

⁴¹⁶ ECJ, C-5/08, Para. 33

⁴¹⁷ ECJ, C-5/08, Para. 48-51

any form or by any method, in whole or in part, directly or indirectly, temporarily or permanently belongs exclusively to the author.”

Reproduction right of the related right holders is governed in Article 80 of the FSEK. Reproduction right for performers is stipulated by the statement of “reproduction of this fixation”; for phonogram producers by the statement of “direct or indirect reproduction of this fixation”; for radio and television organizations by the statement of “direct or indirect reproduction of the broadcast by any technique or method” and for film producers by the statement of “direct or indirect reproduction of this fixation”.

Concept of reproduction defined in Article 22 of the law is in compliance with Article 2 of the Directive. However this definition does not cover only the authors’ rights. It is not clear whether the same concept is also applicable to related rights.

Another factor which increases this uncertainty is the concept of fixation stated in Article 1/b. This article states that this concept is applicable both for copyright and related rights. This is not the case, however, in respect of the concept of reproduction which is closely related to the concept of fixation. And this seems to suggest that this concept differs depending on whether it applies to authors’ rights or to related rights.⁴¹⁸ The definition of “reproduction” should be included in Article 1/b of the Law which is clearly applicable to both copyright and related rights, as it is provided for in Article 2 of the Directive and in Article 22 of the Law. In view of such a definition applicable to both copyright and all the four categories of related rights, in all those provisions of the Law where the right of reproduction is mentioned, simply the word “reproduction” should be used without repeating again any elements of the concept and definition of reproduction.⁴¹⁹

⁴¹⁸ Ficsor Mihaly, “Memorandum On Directive 2001/29 EC Of The European Parliament And The Council Of 22 May 2001 On The Harmonization Of Certain Aspects Of Copyright And Related Rights In The Information Society And Its Implementation In The Turkish Copyright Law, Arcieve Of Ministry Of Culture And Tourism, Ankara,2007,p.4

⁴¹⁹ Ibid, p.4

3.6.4. Right of communication to the public and making available to the public

Right of communication to the public and right of making available to the public for authors and right holders are governed in Article 3 of the Directive. As per this Article:

“1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

Article 3 of the Directive governs the right of communication to the public and right of making available to the public for authors and right holders. While this article was drafted Article 8 of the WIPO Copyright Treaty and Articles 10 and 14 of the WIPO Performances and Phonograms Treaty have been taken into consideration.

3.6.4.1. Right to communication to the public

Before it was regulated in this Directive, right of communication to the public had been arranged only in the legislation on databases (Article 5/d of the Databases Directive) and satellite broadcasting (Article 2 of the Satellite Broadcasting Directive). Although previous arrangements still exist, new arrangement stipulated by this Directive expands the framework of the right of communication to the public.

Right of communication to the public encompasses the concept of “non-concrete copies of the work” in its broadest terms. Concept of communicating to the public means communication by other means (for instance TV broadcast or live broadcast from the internet) and in places other than the first communication of the work to the public (show, concert, etc.).⁴²⁰ Furthermore, a decision of the Supreme Court of Appeals has concluded that a painting used as a wall calendar is a breach of the right to disclose the work to public and right to reproduction⁴²¹. As a result of this; introduction of the work among the family, relatives or certain professional groups cannot be accepted as disclosure to public.⁴²² For instance, distributing a doctorate thesis to the members of the jury and defending it in front of the jury is not a disclosure to the public.⁴²³

In accordance with Recital 23 of the Directive, this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. That is why this right should not cover performance of the work to the public. However, should a performance is transmitted to the audience sitting in the next room by technical devices; this act is in the scope of the right of communicating to the public.⁴²⁴ The basis for the performance right is that the work should directly be communicated to the public by reading, saying, playing or displaying.

As it is obvious from Article 1/3 of the Directive, right to communication to public is regulated only for the authors and related right holders are not in the scope. However, Article 8 of the Directive on Rental and Lending Right and Article 4 of the Directive on Satellite Broadcasting govern this right separately for the related right-holders.

⁴²⁰ Öztan, op.cit.p.385

⁴²¹ Decision of the Supreme Court of Appeals: 11. H.D. 20.2.2001, E:2000/10395, K: 2001/1478, Suluk, Orhan, op.cit. p.242

⁴²² Erdil, op.cit p.432

⁴²³ Kılıçoğlu, op.cit p.223

⁴²⁴ Dreier, Hugenholtz, op.cit. p.185

3.6.4.2.Right of making available to the public

Making available to the public means presenting the work to the public. If the user can still have an access to the work afterwards, this is not making available to the public but it is reproduction. The significant point in terms of making a work available to the public is that the individuals should be able to get access to the work in the place and time they prefer, in other words when they request. Reading a piece of work via an internet address or watching a film via pay TV channels might be given as examples. In case of a transmission by television or radio broadcast or internet radios out of the control of the individual, it is not possible to mention about “making available to the public” because this situation falls under the right of “communicating to the public”.

The question whether the right of making available to the public is applicable to the computer programs should be discussed. As per Article 1/2 of the Directive, provisions of the Information Society Directive shall not infringe the provisions of the directive which were put into effect previously on computer programs. But, this provision does not intend to say that the arrangements not provided for in the Computer Programs Directive shall not be introduced by the new directive. Therefore, it is accepted that the right of making available to the public is also applicable to the computer programs.

Rights of communicating and making available to the public are stipulated in Article 25 of the FSEK. Pursuant to this Article, “The author shall have the exclusive right to communicate the original of a work or its copies to public by way of letting them be broadcast by organizations that broadcast by wire or wireless means such as radio and television, satellite or cable, or by devices permitting the transmission of signs, sounds and/or images including digital transmission, or by way of letting them be retransmission by other broadcasters which obtain the work from such broadcasts.

The author has the right to permit or prohibit the sale or other distribution or supply of the work or its reproduced copies to the public by wire or wireless devices and the communication of the work to the public by providing access to it at a time and place chosen by natural persons.

The distribution and supply of works by means of communication to the public as regulated under this article shall not prejudice the author’s right of distribution.”

Right of communicating to the public is regulated in paragraph one and right of making available to the public is paragraph two. The definition given in paragraph one is more detailed than the one in the Directive. The reason for introducing such a detailed definition is to bring clarity to the said right which is introduced as a new category as a consequence of technological advancements. However, preferring communication to the public by wire or wireless means as stated in the Directive will ensure a more practical and comprehensive arrangement⁴²⁵. Another point is that the statement of “the original of a work or its copies” in the article of the FSEK should be reworded as “the work”. Because, it does not matter whether the communication to the public is made over the work itself or its copies.⁴²⁶

The expression in Article 25/1 of the FSEK according to which the right concerned ”exclusively belongs to the author” is not in accordance with the wording of the relevant provisions of the Directive, which – in the case of exclusive rights – everywhere speaks about the “exclusive right to authorize or prohibit.” This is not, however, even in full harmony with the language of the other provisions of the Law concerning economic rights which begin as follows: “The author shall have the exclusive right of...” If correctly interpreted, this may mean exclusive right to authorize or prohibit (since from the concept of exclusivity it may be deduced that everything depends on the owner of exclusive right). The ideal solution would be to use the same full expression as the one used in the Directive (and then in all provisions on exclusive rights, in order to avoid any dangerous a contrario implication). However, as a minimum, Article 25 should begin the same way as the other provisions of the Law on exclusive right rather than using the less clear term “exclusively belong to the author.”⁴²⁷

Paragraph two of the Article regulates the right of making available to the public. It is seen that the most important element of the “right of making available to the public” which is “providing access to the work in time and place that the real persons select” is included in the text of the article. However, since the statement of

⁴²⁵ Kılıç, op.cit, p.41

⁴²⁶ Ibid, p.41

⁴²⁷ Ficsor, op.cit, p.7

“distributing and supplying to the public” evokes “distribution right” and “performance right” it is suggested to be excluded from the text.⁴²⁸

It is understood that the third paragraph of the article has been regulated to ensure compliance with the international arrangements and Information Society Directive. However, this provision is different in one aspect from the arrangement stated in the Directive. First of all, the words “distribution” and “supply” which have very close meaning have been used together leading to an ambiguity. Secondly, by the statement that the utilization of the right of communicating to the public does not exhaust the right of distribution, it is emphasized that there is no link between the two economic rights which are already independent from each other. Therefore, this provision should be revised in accordance with Article 3/3 of the Directive.⁴²⁹ Last paragraph of Article 25 of the FSEK should be revised to state that the rights of communicating and making available to the public are such rights that they are not exhausted after one time utilization.

3.6.5. Right to distribution

The biggest difference of the distribution right from the right of reproduction regulated in Article 2 of the Directive and rights of communicating and making available to the public regulated in Article 3 of the Directive is that this right concerns concrete copies of the work.⁴³⁰ Existence of the statement of “original of a work or its copies” in the wording of the Article is the most important indicator of this fact. Online transmission of the works via internet is outside the scope of the right of distribution. Presenting the work for the use of the third people via internet or “virtual environment” is evaluated within the scope of the right of communicating to the public.

Article 4 of the Directive is as follows:

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

⁴²⁸ Ibid, p.8

⁴²⁹ Kılıç,op.cit. p.42

⁴³⁰ Öztan, op.cit. p.364

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

As seen from Article 4/1 of the Directive, distribution right concern concrete copies of the works such as CD, DVD, magazine, book, etc.

Article 4/2 regulates principle of exhaustion of the distribution right and it is stated that the distribution right shall be exhausted in respect of the copies of the work where the first sale or other transfer of ownership in the Community of that object is made. Principle of exhaustion of the distribution right has been introduced to prevent that the distribution right hinders free movement of the goods in the EU member states.⁴³¹ The right to decide on the first sale of the work belongs to the right holder. However, once the work or reproduced copies are sold with the permission of the right holder, the right to stop the sales disappears. Because, when the work is sold voluntarily, monopolistic right of the right holder exhausts. For example, if a publishing house has bought the right of publishing of a work, right holder cannot stop that the novel is sold to the main dealer; main dealer sells it to the dealers; and dealers to the customers. This principle is called the exhaustion of right of distribution. In accordance with this principle, only the distribution right is exhausted, not all economic rights.

As per Article 23/I of the FSEK, distribution right also covers renting, lending, putting up for sale or distributing in any other way, the original or copies of a work.

In this article, the term “putting up for sale” means transfer of the property of the work in return for a certain benefit. Pursuant to paragraph one this Article, exclusive right to distribute belongs to the author.⁴³²

“Distributing in any other way” stated in the paragraph means introducing the original or copies of a work by purposes and methods other than renting and lending. “Distributing in any other way” is a very comprehensive statement. This broad definition might lead to contradictions with the right of communicating to the public. Therefore, it is suggested that it is suggested that this statement be excluded from the text.

⁴³¹ Dreier, Hugenholtz, op.cit. p.380

⁴³² Ateş, “Fikir ve Sanat Eserleri Üzerindeki...” op.cit. p.171

The combinations of the provisions on the right of distribution, on the one hand, and the rights of rental and lending, on the other hand, is possible as long as they are in accordance with the *acquis communautaire*. However, it is stated that a much clearer structure may be established if these rights are regulated separately, since there are various provisions of the *acquis* and the relevant international norms that only relate either to the right of distribution or to the right of rental and the right of lending.⁴³³

On the other hand, FSEK adopts the principle of national exhaustion. It should also be noted that the subject of exhaustion here is just the right of sale; rights of renting and lending remain to belong to the right holder.⁴³⁴ As required by the principle of national exhaustion, our legislation bans “parallel import”. For instance, should the right of sale is granted in Turkey, right of distribution will exhaust within the country in terms of copies of the work which is presented for distribution. Permission from the rightholder is required for the sale of these copies in the EU member states. However, as stated above, the Directive does not adopt national exhaustion but “regional exhaustion”. Turkish legislation is not in compliance with the Directive in that sense, however considering that adoption of regional exhaustion before being an EU member would harm the rightholders in Turkey, this incompliance is thought to be beneficial for our country.

3.6.6. Exceptions and limitations

In the legal system, no right is limited. As Rousseau emphasized in the Age of Enlightenment, practice of law is strong as long as it maintains its harmonization with the society. Therefore, all interests in the field of intellectual law should be kept in fair balance.⁴³⁵

It is a longstanding purpose for the intellectual law to protect not only the author but also other people involved in the creativity procedures. As a matter of fact, in case there is a reason for compliance with the laws to the benefit of the society, this right

⁴³³ Ficsor, *op.cit.* p.11

⁴³⁴ Öztan, *op.cit.* p.369

⁴³⁵ Geiger Christopher, “Hirsch’ten Günümüze Fikri Haklar”, Çev: Feyzan Şehirali, Tebliğler, FİSAUM Yayını, Ankara 2004, p. 33

should be designed in a way to produce consequences which will be beneficial for the society and this has to be subject to limitations.⁴³⁶

The purpose of the heading of the “exceptions and limitations” stated in Article 5 of the Information Society Directive is to harmonize all other exceptions and limitations regulated under the legislations of the EU member states.⁴³⁷ Recital 31 of the Directive points out that existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market. The only mandatory exception stipulated by the relevant article is “temporary acts of reproduction” which are provided in paragraph one. Other 20 exceptions listed in the Article are discretionary. Member states are free to include these exceptions and restrictions in their national laws. Therefore, when this subject is elaborated, discretionary exceptions will not be discussed.

Another important point is whether Article 5 of the Directive is applicable to the rights of the works which have been governed by the Directives put into force before the Information Society Directive. Articles 5 and 6 of the Computer Programs Directive regulate exceptions and restrictions on the rights envisaged by Article 4. These exceptions and restrictions are still in force. The most important question to be answered in this sense is whether the mandatory exception envisaged in 5/1 of the Directive is applicable to computer programs. Exceptions and restrictions are prescribed in a very detailed manner in the relevant articles of the Computer Programs Directive. As stated above, the purpose of Article 5 is not to abolish the arrangements introduced by this Directive. For this reason, the mandatory exception envisaged in 5/1 of the Directive is not applicable to computer programs. The same situation applies to Database Directive. Exceptions to the rights stipulated in Articles 5, 7 and 8 on database are governed in Articles 6 and 9 of the Directive. Therefore, Article 5/1 of the Information Society Directive is not applicable to databases.⁴³⁸

Rental and Lending Directive governs the exceptions to the rights of the rightholders of the related rights in addition to those of the authors. Article 10/2 of the Directive states that member states may envisage the exceptions and restrictions to the

⁴³⁶ Ibid, p.33

⁴³⁷ Bayamlioğlu, op.cit. p.197

⁴³⁸ Kılıç, op.cit, p.48

rights of the authors also for the holders of related rights. Therefore, it is possible to envisage the exceptions stated in Article 5 of the Information Society Directive for the holders of related rights. Furthermore, Article 11/1(a) of the Information Society Directive and Article 7 of Rental and Lending Directive which provides for the reproduction right of the related rightholders have been repealed. Reproduction right of the related rightholders is stipulated in Article 2 of the Information Society Directive. That is why all exceptions and restrictions provided for the reproduction rights in Article 5 of the Directive is also binding for the holders of related rights.⁴³⁹

Since no agreement was reached among the member states, there is no provision in WIPO Treaties which stipulates reproduction right. However, together with the advancements in the digital technologies and increasing importance of the concept of reproduction right, “reproduction right” has been stipulated under the Information Society Directive.

In the draft of the Information Society Directive of 1997, a recommendation of article was made to exempt temporary reproductions which are a part of technological process from the right of distribution. A large number of opinions were submitted by the member states on to which level the temporary copies that occur particularly during the transmission of the works under the copyright protection by digital technologies would be excluded from the scope of the right of reproduction. As a result of long discussions, exception of temporary reproduction which is the only one that the member states are liable to apply has been stipulated in Article 5/1 of the Directive.

Article 5/1 of the Directive is as follows:

“Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2”.

⁴³⁹ Ibid,p.49

The statement of “transient or incidental” mentioned in the Directive determines the limits of the temporary reproduction. Thus, any kind of temporary reproduction cannot be included in the scope of this exception.

As an example to the “transient” reproduction, those made over internet “routers”⁴⁴⁰ or records created over the RAMs⁴⁴¹ of the computer and deleted automatically from the memory when it is shut down can be given.

As clear from above, temporary acts of reproduction which are transient or incidental part of a technological process shall be exempted from the reproduction right on condition that other circumstances stipulated by the Article exist. Even if the said reproductions are not “transient” (for example, if it is kept in the memory for 4 hours), they shall be accepted in the scope of exception as long as they constitute incidental part of a technological process.

In parallel with this, aforementioned decision of the ECJ states that the act of printing out an extract of 11 words, during a data capture process, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders.⁴⁴²

Exception envisaged in Article 5/1 of the Directive shall be applicable only to the reproductions required by the technological process. Main function of the reproduction realized via “Routing” and “Proxy server” is not to reproduce the works which are protected through copyright; however the reproductions which contain the works as a requirement of technological process are created via these systems.⁴⁴³

Another prerequisite to accept the said reproduction in the scope of exception is that this process constitutes an integral and essential part of a technological process.

“Technological processes” have been limited as to their purposes in the Article: a transmission in a network between third parties by an intermediary. “Transmission in a network between third parties” primarily prescribes a technological process occurring via internet “routers”. However, this phrase covers not only the internet but also other

⁴⁴⁰ “Routing” is recording the data at temporary paths along the way which it comes from the internet to the users’ computers. Başpınar, Kocabey, op.cit p.124

⁴⁴¹ RAM : Random Access Memory: It is the name given to preliminary or temporary memory of a computer.

⁴⁴² ECJ, C-5/08, Para. 76

⁴⁴³ Dreier, Hugenholtz, op.cit. p.380

communication networks such as telephone and wireless networks. Recital 33 of the Directive states that this network should not modify the information and not interfere with the lawful use of technology.⁴⁴⁴

Even if all the conditions stipulated by the Article are fulfilled, when the act of temporary reproduction has a separate economic value, it cannot be accepted in the scope of exception. Since the criterion of “not having separate economic value on their own” is not included in the international or national copyright arrangements, it has been evaluated as open to interpretation and legally uncertain and therefore ambiguous. As a matter of fact, interpretation of this provision has been left to the lawmakers and implementers of the member states.

FSEK has no provision of exception on “temporary reproductions”. Therefore, an article should be integrated in the law on the implementation of the concerned article of Directive.

3.6.7. Protection of Technological Measures and Rights Management Information

3.6.7.1. Protection of Technological Measures

Music and film industries have been raising complaints for years about music file sharing networks such as Napster, Gnutella, Kazaa and BitTorrent because of large-scale piracy activities. A series of technological measures such as copy control are used to control the distribution of video, music and written works. These measures are also supported by “rights-management information” on digital content and relevant parameters.

Although technological measures promise on high-protection, a system which can assure 100 % security could not be developed until today. Technological protection measures have been hacked since the date they were developed. It is estimated that these systems will be subject to various attacks also in the future.

⁴⁴⁴ Türkekul, Erdem, “Eser Sahibinin Hakları ve Bağlantılı Haklar Ön Raporu T.C. Başbakanlık Devlet Planlama Teşkilatı Dokuzuncu Kalkınma Planı Fikri Mülkiyet Hakları Özel İhtisas Komisyonu”, 2005 s.34

Recently, special provisions have been introduced to enhance the security of such distribution systems. Generation and distribution of devices which disrupt functioning of the legal protection and technological measures introduced in the framework of these provisions are prohibited.

Article 6 of the Information Society Directive provides for more general provisions on this subject. Paragraph one of Article 6 bans circumvention of any effective technological measures. Paragraph two bans wide-scale preparation activities. Paragraph three provides the definition of “effective technological measures”. Paragraph four introduces an arrangement on the consistency between the technological measures and exceptions and limitations.⁴⁴⁵

“Technological protection measure” is defined in a detailed way in Article 6/3 of the Directive. In accordance with this definition, technological measures means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subjectmatter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. The statement of “technology, device or component” in this definition has been included to state that technological measures encompass both computer hardware and software.

“Technological protection measures” is accepted as the synonym of “Digital Rights Management” in practice. However, Digital Rights Management is used to express more complex protection in comparison with the technological protection measures which are geared to protect works and other subjects.⁴⁴⁶

The prerequisite for the protection of technological measures is that these measures should be used for the protection of rights of authors, of the related-rights owners or of the sui generis rights owners. Without considering they authorize or not, technological measures, in case they prevent acts concerning a right which is not recognized within the legal framework, cannot benefit from the provision governed in Article 6 of the Directive. For instance, technological measures preventing the

⁴⁴⁵ Dreier, Hugenholtz, op.cit. p.388

⁴⁴⁶ Kılıç, op.cit. p.80

utilization of the rights concerning a work whose copyright protection term has expired shall not be protected under Article 6 of the Directive.

Article 6/3 of the Directive regulates in which cases technological measures may be accepted as effective. In accordance with this article, technological measures shall be deemed 'effective' where the use of a protected work or other subjectmatter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective. As understood from the Directive, efficacy of a technological measure cannot be measured by its being circumvent.

Article 6/1 of the Directive states that Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. The act of "circumvention" mostly occurs by finding and distributing passwords, manipulating approval protocols and putting physical intervention to break down hardware protection mechanisms.

Article 6/2 of the Directive prescribes prohibited acts to circumvent technological measures. As per this Article, Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
any effective technological measures.

The statement of "devices, products or components" in the Article encompasses special software programs and unauthorized hardware. This statement also covers the

components which are not effective alone but prove to helpful to circumvent the technological measures collectively.⁴⁴⁷

The term “import” here forbids not only the commercial import but also the import made for personal use. And the term “distribution” includes the acts stated in the framework of “distribution right”, one of the exclusive rights which are listed in Article 4 of the Directive. The subjects of communicating or making available to the public the devices which circumvent the technological measures are elaborated under the statement of “provision of services”.

The article envisages that the possession of devices which circumvent the technological measures only for commercial purposes should be regarded as derogatory acts. Therefore, acts committed by a person by downloading software which circumvents the technological measures for personal use or by circumventing the circuit board on a pay TV decoder shall not be regarded as violation in terms of Article 6 of the Directive. However, Recital 49 of the Directive authorizes arrangements which will ensure that private possession of devices is accepted in the scope of the exception.

Statement of “provision of services” covers on-line transmission of devices which circumvent the technological measures and distribution of the relevant rules and procedures in writing or on-line.

On the other hand, as required by the first sentence of Article 6/4, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law. There is no clarity on measures to be taken in the Directive or section of Recital. First of the conditions for the implementation of this provision is to arrange the measures to be taken by the member states with regard to the beneficiaries who has legal access to the work. Therefore, persons who obtain the work unlawfully shall not be able to benefit from exceptions or limitations against technological measures. Secondly, in case “discretionary measures” which harmonize technological measures and exceptions are taken by the right-owners, concerned provision of the Directive shall not be applied. For instance, when the right-owner agrees with a library to let them use his/her work,

⁴⁴⁷ Ibid, p.81

member states shall not provide for any legislative arrangement as per Article 6/4 of the Directive.

Second sentence of Article 6/4 of the Directive governs the measures that might be taken by the Member States in respect of the situation of those who benefit from the exception of reproduction for private use for technological measures. As different from the first sentence, taking the measures concerned is left to the member states. In case the right-owners take the measures voluntarily concerning the reproduction for personal use of the work they protect by technological measures, above mentioned provision shall not be applied. Although the said provision authorizes Member States to take appropriate measures regarding the limitation of technological measures on the exception of reproduction for private use, this authority does not prevent right-owners from restricting the number of copies as regards to personal reproduction by technological measures.

Member States have considerable freedom on two aspects in relation to the implementation of Article 6/4 of the Directive.

Firstly, there is no clarity in the Directive on whether the Member States will introduce this liability as an imperative provision or how the disputes over this liability will be settled; in the court or by a dispute settlement mechanism. Secondly, the provision in the Directive leaves to the Member States the right to take decision on the liabilities to be abided by the right owners. For instance, rightholders (such as visually challenged people) may require from some exception beneficiaries to provide devices and services which circumvent technological measures. The second alternative is to make a legal arrangement which introduces liabilities regarding the compliance of rightholders with the exceptions and limitations of copyright. Another alternative is that rightholders may give to the beneficiaries of exceptions and limitations copies of work which are protected against free reproduction for copies more than one.

Article 6/4 of the Directive prohibits an implementation in particular. This is that the beneficiaries of the exceptions and limitations remove the technological measures

and distribute some devices with this purpose.⁴⁴⁸ On these grounds, the Directive is different from the Digital Millennium Copyright Law.⁴⁴⁹

There is no provision in the FSEK which can be the equivalent of Article 6 “Obligations as to technological measures” of the Directive. Article 73/ 1(c) of the FSEK concerns violation of the technological measures which protect computer programs. This provision is in accordance with Article 7 of the Directive on Computer Programs. Computer programs are not in the scope of the provisions of the Information Society Directive. Therefore, a general provision which will cover all types of works (including computer programs) should be drafted on the protection of technological measures.⁴⁵⁰

3.6.7.2.Rights Management Information

Article 7 of the Directive has been regulated to ensure the Community-level implementation of the provisions on “Rights Management Information” as required by the WIPO Treaties.

Article 7 of the Directive is as follows:

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:
 - (a) the removal or alteration of any electronic rights-management information;
 - (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

⁴⁴⁸ Bayamlioğlu, op.cit. p.202

⁴⁴⁹“Digital Millenium Copyright Act” is the law enacted by the U.S.A on 28 October 1998 concerning the implementation of WIPO Treaties.

⁴⁵⁰ Ficsor, op.cit. p.31

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.”

Pursuant to the Directive, "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter or sui generis right, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.⁴⁵¹

This provision of the Directive states that Member States shall provide for adequate legal protection against the removal or alteration of any electronic rights-management information.

"Rights-management information" is defined as any information on the work, the author or any other rightholder, or information about the terms and conditions of use of the work and any numbers or codes that represent such information. This provision prohibits the removal or alteration without authority of any electronic rights-management information; or the distribution, importation for distribution, broadcasting, communication or making available to the public of works.

Although paragraph two of Article 7 of the Directive provides a general definition for “rights-management information”, acts stated in Article 1/1 (a) and (b) concern the protection of electronic rights-management information. That is why numbering systems such as ISBN are not within the scope of protection governed in Article 7. Such numbering systems shall be accepted in the scope of the protection envisaged by the Directive only if they apply to the works in digital environment.

⁴⁵¹ Kılıç, op.cit. p.88

The acts which are not allowed in accordance with Article 7 are as follows: the removal or alteration of any electronic rights-management information, distribution, broadcasting, communication or making available to the public of works or other subject-matter. The article does not cover any acts to circumvent technological measures on the infringement of rights-management information. Only the acts which are realized without the authority of the rightholders are in the scope of violations. Lastly, the article states that if the person knows, or has reasonable grounds to know these acts are performed without authority, it will be regarded as an infringement.

Paragraph one, two and four of the Additional Article 4 of the FSEK govern the subject of rights management information and the relevant provision is as follows:

“Additional Article 4 - Information which identifies the work, the author of the work, the holder of any right in the work and information about the terms and conditions of use of the work, and any numbers or codes that represent such information attached to a copy of a work or appear in connection with the communication of a work to the public shall not be removed or altered. The originals or copies of the works on which the information and numbers or codes representing this information have been altered or removed shall not be distributed, imported for distribution, broadcast or communicated to the public

The provisions of the preceding paragraph shall also apply to phonograms and performances fixed on phonograms.

The provisions in subparagraph (2) of Article 72 of this Law shall be applied to those who commit the acts indicated in the first paragraph intentionally and without authority and to the content providers who persist in violation of rights.”

Additional Article 4 is a much comprehensive arrangement which includes not only the electronic rights-management information but any kind of rights-management information. However, inclusion of only the phonograms and performances fixed on phonograms in paragraph two (exclusion of films and other subjects) narrows the scope of act of infringement in terms of rightholders of related rights. Therefore all products which constitute the basis for related rights should be included in this scope.⁴⁵²

⁴⁵² Ficsor, op.cit. p.33

3.7. COMPARISON OF TURKISH LAW WITH THE DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 SEPTEMBER 2001 ON THE RESALE RIGHT FOR THE BENEFIT OF THE AUTHOR OF AN ORIGINAL WORK OF ART

3.7.1. Background of the Directive

Right to resale was first put into effect in France in 1920. This right is named as “droit de suite” in French. The first remark on such right which is for the artists indulged in visual arts was mentioned in 1893 in the work of Albert Vaunois which is “Chronique de Paris”⁴⁵³.

In 1921, Belgium followed the French example of “droit de suite” which was introduced in 1920. Afterwards, these two states were supported by an international organization named the ALAI (Association litteraire et artistique internationale) which was set up basing on the results of the Berne Convention Revision Conference held in 1928 and representing the rights of the authors⁴⁵⁴.

Examples put forward by France and Belgium drew attention rapidly and the number of countries which accepted the right to resale increased after the World War II. As a result of this, the principle on “droit de suite” was included in the Berne Convention in Brussels Revision Conference held in 1948.

Berne Convention leaves the point of recognition of the right to the discretion of the member states, so member states do not have to make the arrangements and to be able to claim this right in any country, it has to be regulated in their national legislation. In other words, this right is subject to reciprocity principle and it can be claimed only in a state which recognizes this right.

After this right was included in the Berne Convention, EU states made some arrangements to allow authors and other right-holders to receive a share from the said sale in case the works which are in the scope of this right were sold in an auction or in another place. Consequently, it was envisaged that the trade of works of fine arts in the Single Market would be disrupted, at least on the paper. In the most important art galleries of Europe, in London and Switzerland, the gallery owners, dealers and buyers

⁴⁵³ Garnett, Davies, Harbottle, op.cit., p. 98

⁴⁵⁴ Ibid, p.99

got serious amount of commission but authors could not get any share from the income of these sales⁴⁵⁵.

As a consequence of all these facts, the EU took the initiative to prepare a directive on the right to resale which will cover all member states without any exception. In spite of all oppositions presented by the UK and Netherlands asserting that the market of fine arts may be disrupted, mentioned arrangements were concluded⁴⁵⁶.

EU regulated the right to resale by the Council Directive (2001/84/EC) of 27 September 2001. This directive which makes regulations to allow authors to receive a certain share from the resale of their original works was able to enter into force after the discussions that continued ten years.

3.7.2. Purpose and Scope of the Directive

The thought lying behind this right is to protect the works of fine arts and their creators. The fact that the creators of the works of fine arts had to and still have to sell their works at very low costs at the beginning of their careers to earn their livings is a well-known reality of the fine arts market. The work may be sold and changed hands many times; it may gain value and bring huge profit for the successive owners, dealers and fine arts market. The reason of the value that the work gains is mostly the fame possessed by its creator⁴⁵⁷. However, in this scenario, the only person who cannot get any benefit is the real creator of the work. Right to resale aims to fix this economic imbalance through granting to the creator the right of following the future of his/her own work.

As per Article 1 of the Directive, resale right encompasses, for the benefit of the author of an original work of art, the authority to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author. In accordance with this statement, right to resale exist for the sales subsequent to the first transfer of the work by the author. However, it does not mean that the work has to be disposed by means of sale by its author or heirs.

⁴⁵⁵ Cornish, Llewelyn, loc.cit, p. 562

⁴⁵⁶ Dreier, Hugenholtz, op.cit. p. 405

⁴⁵⁷ Ateş, "Fikir ve Sanat Eserleri Üzerindeki..." op.cit. p.195

Resale right can be applied to each resale of the same work. This means right to receive a royalty will emerge against each resale subsequent to the first transfer of the work.

Pursuant to this Directive, right to resale shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art. As a matter of fact, recital 18 of the Directive states that the scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public.

In some cases, authors may conclude an agreement with the owners of the art galleries not on the resale of the work but only on its exhibition. Although in such cases the seller receives a royalty almost for each sale, since the sales taking place following its exhibition will be between the author and buyer, such sales cannot be the subject matter of right to resale.⁴⁵⁸

In accordance with Article 1/3 of the Directive, Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10000. Recital 18 of the Directive states such situations as the seller has acquired the work directly from the author.

As per Article 45 of the FSEK, authors of fine arts shall have a right to receive a share from the sales subsequent to the first transfer of the work. This article stipulates that each time the originals of works of fine arts change hands by sale at an exhibition or auction or at a store that sells such goods or in other ways, right to receive an appropriate share emerges. Accordingly, the sale has to take place in an exhibition or auction or at a store that sells works of fine arts.

The text of this article includes the statement of “or in other ways” in addition to exhibition or auction or a store that sells works of fine arts. When this statement is interpreted in a broader manner, it can be said that a sale which will take place between

⁴⁵⁸ Tanrıöver Canan, “Fikri Mülkiyet Hukuku’nda Güzel Sanat Eseri Sahibinin Yeniden Satış Hakkı” Unpublished LL.M. Thesis, Ankara, 2010, p.76

two people who are not operating in the market of fine arts can be evaluated in the scope of this arrangement which leads to the right to receive an appropriate share. However, in spite of the statement of “or in other ways”, it should be pointed out that the scope of the said right is limited to professional sales⁴⁵⁹. To prevent any ambiguity, the wording of this article should be re-designed in a way to emphasize that the said right only covers professional sales.

FSEK restricts the transfer of works to the means of sale only. If resale right was applied to the cases where transfers are limited to sales and works change hands by legal transactions, this practice would be more equitable⁴⁶⁰. In case the changing hands subsequent to first transfer of the work takes place by means of donation, even if all subsequent transfers are carried out by way of sale, right to resale shall not be applicable. It is stated that the implementation of this provision with its current wording will contradict with the purpose of the Law and cause injustices⁴⁶¹.

Article 45/2/2 of the FSEK stipulates that an amount to be exempt from the payment of a share shall be specified in a decree. Article 1/1 of this decree states that the sales not exceeding 5000 YTL shall be exempt from the payment of a share.

The works which constitute the subject matter of the said right regulated in Article 45 of the FSEK are scientific and literary works as well as handwritten originals of the musical works.

For the works listed in the group of fine arts to be covered by the right to resale which is stated in Article 45, they have to be in the nature of movables⁴⁶². Whereas Article 45/1 of the FSEK provides a right to receive an appropriate share, it excludes the architectural works. Architectural works and the works which cannot be separated from the immovables such as mosaic, relief, and fresco shall not be the subject matter of the right to resale⁴⁶³.

When the payment of a share was regulated in the FSEK, copies which are deemed to be original works due to the fact that they were produced by the author in limited numbers or under the supervision of the author and with his permission and

⁴⁵⁹ Karahan, loc.cit. p.81

⁴⁶⁰ Öztan, op.cit, p.398

⁴⁶¹ Arslanlı, loc.cit. p. 114

⁴⁶² Ibid, p.113

⁴⁶³ Öztan, op.cit. p. 395

were signed by the author or marked by him in another way have been accepted in the scope of this right. What is meant by the statement of limited number is not less number of copies but the author must specify the number of copies that he will mark as original. Works of fine arts which are created in this manner shall be accepted as original and benefit from the right to receive a royalty.

FSEK stipulates that the works which are in the scope of the right of payment of a share are scientific and literary works (paragraph 1 of art. 2) as well as the handwritten formats of the musical works (art. 3). Not all handwritten works can be the subject matter of this right. To be able to benefit from this right, these handwritten works have to be original. The copies of the handwritten works, even if they are created by the author personally, cannot be the subject matter of the right of payment of a share.

3.7.3. Subject of resale right

The directive specifies the subjects which may be the subject matter of resale right by the method of sampling and does not stipulate any limited number. Article 2/1 of the Directive covers pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs. For such and similar works of fine arts to benefit from resale right, they must be in the scope of copyright protection.

The subject matter which constitutes resale right is the object on which the work of fine arts is created. One of the most important characteristics of resale right is that the subject matter of the right is the physical object itself⁴⁶⁴.

The directive restricts the subject of this right to original works or the copies which are deemed to be original. “Original work” is the work on which the author shapes his/her creativity and created by the author personally. The statement of “created personally” does not mean that the author creates the work alone. In the creation process, assistants or similar contributors might support the author and this does not overrides the originality and resale right.⁴⁶⁵

⁴⁶⁴ Dreier, Hugenholtz, op.cit. p. 411

⁴⁶⁵ Tanriöver, op.cit. p.77

The Directive stipulates that the copies considered being original means copies of works of art which have been made in limited numbers by the artist himself or under his authority. Accordingly, only when the copies are made in limited numbers by the author himself/herself or under his/her authority, they can be the subject matter of resale right.

“Right to Share and Follow-up (droit de suite)” or “Resale Right” as referred to in the EU Acquis Communautaire is regulated in the FSEK under the heading of “Payment of a Share of Sale Proceeds of Works of Fine Arts”. However, this heading is not correct; Article 45 of FSEK also includes scientific and literary works as well as handwritten originals of the musical works. The contradiction between the heading of the said article and the works listed here should be eliminated.

When this right was first governed in the Turkish law, relevant provision of the Berne Convention was taken as the basis. As before the amendment made to Article 45 of the law, regulations regarding the implementation of this right has been conditioned to issuing a decree of Council of Ministers also after the amendment.

The decision of the Council of Ministers which has not been published for 55 years since the publication of the FSEK in 1951 and which encompasses the rules and procedures on the implementation of resale right was put into effect in 2006 upon its publication in the Official Gazette dated 27 September and numbered 26302. However, the reason that this right has never been used in this time period is not only the failure to enact the decision of the Council of Ministers. In that sense, a decision of the Supreme Court of Appeals states that “since the right of payment of a share of sale proceeds from the works of fine arts is a statutory right which is entitled to the authors and their heirs as per Article 45 of the Law No: 5846, the fact that the decree of the Council of Ministers has not been issued shall not make the concerned right inoperative or suspended; although the loss of the right of payment of a share which is deprived as a result of an act of stealing when the paintings are under the trust fund of the dealers should have been assessed as to the principles stated in Article 42/2 of the Law of Debts and an equitable compensation should have been concluded thereon, it is not deemed appropriate to reject the item of this loss basing on the justification that it is not certain

yet whether the loss will occur or not.⁴⁶⁶ The reason that the concerned right has not been enforced until today can be attributed to the conditions of the legal arrangements and the fact that there has been no sufficient information about this right.

In 2004, when the amendments on resale right were made to the FSEK, the Directive 2001/84/EC on resale right which was published in 2001 was not taken into consideration, the original text has been kept.⁴⁶⁷ In that sense, FSEK lags behind the western countries in terms of the developments experienced in the field of resale right.

Decree of Council of Ministers stating the rules and procedures on the implementation of resale right entered into force only in 2006 following its publication in the Official Gazette numbered 26302 and dated 27 September. However, the reason that this right was never used in that time period is not only the absence of this decree but also the circumstances stipulated in the legislation and lack of information on the resale right.

3.7.4. Share which can be obtained in the scope of resale right

The directive leaves to the member states the authority of determining a minimum sale price concerning resale right. It is required that this minimum price to be determined in accordance with paragraph two of Article 3 shall not exceed EUR 3000.

The directive sets some rates concerning resale right. As per Article 4 of the directive, the royalty shall be set at the following rates: (a) 4 % for the portion of the sale price up to EUR 50000; (b) 3 % for the portion of the sale price from EUR 50000,01 to EUR 200000; (c) 1 % for the portion of the sale price from EUR 200000,01 to EUR 350000; (d) 0,5 % for the portion of the sale price from EUR 350000,01 to EUR 500000; (e) 0,25 % for the portion of the sale price exceeding EUR 500000.

The directive also sets a maximum amount of royalty in the same article. In accordance with this provision, the total amount of the royalty may not exceed EUR 12500.

As per Article 45 of the FSEK, for the author and his/her heirs to be able to get a certain amount of share following the first sale of the work, there has to be a substantial

⁴⁶⁶Decision of the Supreme Court of Appeals, 11. H.D. E.2005/4351, K.2006/6967

⁴⁶⁷ Ibid, p.50

disparity between such sale price and the previous sale price. In other words, for emergence of right to receiving a share, the work must be sold by the author or his/her heirs first of all. Regardless of the number of times that the work change hands, after this sale, there has to be a substantial disparity between a sale price and the previous sale price. With this arrangement, it can be said that the right to receive share depends on a subjective concept. This situation clearly contradicts with the fundamental principles of the EU Acquis Communautaire and it is considered that the relevant legislation be revised.⁴⁶⁸

The law leaves to the Decree the determination of rules and procedures on the share to be received in connection with resale right. The decree takes the sale prices as the basis for the determination of share tariffs. Article 1/1 of this decree specifies the tariff for shares. Pursuant to this article, for the rate of disparity from 50% to 100%, 10 % of this difference; from 101% to 200%, 9 % of this difference; for the difference exceeding 201%, 8% share shall be paid to the author. Because of the fact that the right to receive a share from the resale of works of fine arts depends on the disparity between two prices of sale, there is also no proportional compliance between the FSEK and the directive.

3.7.5. Debt to pay royalty

As per Article 1/4 of the directive, the royalty shall be payable by the seller. As understood from this provision, those who are liable to pay the debt arising from the resale right are the sellers or those who are authorized by the seller. According to Article 1 of the directive, member states may hold responsible the salesrooms, art galleries, buyers and one or a few of art market professionals for paying the share. The purpose of this authority granted for the member states is to prevent the exclusion of the situations where the seller is a person who is not engaged in sales of works of fine arts but the buyer or mediator is a person who is active in the market of fine arts.⁴⁶⁹

Article 45/1 of the FSEK stipulates that the natural or legal person who effects the sale is obliged to pay an appropriate share. In accordance with this requirement,

⁴⁶⁸ Lucas Andre, "Observations on Resale Right", Archive of Ministry of Culture And Tourism, Ankara, 2007, p.1

⁴⁶⁹ Tanriover, op.cit. p.61

owner of the art gallery or auction where the sale takes place or a professional from the market of fine arts who organizes the sale in another way shall be liable to pay the share. Seller is the person who sells the work personally on his/her behalf or he/she is the direct representative of it (Article 32, Law of Debts). When this representative is, at the same time, a trader of works of fine arts or a person who is responsible for the administration and execution of the auction, there will be no effect on the situation⁴⁷⁰.

In accordance with the FSEK, the person who buys the work shall never be liable likewise, the person who represents himself/herself in the sale shall not be under liability, even when the seller does not pay his/her debt, others will not be affected⁴⁷¹. It can be considered that this arrangement which holds only the seller responsible does not indicate any probability of loss of right for the author provided that it is accepted resale right will occur in each sale regardless of the parties of this sale. However, in case it is accepted that at least one party of this sale has to be a person who makes the sales of such property professionally, holding only the seller responsible will lead to a result that the sale will stay out of the scope of this arrangement where the seller is any person and the buyer is a person who is engaged in sale of such properties. An arrangement has to be made on the liability of the buyer where only the buyer is a professional of works of fine arts in order to make sure that the author has no loss of right in such a sale. Article 45/3 of the FSEK stipulates that the owner of the enterprise where the sale took place shall be jointly and severally liable with the seller.

3.7.6. Persons entitled to receive royalties

Pursuant to Article 6 of the directive, the royalty shall be payable to the author of the work and, after his death to those entitled under him/her. “Those entitled under him/her” are the heirs of the author⁴⁷².

Concerning the interpretation of the statement of “those entitled to receive royalty after his death” as stipulated in the Article, an application has been referred to the ECJ by preliminary ruling.

⁴⁷⁰ Öztan, *op.cit.* p. 402

⁴⁷¹ *Ibid*, p. 402

⁴⁷² Dreier, Hugenholtz, *op.cit.*p. 416

The reference has been made in the course of proceedings brought by the Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos ('VEGAP'), against the Société des auteurs dans les arts graphiques et plastiques ('ADAGP'), Mr Bonet Domenech, Mrs Bas Dalí, Mrs Domenech Biosca, Mr Domenech Biosca, and Mrs Ana-María Busquets Bonet and Mrs Mónica Busquets Bonet, who are family members of the painter Salvador Dalí, concerning royalties received on sales of works of art by Salvador Dalí.⁴⁷³

The painter Salvador Dalí died on 23 January 1989 at Figueras (Spain), leaving five heirs at law. By will dated 20 September 1982, he had appointed the Spanish State as sole legatee, within the meaning of the French law of succession, of his intellectual property rights. Those rights are administered by the Fundación Gala-Salvador Dalí, a foundation established under Spanish law, created in 1983 at the initiative and under the control of the painter.

In 1997 the Fundación Gala-Salvador Dalí granted to VEGAP, a society under Spanish law, an exclusive worldwide mandate to manage collectively and exercise copyright over the works of Salvador Dalí.

VEGAP has, in addition, a contract with its French counterpart, ADAGP, which is responsible for the management of Salvador Dalí's copyright in France. Since 1997, ADAGP has collected amounts in respect of the exploitation of Salvador Dalí's works, which were transferred by VEGAP to the Fundación Gala-Salvador Dalí, with the exception of those in respect of the resale right. Pursuant to the provisions of Article L. 123-7 of the IPC (French Code of Intellectual Property) which reserve the benefit of the resale right to the heirs alone, to the exclusion of legatees and successors in title, ADAGP paid the amounts in respect of the resale right directly to Salvador Dalí's heirs. In those circumstances, the Tribunal de grande instance de Paris decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

⁴⁷³ Fundación Gala-Salvador Dalí, Visual Entidad de Gestión de Artistas Plásticos (VEGAP) vs Société des auteurs dans les arts graphiques et plastiques (ADAGP), Juan-Leonardo Bonet Domenech, Eulalia-María Bas Dalí, María del Carmen Domenech Biosca, Antonio Domenech Biosca, Ana-María Busquets Bonet, Mónica Busquets Bonet, C-518-08, The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

Can [the French Republic], subsequent to Directive [2001/84], retain a resale right allowed only to heirs to the exclusion of legatees or successors in title?⁴⁷⁴

In the context of the objectives pursued by Directive 2001/84, The Court stated that it is permissible for Member States to make their own legislative choice in determining the categories of persons capable of benefiting from the resale right after the death of the author of a work of art.

That being so, there is nothing in Directive 2001/84 to indicate that the European Union legislature intended to rule out the application of rules governing coordination between the various national laws relating to succession, in particular those of private international law which are intended to govern a conflict of laws such as that arising in the dispute in the main proceedings.

As a matter of fact, it is for the referring court, for the purposes of applying the national provision transposing Article 6(1) of Directive 2001/84, to take due account of all the relevant rules for the resolution of conflicts of laws relating to the transfer on succession of the resale right.

Finally The Court concluded that the answer to the question is that Article 6(1) of Directive 2001/84 must be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which reserves the benefit of the resale right to the artist's heirs at law alone, to the exclusion of testamentary legatees. That being so, it is for the referring court, for the purposes of applying the national provision transposing Article 6(1) of Directive 2001/84, to take due account of all the relevant rules for the resolution of conflicts of laws relating to the transfer on succession of the resale right.⁴⁷⁵

Resale right cannot be transferred to third parties, cannot be used by people other than the author or his/her heirs. However, when the pursuit of resale right is left to a collecting society or pursuit of the said right is carried out by the collecting society compulsorily, it does not mean that the right is transferred.

As per FSEK, owner of the resale right and claims arising from this right is the author and after death, his/her heirs in accordance with the main principles set forth in Articles 1, 1B/b and 8. In terms of regulating the right owners in the FSEK, there are

⁴⁷⁴ ECJ, C-518/08, Para. 16-18

⁴⁷⁵ ECJ, C-518/08, Para. 33-36

differences between the way resale right and other economic rights are governed. Whereas there is no restriction preventing the heirs from using the right after the death of the author concerning other economic rights, the heirs who are entitled to benefit from the right to receive a share is restricted to the second degree.

FSEK stipulates that the royalty shall be paid to the collecting society of the relevant field if the heirs of the author do not exist. Whereas the income generated by the authors in connection with the other economic rights cannot be handed over to the collecting societies after death even if the author is a member of any of the collecting societies in his/her life, collecting societies are entitled to benefit from the right to receive a royalty. These restrictions are not in compliance with the EU Acquis Communautaire and it is suggested they be changed.

As per Article 45/2/3 of the FSEK, the relevant collecting society to which the royalty will be paid in case the author has no heirs shall be determined in accordance with the decree. Article 2 of the decree determines the relevant collecting society to which the royalty will be paid for each category of works. Article 2/2 of the decree stipulates that in case more than one relevant collecting society exists, the royalty shall be distributed among the collecting societies proportionally to the number of their members.

As per Article 1 of the Directive, resale right is inalienable. This right cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work. The rationale behind the provision stating that resale right is inalienable is to prevent the author from having to be a party to a transfer agreement for the sake of earning his/her living. However, this right is alienable in case of a death⁴⁷⁶.

It is controversial whether resale right is alienable in the scope of the FSEK. Transfer of royalty right is not deemed permissible, because it is considered that the moral bond between the work and its author is not disrupted in spite of the sale and paying royalty over the subsequent sales can be accepted only for the person who owns this moral bond⁴⁷⁷. There is no arrangement in the FSEK on this subject. According to one thought, when moral features of this right are taken into consideration in terms of

⁴⁷⁶ Garnett, Davies, Harbottle, op.cit. p. 100

⁴⁷⁷ Erel, "Türk Fikir ve Sanat.." op.cit. p.189

the author, transfer of resale right is not permissible⁴⁷⁸. Second thought suggests that financial aspect of the resale right is more dominant and it should be accepted that transfer of this right is permissible⁴⁷⁹. This right is considered to be inalienable basing on the fact that Berne Convention -the first international text to regulate the said right- adopts the idea of protecting the author of fine arts works who are weaker in comparison with other authors and article 45 lists in a detailed manner those who can benefit from this right other than the author.

3.7.7. Terms in which royalty right arising from resale can be used and in which the royalty can be requested

As regards to protection terms of resale right, this Directive makes reference to Article 1 of the Directive 93/83/EEC which regulates protection terms. Pursuant to Article 1 of the Directive 2006/116, protection term covers lifespan of the author plus seventy years after death.

Article 45 of the FSEK states that in order to receive royalty from the resale of the works of fine arts and other works listed in the relevant provision, it is required that protection term should not be expired. Article 27 of the FSEK stipulates protection term as the lifespan of the author plus seventy years after death. Accordingly, resale right can be used lifelong by the author and for seventy years after his/her death by the right-owners other than the author.

The directive does not envisage any prescription time to request the royalty payment after the sale is completed. On the other hand, Article 45 stipulates that the prescription for the obligation to pay a share is five years from the sale that gives rise to such obligation. The royalty cannot be claimed after five-year-time expires. In this context, the resale right itself is not subject to prescription; but it is the claims which will be subject to prescription after five year is completed⁴⁸⁰. The time stipulated here is different than the prescription time stated in Article 60 of the Law of Debts. In cases where it is not possible to reach right-owners, this arrangement aims to save people liable for paying royalty from the insecure situation of paying the debt.

⁴⁷⁸ Arslanlı, op.cit. p. 115

⁴⁷⁹ Erel, "Türk Fikir ve Sanat.."op.cit. p.189

⁴⁸⁰ Öztan, op.cit. p.403

3.7.8. Collective management of resale right

As per Article 6 of the directive, Member States may provide for compulsory or optional collective management of the royalty. Recital 28 of the directive states that in case collective management is compulsory, Member States should ensure that collecting societies operate in a transparent and efficient manner.

Member States should also ensure that resale right of authors who are the citizens of other member states are followed-up and their royalties are collected.

When the practices of collective management of resale right are examined in the member states, it is observed that some countries make resale right compulsory and the others have discretionary arrangements. It is also understood that the right is implemented more efficiently where the collective management of resale right is compulsory.

Authors and owners of related rights generally cannot reach directly to those who benefit from their works and cannot learn the violations of rights that these people lead to. Those who would like to continue their creative and artistic activities, therefore, have to seek for the support and protection of the strong organizations which will protect their rights against the abuse of intellectual and artistic works⁴⁸¹.

FSEK does not contain any provision on how to carry out the collective management as regards to the follow-up of the right arising from the resale of the works listed in Article 45. Therefore, it is interpreted that the author may follow up his/her right either himself/herself or through a collecting society.

3.7.9. Right to Information on Sale

The directive regulates the right to obtain information in order to secure the payment of royalties in respect of the resale. Article 9 of the directive stipulates that the Member States shall provide that for a period of three years after the resale, the persons entitled may require from any art market professional to furnish any information that may be necessary.

⁴⁸¹ Ibid, p.512

Right to information may also be used by the collecting society upon the authority provided by the author. Pursuant to Recital 30 of the directive, Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information.

Although Article 45 of the FSEK does not include the right to information, this gap has been taken into consideration and to this end; Article 3 of the Decree governs the liability of the seller and owner of the enterprise where the sale takes place for providing information. In accordance with this article, the seller or the owner of the enterprise where the sale takes place are jointly liable to the author, if he/she is dead, to the other right-owners to provide information on the sale within two months following the sale. In case the author or the other right-owners cannot be reached, the said liability is fulfilled by communicating the sale to the relevant collecting society within the aforementioned time limit (Article 3 of the Decree). In our country, collective management of rights is not compulsory; therefore the said regulation seems compatible with the directive.

CONCLUSION

Intellectual rights have been the subject matter of a great number of international arrangements. The underlying reason is that once intellectual products are created it is possible to reproduce and make copies of them at the same time, in different regions of the world and by many people, however protection of intellectual rights is restricted to the country in which the registration takes place in accordance with the principle of territoriality. Subject of intellectual rights, with its aforementioned characteristics, is a discipline which has always been controversial in the international platform and shaped in line with new requirements. Most of the provisions included in our legislation are those which have been drafted as a result of the international discussions. In addition to the fact that Turkey has reflected international texts into the national laws, its active role in the process of preparing and discussing these texts and international cooperation with the countries which have the same or similar structures are of great importance in terms of Turkey's "involvement" in the system.

Turkey has determined its direction and line on the adoption and implementation of the intellectual rights system. It is not possible to step back from this direction and line. Therefore, legal arrangements required by the EU harmonization process and international agreements to which Turkey is party should be fulfilled. However, until Turkey is entitled to full-membership to the EU, due care should be shown to safeguard the national facts and interests and in this process particularly the areas which are left to the national preferences should be specified carefully and the results caused by these preferences should be taken into consideration.

Thanks to the legislative amendments made within the process which started in 1995, Turkish copyright legislation has no problem of harmonization with the international agreements in general and EU *Acquis Communautaire*. However, there is still a need for change in some articles of the FSEK in order to assure compliance with the EU Directives.

In that sense, when the provisions of the Directive 2009/24 on Legal Protection of Computer Programs and those of the Law No: 5846 concerning computer programs are assessed collectively, rights of authors and related rights holders to reproduction, distribution and communication to public seem to be compatible with the Directive.

However the concepts of preparatory designs used in the FSEK and Directive are not compatible with each other. While the FSEK states that preparatory designs, for protection, should lead to a computer program at the next stage, the Directive only requires the nature of the preparatory work is such that a computer program can result from it at a later stage.

To ensure compliance with the Directive, the statement of “provided that the same leads to a computer program at the next stage” in Article 2/1 of the FSEK should be interpreted in accordance with the Directive and requirement for the draft material to be detailed and specific enough and to lead to a computer program or to become a computer program at the next stage should be deemed sufficient.

Two conditions are envisaged in the FSEK to protect computer programs as scientific and literary works. On conditions that it bears the characteristics of its author and it is fixed on a material, computer programs shall benefit from the protection extended by the copyright law. In other words, as long as the program is not copied and it is created as a result of personal and intellectual efforts, each computer program shall benefit from the protection provided in the scope of the FSEK.

It is not possible to say that concept of originality defined in the Directive and concept of author’s characteristics stated in the FSEK correspond to each other properly. Originality prescribed in the Directive brings more objective standards when compared with the author’s characteristics defined in the FSEK. In this context, depending on the fact that it provides legal certainty and eliminates the probability of implementing excessively subjective conditions on originality, it is suggested that the definition used in the Directive be reflected in the Turkish legislation as it is.

Although the FSEK looks compatible with the 2006/115 Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property in general, it is suggested that the definitions of rental and lending be included in Article 1b of the FSEK in accordance with Article 2(1) of the Directive 2006/115.

On the other hand, in spite of the fact that lending right is stated as a monopolized right of the author in Article 23 of the FSEK, acts of lending are currently conducted by the libraries without permission of the author and no charge is paid to the right owners.

In this context, it is proposed that Article 23 of the FSEK be revised and provision of “an author does not have the right to prohibit the public lending of copies of his/her work from libraries but the author has the right to obtain equitable remuneration for such lending” be added to the last paragraph of the article. It is also suggested that the statement of “the principles and rules related to this article as it concerns the public lending right shall be arranged by a regulation to be issued by the Ministry of Culture and Tourism” be included to facilitate the implementation.

This arrangement should also clarify how to determine the amount and ratio of remuneration to be paid to authors in return for their works, who will make payment requests (authors or collecting societies) and process the payments, which establishments or libraries will be exempt from the payment of remuneration considering cultural and other needs of the country.

On the other hand, Article 3(2) of the Directive points out an exception that buildings and works of applied art cannot be the subject matter of rental and lending rights. Article 3(2) of the Directive stipulates that “This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art”. Pursuant to this Article, two-dimensional works such as an architectural drawing or picture of a building in a book can be deemed as the subject matter of rental and lending rights, however the building itself having three dimensions cannot be deemed in the scope of the said rights. Therefore, no permission from the architecture is required to rent a flat or no fee is charged.

Considering the consequences of not having any provision in the FSEK on this subject, it is suggested that a provision in parallel with the provision in the Directive be added in paragraph one of Article 23 of the FSEK.

The Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission stipulates the circulation of the program carrying signals for satellite and cable broadcasting in line with the principle of free circulation of services among the member states and provisions concerning the rights of the authors and related-rights holders in such transmissions. Although the Directive and FSEK seems harmonized in general, two rules are envisaged by the Directive on the utilization and assignment of retransmission right. The first rule is that cable operators who will carry out

retransmission shall rely on contractual agreements concluded with holders of related rights and second rule is that retransmission right shall be managed only through a collecting society. Collective administration of rights which is not regulated in any other directive is envisaged by the Directive 93/83/EEC in order to assure functioning of cable retransmission in practice.

In addition to Article 80/1A-2 of the FSEK which grants exclusive right of retransmission for the performers and Article 80/1 b-1 which grants rights for phonogram producers on retransmission of their fixations, Article 43 defining the rules on retransmission of performances and other products of intellectual rights should also be mentioned. In accordance with paragraph two of this Article, for works, performances, phonograms and productions other than staged works, these organizations are obliged to obtain permission from the collecting societies of the relevant field, by concluding a contract to make the payments for such broadcasts and/or transmissions to such societies. Article 43/2 of the FSEK which was amended in 2004 by the Law No: 5101, because of its wording, seems to introduce the requirement of contractual agreements and collective administration of rights. However, in Article 37 of the Law No: 3984 which was amended by the Law No: 5101, it is stipulated that radio and television organizations may conclude contracts with the authors, owners of related rights or collecting societies to which these people are member in order to use works, performances, phonograms or productions in their broadcasts and transmissions. In this case, when Article 43/2 of the FSEK and Article 37 of the Law No: 3984 are examined together, it may be concluded that Turkish law does not envisage any system of collective rights on broadcasting or retransmission. Since the FSEK does not contain additional provisions in terms of those who are not member to any collecting society, it is not possible to make a contractual agreement only with the collecting societies. Therefore, it is suggested that Article 43 of the FSEK be assessed again to bring clarity to the subject.

Pursuant to 93/98/EEC Directive on the term of protection of copyright and certain related, protection term granted for the author has been determined as his/her lifetime plus 70 years. This duration is same with the term provided for by the FSEK. However, while the Directive stipulates 50 years of protection term concerning related rights, our legislation has determined this term as 70 years. Since terms of protection

carry importance in terms of the free movement of the goods, concerned provision in the FSEK should be drafted in line with the Directive. However, as the Working Paper prepared by the EU Commission states that there are requests to extend the terms for the related rights, change of the said provision is not considered to be crucial at this stage.

Article 4 of the Directive states that any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to 25 years. FSEK does not contain any provision on this subject. FSEK also lacks a provision granting protection equivalent to 30 years for critical and scientific publications as required by Article 5 of the Directive. Therefore, these provisions should be taken into consideration in terms of the planned amendments.

Concerning the Directive 96/9 of the European Parliament and of the Council on the Legal Protection of Databases, some amendments are required to ensure harmonization. First of all, FSEK provides much weaker protection than the one envisaged by the Directive on the original databases.

The definition of article 6(11) is narrower than the definition of the Directive and fails to integrate the basic elements of the definition of the database provided by article 1 of the Directive (independence of the works, data or other materials, individual access to the data, systematic or methodical way of arrangement). Another difference is that it doesn't make any reference to the possibility that databases may contain protected works. Existing definition should be excluded from the category of adaptations in parallel with the definition envisaged in the directive and governed as a separate article.

As one of the most important developments introduced by the directive, the second type of protection is sui generis protection which is improved to protect financial expenditures made for the preparation of databases that are not original enough to qualify for copyright protection.

On sui generis protection, FSEK states that concerning the exceptions that may be imposed on the rights of the database producer or right-owners, the person who has a right on the database may allow or prevent "with the exceptions specified in this Law and required by purposes of public security and administrative and judicial procedures". In that sense, provisions of exceptions envisaged by the FSEK for intellectual and

artistic works shall also be applied to the content of databases. This situation is considered to be problematic because it might lead to confusion between database copyright protection and sui generis protection. On the other hand, our law makes no distinction between electronic and non-electronic databases in terms of the exceptions to the rights on databases. It can be said that this aspect of the law presents a problem of harmonization

The first two paragraphs of article 10 of the Directive determine the term of the sui generis protection as follows: “1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion. 2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public”.

According to additional article 8 of the FSEK, the duration of the protection shall be 15 years from the day of being made available to the public of the database. This way of calculation of the duration of the sui generis right is not correct and doesn't comply with the Directive. Therefore, this provision should be replaced by the relevant provision of the directive.

Chapter I of the Directive 2001/29 EC of The European Parliament and the Council on The Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society defines and specifies the scope of the rights of reproduction, distribution and communication to the public for the authors and related rights holders. Following the comparative study carried out between the provisions of the Directive and FSEK, it has been concluded that there is no problem of compliance in general.

As the “exception of temporary reproduction” which is envisaged in the first paragraph of Article 5 of the Directive is a compulsory exception for the Member States, this provision should also be included in our legislation to ensure harmonization with the EU Acquis Communautaire. Three-step test which is governed by Article 5 of the Directive and sets the framework for all exceptions and restrictions is mentioned in our legislation in certain limits however, the said arrangement should be stipulated in our Law as a general provision which will cover all restrictions.

Considering that the FSEK contains no provision equivalent to Article 6 of the Directive which states that Member States shall provide adequate legal protection against the circumvention of any effective technological measures taken to protect the digital works against, it is concluded that there is a need for making amendments in the relevant field.

Lastly, pursuant to the Directive, "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter or sui generis right, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information. The relevant provision of the Directive states that Member States shall provide for adequate legal protection against the removal or alteration of any electronic rights-management information. Paragraph one, two and four of the Additional Article 4 of the FSEK govern the subject of rights management information. Additional Article 4 is a much comprehensive arrangement which includes not only the electronic rights-management information but any kind of rights-management information. However, inclusion of only the phonograms and performances fixed on phonograms in paragraph two (exclusion of films and other subjects) narrows the scope of act of infringement in terms of rightholders of related rights. Therefore all products which constitute the basis for related rights should be included in this scope.

In order to assure compliance with the Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art, series of important amendments should be made and the said right should be made applicable in our legislation.

As per Article 45 of the FSEK, authors of fine arts shall have a right to receive a share from the sales subsequent to the first transfer of the work. On the other hand, the Directive deems sufficient the transfer of the work by any means by its author or heir. This provision prevents the author from being subject to loss of rights where the first sale does not take place by sale. Considering also the difficulty in proving that the first transfer has taken place by sale, the statement of "first sale" needs to be replaced by "first transfer".

For the emergence of the right to receive an appropriate share, the work must change hands by sale at an exhibition or auction or at a store that sells such goods or in other ways. The Directive states the places such as exhibition or auction rooms and it also stipulates that the right to resale shall arise in case “sellers, buyers or intermediaries are art market professionals”. Furthermore, it is clear from the article that a sale which will take place between two people who are not operating in the market of fine arts cannot be evaluated in the scope of resale right. However, the statement of “or in other ways” in Article 45 may be interpreted that such unprofessional sales are also in the scope of the said right. Therefore, to prevent any ambiguity, the wording of this article should be re-designed in a way to include buyers and intermediaries and to emphasize that the said right only covers professional sales.

The works which constitute the subject matter of the resale right regulated in Article 45 of the FSEK are the works of fine arts and the copies of the works of fine arts, scientific and literary works and handwritten originals of the musical works which are deemed to be original works due to the fact that they were produced by the author in limited numbers or under the supervision of the author and with his permission and were signed by the author or marked by him in another way. In order to assure harmonization with the EU Acquis Communautaire, “scientific and literary works and handwritten originals of the musical works” which is not stated in the Directive should be excluded from the scope of this right.

As per Article 45 of the FSEK, for the author and his/her heirs to be able to get a certain amount of share following the first sale of the work, there has to be a substantial disparity between such sale price and the previous sale price. Limits of this substantial disparity has been determined by the Decree of Council of Ministers published in the Official Gazette numbered 26302 and dated 27 September 2006 but this arrangement is not in compliance with the EU Directive. The Directive does not seek for a substantial disparity between two prices; it even does not require that the price of the subsequent sale must be higher than the previous one. As a matter of fact, this requirement which results in loss of right for the authors should be abolished.

The real problem concerning intellectual rights becomes more obvious in practice. Problems such as fighting against piracy, counterfeiting or copying from the internet are not specific to Turkey but common all around the world. It is not possible to

overcome these problems only by legislative changes. In that sense, adoption and scaling up the culture of intellectual rights is of great significance. To achieve this objective, we need to understand that unlawful use of somebody else's intellectual products should not be tolerated and principle of respect for human labour should be established across the society.

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ANNEXES

LAW ON INTELLECTUAL AND ARTISTIC WORKS⁴⁸²

**Law No. 5846 of
5.12.1951;**

amended by:

**Law No. 2936 of 1.11.1983;
Law No. 4110 of 7.6.1995;
Law No. 4630 of 21.2.2001;
Law No. 5101 of 3.3.2004;
Law No. 5217 of 14.7.2004;
Law No. 5571 of
28.12.2006.**

PART ONE

INTELLECTUAL AND ARTISTIC WORKS

A. Purpose

Art. 1. (Amendment: 21.2.2001 - 4630/1) The purpose of this Law is to establish and protect the moral and economic rights of authors who create intellectual and artistic works, performers who perform or interpret such works, phonogram producers that make the first fixation of sounds, producers that make the first fixation of films, and radio-television organizations on their products; to regulate the conditions of exploitation of such products and to determine the sanctions for exploitation in breach of such rules and procedures.

Scope

Art. 1/A. (Addition: 21.2.2001 - 4630/2) This Law covers the moral and economic rights of authors who create intellectual and artistic works and performers who perform or interpret such works, phonogram producers that make the first fixation of sounds, producers that make the first fixation of films and radio-television organizations on their

⁴⁸² Parts I – III of the Law have been translated by Dr. Gül Okutan Nilsson (İstanbul Bilgi University Faculty of Law, Parts IV to VI have been translated by Dr. Feyzan Hayal Şehirali Çelik (Ankara University Faculty of Political Sciences).

products, the rules and procedures regarding transactions on such rights, ways of legal recourse and sanctions, together with the duties, authorities and responsibilities of the Ministry of Culture.

Definitions

Art. 1/B The following terms have the following meanings:

- a) **Work:** Any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work.
- b) (Amendment: 3.3.2004 - 5101/28) **Author:** The person creating the work.
- c) **Adaptation:** Intellectual and artistic product bearing the characteristic of the adaptor, which is created by benefiting from another work but which is not independent of such work.
- d) **Collection:** Works such as encyclopedias and anthologies whose content consists of selection and arrangements, which are the results of intellectual creativity, provided that the rights on the original work are reserved.
- e) **Fixation:** The act of recording sounds or representation of sounds or sounds and images in an apprehensible, reproducible and transmittable manner.
- f) **Phonogram:** The physical medium that carries sounds in which sounds of a performance or other sounds or representations of sounds are fixed, excluding fixation of sounds that are comprised in audiovisual works such as cinematographic works.
- g) **Computer program:** A set of computer instructions arranged in a way that will make a computer system carry out a special process or task and the preparatory work that will lead to the creation and development of such set of instructions.
- h) **Interface:** The parts of a program that form the interaction and connection between the hardware and software elements of a computer.
- i) **Interoperability:** The ability of computer program parts to jointly function, to interact and to mutually use the exchanged information.
- j) **Related rights:** The rights that belong to holders of neighbouring rights and film producers that make the first fixation of films, provided that the moral and economic rights of the author are not prejudiced.

- k) **Neighbouring rights:** The rights that belong to performers who interpret, introduce, recite, sing, play and perform a work in various ways and in an original form with the permission of the author, phonogram producers that make the first fixations of sounds that are the result of a performance or other sounds and radio-television organizations, provided that the moral and economic rights of the author are not prejudiced.
- l) (Amendment: 3.3.2004 - 5101/9) **Ministry:** The Ministry of Culture and Tourism.

B. Types of Intellectual and Artistic Works

I. Literary and Scientific Works

Art. 2. The following are literary and scientific works:

1. (Amendment: 7.6.1995 - 4110/1) Works that are expressed by language and writing in any form, and computer programs expressed in any form together their preparatory designs, provided that the same leads to a computer program at the next stage.
2. (Amendment: 1.11.1983 – 2936/1) All kinds of dances, written choreographic works, pantomime and similar theatrical works without dialogue;
3. (Amendment: 7.6.1995 - 4110/1) All kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models, industrial, environmental and theatrical designs and projects, lacking in aesthetic quality.

(Addition: 7.6.1995 - 4110/1) Ideas and principles on which any element of a computer program is based, including those on which its interfaces are based, are not deemed works.

II. Musical Works

Art. 3. Musical works are all types of musical compositions, with or without lyrics.

III. Works of Fine Arts

Art. 4. (Amendment: 7.6.1995 - 4110/2) Works of fine arts are the following works, which have aesthetic value:

9. Oil paintings or water colors, all types of drawings, patterns, pastels,

engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing;

10. Sculptures, reliefs and carvings;
11. Architectural works;
12. Handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs;
13. Photographic works and slides;
14. Graphic works;
15. Cartoons;
16. All kinds of personifications.

The use of sketches, drawings, models, designs and similar works as industrial designs does not affect their status as intellectual and artistic works.

IV. Cinematographic Works

Art. 5. (Amendment: 21.2.2001 - 4630/30) Cinematographic works are works such as films of an artistic, scientific, educational or technical nature or films recording daily events or movies, that consist of a series of related moving images with or without sound and which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices.

C. Adaptations and Collections

Art. 6. Intellectual and artistic products created by benefiting from another work but that are not independent of such work are adaptations, of which the main types are listed below:

1. Translations;
2. Converting a work like novel, story, poem or play, from said types to another type;
3. Converting musical works, literary and scientific works or works of fine arts into films, or converting them into a form which is suitable for filming or for broadcasting by radio and television;
4. Musical arrangements and compositions;
5. Transforming works of fine arts from one form to another;
6. Making a collection of all or the same type of works of one author;

7. Making a collection of selected works according to a specific purpose and in accordance with a specific plan;
8. Making an unpublished work ready for publication as a result of scientific research and study (ordinary transcriptions and facsimiles that are not the result of scientific research and study are excluded);
9. Annotating, commenting or abridging the work of another person;
10. (Addition: 7.6.1995 - 4110/3) Adaptation, editing or any modification of a computer program;
11. (Addition: 7.6.1995 - 4110/3) Databases obtained by the selection and compilation of data and materials according to a specific purpose and a specific plan, (Addition: 21.2.2001 - 4630/4) which are in a form that can be read by a device or in any other form (This protection can not be extended to the data and materials contained in the database.)

(Amendment: 21.2.2001 - 4630/4) Adaptations bearing the characteristic of the person making the adaptation, which are created without prejudice to the rights of the author of the original work, shall be deemed works under this Law.

D. Works Made Public and Published Works

Art. 7. A work disclosed to the public with the consent of the rightholder shall be deemed to have been made public. A work shall be deemed to have been published, if copies obtained by reproduction of the original are supplied to the public by way of selling, distributing or otherwise putting into commercial circulation with the consent of the rightholder.

The provisions of paragraph two of article 3 of the Press Law No. 5680 are reserved.

PART TWO

THE AUTHOR

A. Definition

I. In General

Art. 8. (Addition: 21.2.2001 - 4630/5) The author of a work is the person who has created it.

The author of an adaptation or collection is the person who has made the adaptation, provided that the rights of the original author are reserved.

In the case of cinematographic works, the director, the composer of original music, the scriptwriter and the dialogue writer are joint authors of the work. For cinematographic works which are produced with the technique of animation, the animator is also among the joint authors of the work.

II. Multiple Authors

Art. 9. If a work created jointly by more than one person can be divided into parts, each person shall be deemed the owner of the part he created.

Unless otherwise agreed, each of the persons who have jointly created the work may request the other persons' participation in the modification or publication of the whole work. If the other party refuses to participate without good reason, permission may be granted by the court. The same provision shall apply to the exercise of economic rights.

III. Union of Authors

Art. 10. If a work created by the participation of more than one person constitutes an indivisible whole, the author of the work is the union of the persons who created it.

The provisions on ordinary partnership shall apply to such union. If one of the authors refuses without good reason to permit a joint transaction, then such permission may be granted by the court. Each of the authors may act individually if the interests of the union are violated.

Technical services or assistance pertaining to detail rendered for the creation of a work shall not be deemed a basis for participation.

(Addition: 21.2.2001 - 4630/6) If a work created by the participation of more than one person constitutes an indivisible whole, the rights on the joint work shall be exercised by the natural or legal person who has assembled the authors, provided that nothing to

the contrary is stipulated in a contract or in the terms of service or in any law that was in force at the time of creation of the work. Rights regarding cinematographic works are reserved.

B. Presumption of Authorship

I. Works on Which the Name of the Author is Given

Art. 11. The person whose name or known pseudonym is given as the author of a work on the published copies of a work or on the original of a work of fine arts, shall be deemed the author of the work until it is proven otherwise.

(Amendment: 7.6.1995 - 4110/5) The person who is introduced in the customary manner as the author of a work at conferences or performances made in public premises or broadcast by radio and television, shall be deemed the author of the work, unless another person is deemed the author by way of the presumption given in the first paragraph.

II. Works on Which the Name of the Author is Not Given

Art. 12. So long as the author of a published work can not be established under article 11, the rights and authorities belonging to the author may be exercised by the publisher, and, if the publisher can not be determined, by the person making the reproduction, in his own name.

Such authorities shall belong to the person giving the conference or the person having the performance made, in cases where the author can not be determined by the presumption under the second paragraph of article 11.

The provisions on mandate shall apply to the relations between the persons authorized under this article and the real rightholders, unless agreed otherwise.

PART THREE
INTELLECTUAL RIGHTS

A. Rights of the Author

I. In General

Art. 13. The economic and moral interests of authors in their intellectual and artistic works shall be protected under this Law.

The rights and authorities granted to authors shall extend over the entire work and its parts.

(Addition: 21.2.2001 - 4630/7; Amendment: 3.3.2004 - 5101/7) Film producers that make the first fixation of films and phonogram producers that make the first fixation of sounds shall have their productions containing cinematographic and musical works recorded and registered for the purpose of preventing violation of their rights, facilitating proof of rightholdership and tracking the authority to exercise economic rights, and without the aim of creating any rights. The recording and registration of all the works protected under this Law may be made for the same purpose upon demand of the authors; the authority to exercise economic rights may also be recorded. The Ministry can not be held responsible for these procedures which are made based on declaration. However, persons who make a wrong declaration in the procedures on which the recording and registration shall be based, with regard to moral or economic rights which they do not own or whose non-existence was known or should have been known to them, shall be subject to the legal and criminal sanctions set out in this Law. All fees regarding recording and registration procedures carried out under this Law shall be determined by the Ministry. The rules and procedures of recording and registration, the determination of the fees and other matters shall be set out in a by-law to be issued by the Ministry.

II. Moral Rights

(1) Authority to Disclose the Work to the Public

Art. 14. The author shall exclusively determine whether or not his work shall be disclosed to the public and the time and manner of its publishing.

Only the author may give information on the contents of a work of which the whole or a substantial part has not yet been made public, or whose main features have not yet been

introduced to the public in any way. (Addition: 21.2.2001 - 4630/8) The author may prohibit, even if he has given written approval to others, the promotion to the public or the publishing of both the work and its adaptation, where the manner of disclosing to the public or publishing of the work is of such a nature as would damage the honor and reputation of the author. Waiving such power of prohibition by contract shall be null and void. The other party's right to compensation is reserved.

(2) The Authority to Designate the Name

Art. 15. The author shall have the exclusive authority to decide whether the work shall be disclosed to the public or published with or without the name of the author or under a pseudonym.

The name or mark of the original author must be shown in the manner which is agreed upon or is customary, on copies of a work of fine arts created by reproduction and on the original and copies of an adaptation, and it must be clearly depicted that the work is a copy or an adaptation.

The real author of a work may ask the court to establish his rights, if the creator of the work is disputed or if another person claims to be the author of the work.

(Addition: 7.6.1995 - 4110/6) For architectural constructions that have the quality of a work, the name of the author shall be inscribed in an indelible way with material considered suitable by the author on a visible part of the work, upon written request.

(3) Prohibition of Modification

Art. 16. No abbreviations, additions or other modifications may be made to a work or to the name of its author without his consent.

A person who adapts, discloses to the public, reproduces, publishes, performs or otherwise distributes a work in any manner under the permission of the law or the author may make modifications that are deemed indispensable due to the technique of adaptation, reproduction, performance or publication, without special permission by the author.

(Amendment: 21.2.2001 - 4630/9) The author may prohibit all modifications, which prejudice his honour and reputation or damage the nature and characteristics of the

work, even if he has given written and unconditional permission. Waiving the power of prohibition shall be null and void even if agreed by contract.

(4) Rights of the Author against Persons Who Own or Possess a Work

Art. 17. (Amendment: 21.2.2001 - 4630/10) Where necessary the author may, provided that the conditions for protection are fulfilled, demand the owner or possessor of the original to temporarily avail him of the original of works of fine arts listed in the first and second subparagraphs of article 4 and works that are listed in the first subparagraph of article 2 and in article 3, provided that the latter are handwritten by authors or composers. Persons who trade the work shall disclose such right of the author in auction or sale catalogues or related documents to buyers or acquirers of the work.

(Amendment: 7.6.1995 - 4110/7) The owner of the original of a work may dispose of it according to the terms of the contract he has concluded with the author. However, he may not damage or destroy the work or prejudice the rights of the author.

If the work exists in a single original form, the author may request the work for use in retrospective works and exhibitions covering all of his working periods, subject to conditions of protection and to be returned.

III. Exercise of Rights

(a) In General

Art. 18. (Amendment: 21.2.2001 - 4630/11) The authority to exercise economic rights belongs exclusively to the author.

The rights in works created by civil servants, employees and workers during the execution of their duties shall be exercised by the persons who employ or appoint them; provided that the contrary may not be deduced from a special contract between such persons or from the nature of the work. This rule shall also apply to the organs of legal persons.

The producer or publisher of a work may exercise the economic rights only in accordance with a contract to be concluded with the author.

(b) Persons Entitled to Exercise Rights

Art. 19. If an author has not determined the manner in which the authorities granted to him by the first paragraphs of Articles 14 and 15 are to be exercised or has not left this

matter to another person, these rights shall be exercised after his death by the executor, or, if no executor has been appointed, successively by the surviving spouse, his children, his testamentary heirs, his parents, his siblings.

(Amendment: 21.2.2001 - 4630/12) After the death of the author, those persons set out in the preceding paragraph may exercise the rights granted to the author under the third paragraphs of Articles 14, 15 and 16, in their own name and for a period of 70 years after the death of the author.

If the author or the persons authorized under the first and second paragraphs do not exercise their authorities, any person who has acquired an economic right from the author or from his successor may, provided that he proves a legitimate interest, exercise in his own name the rights granted to the author under the third paragraphs of Articles 14, 15 and 16.

Where there are more than one authorized persons who can not agree on an action, the court shall settle the conflict in summary proceedings, according to the presumed intentions of the author.

(Amendment: 1.11.1983 - 2936/2) If there are no authorized persons under Article 18 or the preceding paragraphs or if such persons exist but they do not exercise their rights or if the terms laid down in the second paragraph have expired, the Ministry of Culture and Tourism may exercise in its own name the rights granted to the author under the third paragraphs of Articles 14, 15 and 16 if the work is deemed to be important for national culture.

IV. Economic Rights

(1) In General

Art. 20. (Amendment: 1.11.1983 - 2936/3) The right to exploit, in any manner or form, a work that has not yet been made public belongs exclusively to the author. The exclusive right granted to the author to exploit a work that has been made public consists of the rights stipulated as economic rights by this Law. Economic rights are independent of one another. The disposal and exercise of one does not affect the other.

(Second paragraph revoked: 3.3.2004 - 5101/28)

(Third paragraph revoked: 3.3.2004 - 5101/28)

The author of an adaptation may exercise the economic rights granted to him in such capacity, to the extent permitted by the author of the original work, except the cases where adaptation is free.

(2) Types

(a) Right of Adaptation

Art. 21. (Amendment: 21.2.2001 - 4630/13) The right to exploit a work by adapting it belongs exclusively to the author.

(b) Right of Reproduction

Art. 22. (Amendment: 7.6.1995 - 4110/8) The right to reproduce the original or copies of a work in any form or by any method, in whole or in part, directly or indirectly, temporarily or permanently belongs exclusively to the author.

The making of a second copy of the original of the work or the recording of the work on all types of devices now known or to be developed in the future enabling the transmission or repetition of signs, sounds and images, all kinds of sound and music recordings as well as the application of plans, projects and sketches of architectural works are deemed reproduction. The same provision shall apply to molds with relief or perforation.

The right of reproduction also covers the acts of loading, displaying, running, transmitting and storing a computer program to the extent that such acts require the temporary reproduction of the computer program.

(c) Right of Distribution

Art. 23. (Amendment: 7.6.1995 - 4110/9; 21.2.2001 - 4630/14) The exclusive right to rent, lend, put up for sale or distribute in any other way, the original or copies of a work, belongs to the author.

The author has the exclusive right to import copies of a work that have been reproduced abroad with his permission and to exploit such works by distribution. Copies that are reproduced abroad may not under any circumstances be imported without the permission of the author and/or the holder of the right of distribution who has the author's permission. Provided that the authorities of rental and public lending remain with the author, the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the

distribution right by the rightholder shall not infringe the right of distribution granted to the author.

The distribution of a work or its copies by way of rental or lending, may not lead to a widespread copying of the work in a manner prejudicing the right of reproduction of the author. The rules and procedures regarding the application of this article shall be regulated with a by-law to be issued by the Ministry of Culture and Tourism.

(d) Right of Performance

Art. 24. (Amendment: 21.2.2001 - 4630/36) The right to exploit a work by performing it in such ways as reciting, playing, acting or displaying it on public premises either directly or by means of devices enabling the transmission of signs, sounds or images belongs exclusively to the author.

The right to transmit the performance, from the premises where the performance to the public took place to any other location by means of a technical device also belongs to the author.

(Amendment: 1.11.1983 - 2936/4) The right of performance may not be exercised by other natural or legal persons without the written permission of the author, or if the author is a member of a collecting society, the written permission given by such collecting society in accordance with the authorities set out in the authorization certificate. However, the provisions of articles 33 and 43 are reserved.

(e) Right to Communicate a Work to Public by Devices Enabling the Transmission of Signs, Sounds and/or Images.

Art. 25. (Amendment: 21.2.2001 - 4630/15) The author shall have the exclusive right to communicate the original of a work or its copies to public by way of broadcasting by organizations that broadcast by wire or wireless means such as radio and television, satellite or cable, or by devices enabling the transmission of signs, sounds and/or images including digital transmission, or by way of re-broadcasting by other broadcasters that obtain the work from such broadcasts.

The author has the right to permit or prohibit the sale or other distribution or supply of the work or its reproduced copies to the public by wire or wireless devices and the communication of the work to the public by providing access to it at a time and place chosen by natural persons.

The distribution and supply of works by means of communication to the public as regulated under this article, shall not prejudice the author's right of distribution.

(3) Terms

(a) In General

Art. 26. The economic rights granted to the author are limited in time. Except for the cases in articles 46 and 47, all persons may exercise the economic rights granted to the author following the expiry of the term of protection.

Terms of protection granted for the original of a work and its adaptations are independent of each other.

This provision shall also apply to works mentioned in the first paragraph of article 9. The term of protection shall not begin to run until the work is made public.

For works that are published in sections or fascicles, the publication date of the last part or fascicle shall be deemed the date on which the work was made public. For works that are composed of several volumes published at intervals and for works such as bulletins, pamphlets, periodicals and annuals, the date on which the work is made public shall be the date of publication of each volume or each such work.

Terms that begin on the date on which the work was made public shall be calculated starting from the first day of the year following the year in which the work was first made public or is deemed to have been made public under paragraph four.

Terms that begin on the date of the author's death shall be calculated from the first day of the year following the year of the author's death. In the cases determined in the first paragraph of article 10, the term shall start to run on the date of the death of the last surviving author.

(b) Duration of Term of Protection

Art. 27. (Amendment: 7.6.1995 - 4110/10) The term of protection shall last for the lifetime of the author and for 70 years after his death. (Addition: 21.2.2001 - 4630/16) If there is more than one author, this period shall end upon the expiry of 70 years after the death of the last remaining author.

The term of protection for works that have been first made public after the death of the author shall be 70 years after the date of death.

The term of protection in the cases determined in the first paragraph of Article 12 shall be 70 years from the date on which the work was made public, unless the author reveals his name before expiry of such term.

If the first author is a legal person, the term of protection shall be 70 years from the date on which the work was made public.

(c) Term of Protection for Translation Into Turkish

Art. 28. (Revoked: 21.2.2001 - 4630/36)

(d) Term of Protection for Handicraft, Minor Works of Art, Photographic and Cinematographic Works

Art. 29. (Revoked: 21.2.2001 - 4630/36)

B. Limitations

I. Due to Public Order

Art. 30. The rights granted to authors shall not prevent a work from being used as evidence in court or before other authorities or from being the subject matter of police or criminal proceedings. Photographs may be reproduced and distributed in any form by official authorities or on their instructions due to public security or for judicial reasons without the author's consent.

Reserved are the provisions of public law that prohibit putting a work into commercial circulation by any means, its performance or exploitation in any other form or that make them subject to permission or control.

II. Due to Public Interest

(1) Legislation and Court Decisions

Art. 31. The reproduction, distribution, adaptation or exploitation in any other form of laws, by-laws, regulations, notifications, circulars and court decisions that have been officially published or announced is permitted.

(2) Speeches

Art. 32. The reproduction, public recitation or broadcasting by radio and distribution by any other means, of speeches and addresses made in the Grand National Assembly and at other official assemblies and congresses, in courts of law or at public meetings, is permitted for the purpose of giving news and information. Where the nature of the event or of the situation does not so require, the names of the speakers do not need to be cited.

The right to reproduce or distribute speeches and addresses for purposes other than those mentioned in the first paragraph belongs to the author.

(3) Freedom to Perform

Art. 33. (Amendment: 21.2.2001 - 4630/17) Published works may be freely performed in all educational institutions for the purpose of face-to-face education and without directly or indirectly aiming for profit, provided that the name of the author and the work is announced in the customary manner.

(4) Selected and Collected Works for Educational and Instructional Purposes

Art. 34. (Amendment: 7.6.1995 - 4110/13) It is free to create selected or collected works, which are dedicated to educational purposes, by way of making quotations in an amount justified by the purpose, from published musical, literary and scientific works and works of fine arts that are made public. Works of the type set out in the third subparagraph of article 2 and first and fifth subparagraphs of the first paragraph of article 4 may only be quoted to explain the content of the selected and collected work. However, this freedom may not be used in a way which would prejudice the legitimate interests of the author without good reason or which would conflict with the normal exploitation of the work. The first paragraph shall also apply to school radio broadcasts made exclusively for schools and approved by the Ministry of Education. (Addition: 21.2.2001 - 4630/18) The permission of the author is necessary for making selected or collected works for purposes other than education, by way of quotations of published musical, literary and scientific works and works of fine arts that are made public.

In all such cases, the name of the work and the author shall be cited in the customary manner.

(5) Freedom of Quotation

Art. 35. Quotations of a work are permitted in the following cases:

1. Quoting a few sentences or passages of a work made public, in an independent literary or scientific work;
2. Incorporating certain elements of a published composition, at the most such as themes, patterns, passages or ideas, into an independent musical work;
3. Reproducing works of fine arts that have been made public and other published works, in a scientific work for the purpose of explaining its

content and to the extent justified by such purpose;

4. Displaying works of fine arts that have been made public by projection or similar means in order to explain a subject at scientific conferences or lectures.

The quotation must be made in a manifest way. In scientific works, it shall be necessary to mention not only the name of the work and the author but also the passage from which the quoted part has been taken.

(6) Contents of Newspapers

Art. 36. Article 15 of the Press Law being reserved, daily news and information communicated to the public by the press or radio may be freely quoted.

Articles or features on social, political or economic issues of the day published in newspapers or journals may be freely quoted in their original or adapted form in other newspapers or journals and may be broadcast by radio or disseminated by any other means, except where the right to quote them has been expressly reserved. Even where the right to quote is reserved, it is permitted to abridge such articles and features as a press review and to so quote, broadcast by radio or disseminate them in any other manner.

In all such cases, mention must be made of the name, the issue and the date of the newspaper, of the journal, of the agency and of any other source from which the quotations have been made, together with the name, the pseudonym or the mark of the author of the articles.

(7) News

Art. 37. (Amendment: 21.2.2001 - 4630/19) It is permitted to record parts of an intellectual or artistic work on devices enabling the transmission of signs, sounds and/or images in relation to current events, provided that this is has the nature of news and does not exceed the limits of giving information. The reproduction, distribution, performance and broadcasting by devices such as radio and television of passages quoted in such a manner are free. This freedom may not be used in a way which may prejudice the legal interests of the rightholder or which may conflict with the normal exploitation of the work.

III. Due to the Interest of Individuals

(1) Personal Use

Art. 38. (Amendment: 7.6.1995 - 4110/14; 21.2.2001 - 4630/19) It is permitted to reproduce all intellectual and artistic works for personal use without pursuing profit. However, such reproduction may not prejudice the legitimate interests of rightholders without good reason or conflict with the normal exploitation of the work.

(Second paragraph revoked: 21.2.2001 - 4630/36)

In the absence of specific contractual provisions, the reproduction and adaptation of a computer program by the lawful acquirer is permitted where necessary for the use of the computer program in accordance with its intended purpose, including for error correction.

The loading, running and error correction of a computer program by a person who has lawfully acquired the program may not be prohibited by contract. The making of a backup copy by a person having the right to use the computer program may not be prevented by contract insofar as it is necessary to ensure the use of such program.

The person who has acquired the right to use a computer program may observe, analyze or test the functioning of the program in order to determine the ideas and principles underlying any element of the program while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Where reproduction of the code and translation of its form in the sense of reproduction and adaptation of the computer program are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, the performing of such acts shall be permitted, provided that the following conditions are met:

1. That these acts are performed by the licensee or by another person having the right to use a copy of the program or by a person authorized to do so in their name;
2. That the information necessary to achieve interoperability was not made available to the persons specified in subparagraph one;
3. That these acts are confined to the parts of the program which are necessary to achieve interoperability.

The paragraph above does not entitle the information obtained under that paragraph;

1. To be used for purposes other than to achieve the interoperability of the independently created computer program;
2. To be given to others, except where necessary for the interoperability of the independently created computer program
3. To be used for the development, production or marketing of a computer program substantially similar in its expression or for any other act which infringes copyright.

The provisions of the sixth and seventh paragraphs may not be interpreted in a way that conflicts with the normal exploitation of the program or that unreasonably prejudices the rightholder's legitimate interests.

(2) Right of Composers

Art. 39. (Revoked: 21.2.2001 - 4630/36)

(3) Reproduction and Exhibition

Art. 40. Works of fine arts permanently placed on public streets, avenues or squares may be reproduced by drawings, graphics, photographs and the like, distributed, shown by projection in public premises or broadcast by radio or similar means. For architectural works, this freedom is only valid for the exterior form.

Works of fine arts may be publicly exhibited by their owners or by others with their consent, unless the author has expressly prohibited such exhibition.

Works to be sold by auction may be exhibited to the public. Works exhibited in public premises or placed at an auction may be reproduced and distributed by way of catalogues, guides or similar printed matter published for such purposes by persons organizing the exhibition or auction. The name of the author may be omitted in such cases unless there is a contrary customary usage.

(4) Principles Concerning the Use in and/or Communication in Public Premises of Works, Performances, Phonograms, Productions and Broadcasts

Art. 41. (Amendment: 3.3.2004 - 5101/11) Public premises where the entrance may or may not be subject to a fee, shall conclude a contract in accordance with article 52 with rightholders or collecting societies to which the rightholders are members, in order to obtain permission for the use and/or communication of works, performances, phonograms, productions and broadcasts and make the payments for economic rights stated in such contracts in accordance with this article.

Public premises which use and/or communicate works, performances, phonograms, productions and broadcasts shall be classified or left out of classification taking into consideration the characteristics of the region where the public premises are located, the quality and quantity of the premises, whether or not the works, performances, phonograms, productions and broadcasts that are the subject of intellectual property are an integral part of, or contributing to, the product or services supplied by the premises and similar issues.

For the sectors in which they operate, collecting societies of authors and/or related rights holders shall set the tariffs for fees arising from the use and/or communication of works, performances, phonograms, productions and broadcasts in conjunction with the classification made. Contracts between the collecting societies and public premises shall be concluded based on the amounts which shall be determined according to such tariffs or amounts that may be agreed on by negotiations of the parties.

Contracts concerning tariffs shall be based on the calendar year and such tariffs shall be valid starting from the beginning of the calendar year.

In order to ensure the performance of the provisions of this article:

1. Collecting societies are obliged to submit to the Ministry information about their members and the works, performances, phonograms and productions which they represent. Such notification shall be updated every three months and shall be opened to the access of related parties on a common database to be formed by the Ministry.
2. Authors' collecting societies or collecting societies of related rights holders or collecting societies that operate in the same sectors, may determine joint tariffs by concluding a joint protocol. The joint tariffs are binding for the collecting societies that are parties to them.

Collecting societies shall notify the tariffs or joint tariffs in the ninth month of each calendar year to the Ministry and to professional associations representing users, which are set up by law as public institutions. They shall also announce them to the public. Public premises may negotiate the tariffs or joint tariffs and conclude contracts also through the professional associations to which they are members, by giving them binding authorization regarding negotiation and contract conclusion. However, where

the tariffs are determined on a lump sum basis, public premises may only negotiate and conclude contracts through professional associations.

In case no agreement can be reached and no contract can be concluded on the tariffs or joint tariffs between collecting societies and public premises or professional associations by the tenth month, collecting societies and/or professional associations may demand the negotiation of such tariffs at a conciliatory commission which shall be formed by the Ministry.

Upon the request of one of the parties and the approval of the Ministry, the conciliatory commission shall be formed by the Ministry within fifteen days from the date of request, in order to negotiate the tariffs. The commission shall comprise one representative of the Ministry, two of the Competition Authority, and one each of the concerned collecting societies and professional associations representing the users. The representative of the Ministry is at the same time the chairman of the commission. As many substitute members as the number of commission members shall also be elected in the same manner. The secretarial work of the commission shall be conducted by the relevant department of the Ministry.

The commission shall prepare a report and notify it to the Ministry and related parties within fifteen days of its formation. Public premises and collecting societies may conclude contracts within fifteen days of the declaration of the report based on the tariffs set by the collecting societies or agreed as a result of negotiations.

Where no contract is concluded based on the tariffs or joint tariffs set by the collecting societies, the parties may have recourse to courts. Public premises which had a contract in the preceding year may continue using and/or communicating works, performances, phonograms, productions and broadcasts by paying $\frac{1}{4}$ of the tariff at dispute in a bank account opened in the name of the collecting societies every three months until the end of the adjudication process, provided that the collecting societies do not prohibit such use. The permission of the collecting societies is necessary for the use of and/or communication of works, performances, phonograms, productions and broadcasts in the manner set out in this paragraph by public premises which had no contract in the preceding year and those that are to make a contract for the first time. Amounts paid in

this way until the end of the court proceedings shall be deducted from the amount of the tariff determined by the court.

Principles regarding the determination of tariffs laid down by paragraph three of article 42/A of this Law shall be taken into consideration in the determination of tariffs and the settlement of disputes.

Natural or legal persons who have rights on works, performances, phonograms, productions and broadcasts which are used and/or communicated at the public premises may demand payments for such use and/or communication only through collecting societies that they have authorized. The application of this provision is not obligatory for cinematographic works.

Other rules and procedures regarding classification, fees to be collected by the Ministry in case of recourse to the conciliatory commission and the functioning of the commission shall be determined with a by-law to be issued by the Ministry.

IV. Authorities Granted to the Government

(1) Creation of Collecting Societies

Art. 42. (Amendment: 1.11.1983 - 2936/7; 21.2.2001 - 4630/21; 3.3.2004 - 5101/12)

Authors and related rights holders and those persons who reproduce and distribute non-periodical publications by way of acquiring powers to exercise economic rights by contracts concluded in accordance with article 52 of this Law [or] by way of exercising rights on literary and scientific works in accordance with article 10 of this Law, may set up more than one collecting societies in areas which shall be determined pursuant to regulations and uniform statutes to be prepared by the Ministry of Culture and Tourism and approved by the Council of Ministers, in order to protect the mutual interests of their members, the management and pursuit of the rights granted by this Law and the collection and distribution of fees to the rightholders. Natural or legal persons who carry the qualifications to become members must apply to the Ministry in order to obtain permission to operate as a collecting society. The number of applicants must be, for authors or performers, four times the number of full members of compulsory organs and for producers or radio-television organizations, twice the number of full members of the compulsory organs. After obtaining such permission, collecting societies shall operate in the field for which they are set up.

(Amendment: 21.2.2001 - 4630/21) In order that another collecting society may be founded in the same field, an application for permission to operate shall be made to the Ministry by natural or legal persons carrying the qualification to become members, such persons being as many as one third of the total number of members of the collecting society with the largest number of members set up for that field, provided that such number is not less than the number of founding members given above. They shall operate in case the Ministry approves of such application and grants permission. Each society may set up and operate branches in accordance with its necessities. A minimum of two collecting societies founded in the same field may set up a federation according to principles and procedures laid down by the regulations and uniform statutes prepared by the Ministry. No more than one federation may be established in the same field.

Collecting societies and the federation are legal persons subject to private law. Their members may not be obliged to participate in capital, profit and loss or legal liability.

General assembly, board of directors, board of audit, technical-scientific board and the discipline committee shall be regulated as compulsory organs in the uniform statutes of the collecting societies and the federation. The Ministry shall, after obtaining the views of related organizations, prepare a regulation in order to regulate the principles and procedures regarding the foundation, supervision and audit of such societies and federations, the minimum number of members necessary for their first general assemblies to be convened, the manner of formation of other voluntary organs and the number and duties of their members, conditions for becoming a member, resigning from membership and expulsion, the determination of regions where they can set up branches, their relations with public entities and organizations in the country and abroad, their rights and competences in such relations, their monetary relations with their members, the distribution of collected royalties and compensations and other matters.

Article 21, second paragraph, Articles 30, 37, 40, 42, 43, 44, 45, 48, 65, 66, 67, 68, 69, 70 and 90 of the Law on Associations, No. 2908, dated October 6, 1983, shall apply, together with the criminal provisions, to the collecting societies and the federation to be established in accordance with this Article.

(Amendment: 21.2.2001 - 4630/21) The rights granted by this Law to authors and related rights holders may not be pursued by any unions, associations or similar

organizations other than collecting societies founded within the country in accordance with this Article. Matters regulated by this Article such as membership, number of founding members and the total number of members, shall also apply for collecting societies founded before the entry into force of this Law. All collecting societies must comply with the principles laid down by this Article within six months following the entry into force of this Law. Collecting societies that have not complied with this condition within the given period of time shall be considered automatically dissolved.

(2) Duties of the Collecting Societies and Principles concerning the Determination of Tariffs

Art. 42/A. (Addition: 3.3.2004 - 5101/13) Collecting societies founded in order to administer rights for the purposes set out in Article 42 of this Law are obliged to;

1. Notify the Ministry of all information concerning their members and the works, performances, phonograms and productions they represent and to update, every three months, this information which shall be open to concerned parties;
2. To provide, in an equitable way, the management of the rights resulting from the activities of their members;
3. To distribute the income obtained from their activities concerning the management of their members' rights to the rights holders in accordance with a distribution plan;
4. To give information concerning the works, performances, phonograms and productions they represent, to persons who make written requests;
5. To act in an equitable manner in the conclusion of contracts regarding the rights they manage; to provide discounts and facilitated payment methods that they deem necessary for their economic and/or moral interests;
6. To determine the payment tariffs regarding the rights they manage in due time for contracts to be made and to announce such tariffs and any changes in such tariffs in due time;
7. To have their accounts approved by sworn financial consultants.

The records of the Radio and Television Supreme Council shall be used as a reference for the application of the paragraph above with respect to the broadcasts of radio-television organizations.

In the determination of the tariffs; tariffs should be determined at a reasonable level by considering the adaptability of international practices to the economic and social conditions of the country; an impact which damages the structures of the sectors where works, performances, phonograms, productions and broadcasts are created and used, which hampers production and use and which prejudices generally accepted practices should be avoided; anti-competitive conditions should not be created; and the determination should be based on the classification made, product prices in the relevant sectors and the shares of these sectors in the gross domestic product, the frequency with which works, performances, phonograms, productions and broadcasts are used and/or communicated, unit price or lump sum payment, payment plan and similar issues.

Societies that operate in the same field and/or sector may act jointly in the determination of tariffs, conclusion of contracts and other actions and transactions regarding the application of this Law.

Where a joint tariff is made, collecting societies which operate in the same field must determine their capacity of representation in the field and the usage ratio of the works, performances, phonograms, productions and broadcasts that they represent and notify them to the Ministry. In case an agreement can not be reached in the determination of these ratios and/or they are not notified to the Ministry, a commission formed by the Ministry shall make that determination. Until such determination is made, users that have made a contract shall deposit the amount they are supposed to pay at a place of deposit determined by the court on demand of the Ministry. The amount so collected shall be distributed, after the working expenses of the commission are deducted, between the collecting societies according to the usage ratio which is determined by the commission or, in case the societies can come to an agreement at any stage, according to the ratio on which they agree. The commission shall be formed of one representative each of the Ministry, The Competition Authority and the concerned collecting societies. The representative of the Ministry shall at the same time act as the president of the commission. The decision of the commission is subject to judicial review; the competent court is the relevant specialized court.

The Ministry may ask for an interlocutory injunction to be issued against the distribution accounts of the collecting societies which are identified as not having

fulfilled their duties of notification as required by this Article, until the completion of such duties.

The pursuit of the rights regarding all works, performances, phonograms, productions and broadcasts that are made public or published, of authors or related rights holders that are members of a collecting society, shall be carried out according to the authorization certificate to be given to the collecting society. The rules and procedures regarding the authorization certificate shall be determined with a by-law to be issued by the Ministry.

(3) The Supervision of Collecting Societies

Art. 42/B. (Addition: 3.3.2004 - 5101/13) Collecting societies are under the supervision of the Ministry with regard to administrative and financial issues. The Ministry may itself always audit whether collecting societies are fulfilling their duties and obligations set out by this law, as well as asking the collecting societies to have this audit done by an independent audit firm. A copy of reports issued by such audit firms on the audit they have carried out shall be sent to the Ministry.

During the audit, it is compulsory to present or submit all kinds of books, document and information requested by those who are appointed to make the audit, to have the safe or cash register controlled, to fulfill requests such as entering management areas, branches and annexes.

If it is established that collecting societies,

1. Do not fulfill their duties and obligations laid down by this article and articles 42 and 42/A of this Law;
2. Do not make collections and distributions in compliance with contracts or make wrong or unfair distributions;
3. Do not set tariffs in compliance with the principles laid down by the third paragraph of article 42/A;

the concerned collecting societies shall be warned once by writing; and if the fault has not been remedied within thirty days from the receipt of the warning, the collecting society shall be warned for a second time.

In case the faults mentioned in the paragraph above are still not remedied within thirty days following the second warning or if legal irregularities in the records of the society or in its other actions and transactions are determined during the audits, the Ministry

shall invite the members to hold an extraordinary general assembly at the latest within three months. Those persons who are observed to have misused their authority in the actions and transactions of the society shall be dismissed from service as a precautionary measure until the extraordinary general assembly is held; the Ministry shall make a new appointment in their place, or the substitute member next in line shall be called to duty.

The provisions of this article and articles 42 and 42/A of this Law shall also apply to federations that shall be established under article 42.

(4) Principles on the Broadcasting and/or Transmission of Works, Performances, Phonograms and Productions

Art. 43. (Addition: 3.3.2004 - 5101/14) Radio-television organizations, cable and satellite broadcasting organizations and organizations that shall carry out broadcasting and/or transmission by using technical means now known or to be developed in the future, are obliged to obtain prior permission from rightholders regarding opera, ballet, and similar staged works that they shall use in their broadcasts.

For works, performances, phonograms and productions other than staged works, these organizations are obliged to obtain permission from the collecting societies of the relevant field, by concluding a contract in accordance with article 52, to make the payments for such broadcasts and/or transmissions to such societies and to inform such societies of the lists of works, performances, phonograms and productions that they have used.

Radio-television organizations that operate under the Law no. 3984 on the Establishment of Radio and Television Enterprises and their Broadcasts shall be classified by the Radio and Television Supreme Council; other organizations that carry out broadcasting and/or transmission that are outside of said Law shall be classified by the Ministry.

For the sectors in which they operate and in connection with the classification made, collecting societies of authors and/or related rights holders shall determine the tariffs for the payments arising from the broadcasting and/or transmission of the works, performances, phonograms and productions. Contracts between collecting societies and organizations shall be concluded based on these tariff amounts or based on other amounts that shall be determined as a result of negotiations to be made by the parties.

Paragraphs four to thirteen of article 41 of this Law shall apply to the notification obligation of collecting societies regarding their members and works, performances, phonograms and productions that they represent, the determination, announcement and negotiation of tariffs, conclusion of contracts, settlement of disputes and other matters. However, the application of the last sentence of paragraph six of article 41 is not compulsory with regard to organizations that carry out broadcasting and/or transmission.

Furthermore, with regard to the application of paragraph 10 of article 41, the Turkish Radio and Television Corporation may use works, performances, phonograms and productions in its broadcasts by paying $\frac{1}{4}$ of the annual tariff determined by the collecting societies every three months.

(5) Marking of Intellectual and Artistic Works

Art. 44. (Amendment: 7.6.1995 - 4110/18; 3.3.2004 - 5101/15; 28.12.2006 – 5571/2)

For the purpose of protection and effective pursuit of intellectual property rights, places which manufacture materials serving the fixation or reproduction of intellectual and artistic works and/or carry out the recording, reproduction and sale of such materials or distribute and supply to the public in any way, excluding places that only print periodicals, shall be given a certificate by the Ministry against a fee. Places that are determined by the Ministry are obliged to maintain software approved by the Ministry and hardware complying with criteria to be set by the Ministry, to form the necessary infrastructure and to inform to the Ministry transactions they carry out in each calendar year. Such places and economic rights holders are also jointly obliged to maintain codes complying with international standards and marks and serial numbers that are deemed necessary by the Ministry, on the materials carrying works.

(Amendment: 21.2.2001 - 4630/23) Natural and legal persons who manufacture or import for commercial purposes any kind of materials carrying works such as blank video cassettes, audio cassettes, computer discs, CDs, DVDs and all kinds of technical equipment which serve the reproduction of intellectual and artistic works are obliged to collect every month and deposit, until the middle of the following month at the latest, in a special account to be opened with a national bank in the name of the Ministry of Culture and Tourism, an amount to be determined by the Council of Ministers not exceeding 3% of the manufacturing or importation costs. (Addition: 14.7.2004 -

5217/17) A quarter of the amounts collected in the special account shall be transferred to the account of the Ministry of Culture Central Accounting Office and shall be recorded as revenue in the budget.

(Amendment: 21.2.2001 – 4630/23; 14.7.2004 - 5217/17) The amounts remaining in this account shall be used the purpose of strengthening the intellectual property system and the execution of cultural and artistic activities. The rules and procedures concerning the distribution and use of these monies shall be determined with a by-law to be issued by the Ministry of Culture and Tourism. The allowance which is necessary for activities concerning the protection of the cultural heritage within and outside the country shall be placed in the budget of the Ministry.

(Amendment: 3.3.2004 - 5101/15) Rules and procedures regarding the application of this article and the fees to be collected shall be determined with a by-law to be issued by the Ministry of Culture.

(6) Payment of a Share of Sale Proceeds of Works of Fine Arts

Art. 45. (Amendment: 3.3.2004 - 5101/16) Each time the originals of works of fine arts, excluding architectural works, mentioned in article 4 of this Law or their copies which are deemed to be original works due to the fact that they were produced by the author in limited numbers or under the supervision of the author and with his permission and were signed by the author or marked by him in another way, and the originals of works listed in subparagraph one of article 2 and article 3 that are handwritten by authors and composers change hands, within the protection period, by sale at an exhibition or auction or at a store that sells such goods or in other ways subsequent to the sale by the author or his heirs, if there is a substantial disparity between such sale price and the previous sale price, at each sale, the natural or legal person who effects the sale is obliged to pay an appropriate share of the price difference to the author, or, if the author is deceased, to his legal heirs up to (and including) the second degree and to his spouse and if such persons do not exist, to the collecting society of the relevant field, in accordance with the rules and procedures to be laid down by a decree to be issued by the Council of Ministers.

The decree shall stipulate;

1. a share tariff to be determined in proportion to the amount of the price difference, not to exceed 10% of such difference;

2. that sales whose proceeds do not exceed the amount laid down in the decree shall be exempt from the payment of a share;
3. which branch of the collecting society is to be deemed the relevant one for each type of work.

The owner of the enterprise where the sale took place shall be jointly and severally liable with the seller.

In the event of an executionary sale, the share shall be paid only after all other debts have been fully paid.

The prescription period for the obligation to pay a share is five years from the sale that gives rise to such obligation.

(7) Right of Use by the State

Art. 46. (Amendment: 1.11.1983 - 2936/10) Works that have not yet been published or made public and whose author has not expressly prohibited reproduction and publication and which are preserved in public libraries, museums or similar institutions, shall belong to the public institution or organization in which they are kept, provided that the term of protection of economic rights has expired. The authority which shall give permission to persons who would like to benefit from such works for scientific and other reasons and public institutions and organizations, the fees to be charged and the cultural purposes for which such fees shall be spent and other matters shall be determined by a regulation to be issued by the Ministry of Culture and Tourism following consultation with relevant institutions.

(8) Expropriation

Art. 47. The authority to exercise economic rights on a work which is deemed important for the culture of the country may be expropriated before the expiry of the term of protection through the payment of an appropriate fee to the rightholders and by issuing a decree.

(Amendment: 21.2.2001 - 4630/24) In order for such a decision to be taken, the work must have been created in Turkey or by Turkish citizens outside of Turkey and the published copies of the work must have been out of print since two years and it must be established that the rightholder shall not publish a new edition in an appropriate amount of time.

The decree shall stipulate:

1. The name of the author and title of the work;
2. The fee to be paid to persons whose acquired rights are violated;
3. The authority and establishment which shall exercise economic rights;
4. The cultural purposes for which the net profit to be obtained following the full payment of the fee shall be allocated.

PART FOUR

CONTRACTS AND DISPOSALS

A. Disposals Inter Vivos

I. Original Acquisition

Art. 48. The author or his heirs may transfer to others the economic rights granted them by law, unrestricted or restricted as regards duration, place or scope, with or without consideration.

The authority only to exercise the economic rights may also be granted to another person (license).

Acts of disposal specified in the preceding paragraphs shall be null and void, if they relate to a work which has not yet been created or shall be completed in future.

II. Derivative Acquisition

Art. 49. A person who has acquired an economic right or a license to exercise such right from the author or his heirs may transfer such right or license to another person only with the written consent of the author or his heirs.

Where the right of adaptation is transferred, the consent of the author or his heirs shall also be necessary as to the person who has acquired by derivative transfer.

III. Contracts

(1) Future Works

Art. 50. Commitments regarding the acts of disposal mentioned in Articles 48 and 49 shall also be valid, if they have been made before the creation of work.

Such commitments relating to the whole or a specific category of the works of an author to be created in the future may be terminated by either contracting party with a notice of one year.

Such commitments shall terminate automatically, if the author dies or loses the capacity to complete the work before the completion of work or, if completion of work becomes impossible without any fault of his own. This rule shall also apply in cases when the other party goes bankrupt or is unable to exercise the economic rights transferred to him under the contract or, if the exercise of such rights becomes impossible without any fault of his own.

(2) Prospective Possibilities of Exploitation

Art. 51. Contracts concerning the transfer of economic rights, which are likely to be granted to the author by future legislation, or their exercise by other persons, shall be null and void.

The same provision shall apply to contracts concerning the renunciation or transfer of authorities which may arise from the extension of the scope or term of protection of economic rights by future legislation.

IV. Form

Art. 52. Contracts and disposals concerning economic rights shall be in writing and the rights constituting their subject matter shall be specified individually.

V. Warranty

(1) Non-Existence of Right

Art. 53. A person who transfers an economic right or grants a license to exercise such right shall ensure to the acquirer the existence of the right in accordance with Articles 169 and 171 of the Code of Obligations.

Claims arising from torts and unjust enrichment shall be reserved.

(2) Lack of Authority

Art. 54. A person who acquires an economic right or a license to exercise such right from a person without authority to transfer shall not be protected even if he acted in good faith.

A person who, without authority, transfers an economic right or grants a license to exercise such right to another person shall be liable to pay compensation for the damages arising from the invalidity of the disposal, unless he proves that the other person was aware or should have been aware that he had no authority. In case of fault the court may order greater compensation, if equity requires.

Claims arising from torts and unjust enrichment shall be reserved.

VI. Rules of Interpretation

(1) Scope

Art. 55. Unless otherwise agreed, transfer of an economic right or the grant of a license shall not extend to translation or other adaptation of a work.

(2) License

Art. 56. A license is non-exclusive, if it does not prohibit the holder of economic rights to grant the same license to others, and is exclusive, if it is granted only to one person.

Unless the contrary may be deduced from law or contract, all licenses shall be deemed to be non-exclusive.

The provisions on usufructuary leases shall apply to non-exclusive licenses and those on usufruct shall apply to exclusive licenses.

(3) Transfer of Ownership

Art. 57. Transfer of ownership of an original or of reproduced copies of a work shall not involve the transfer of intellectual rights, unless otherwise agreed.

A person who has acquired the possession of moulds or other devices for reproduction from the owner of the right of reproduction in a work of fine art shall, unless otherwise agreed, be deemed to have also acquired the right of reproduction.

(Revoked paragraph: 21.2.2001-4630/36-f)

VII. Right of Rescission

Art. 58. If the acquirer of an economic right or a license exercises his rights and authorities insufficiently within the agreed period or, where no period has been determined, within a reasonable period of time and if thereby the author's interests are significantly violated, the author may rescind the contract.

The author desiring to exercise the right of rescission shall be obliged to grant the other party, upon notifying him by a notary public, a period of time adequate to sufficiently exercise the rights in the contract. The grant of such a period shall not be necessary, if it is impossible for the other party to exercise such right or, if he refuses to exercise it or, if the grant of such period would significantly jeopardize the author's interests.

The notice issued by the notary public shall give effect to the rescission of the contract, if the expiration date for the granted period exceeds inconclusively or, if it is

not necessary to grant such a period. An action for objection against the rescission of the contract shall not be permitted after four weeks from the date of the notice issued by the notary public.

If the acquirer was not at fault for failure to exercise the economic rights, or greater fault may be attributed to the author, the acquirer may claim compensation in cases where equity requires.

The right of rescission may not be waived in advance and limitations precluding its exercise for more than two years shall be null and void.

VIII. Reversion of the Right to the Author

Art. 59. If the author or his heirs have transferred an economic right for a specific purpose or for a definite period of time, the right concerned shall revert to the author when the purpose ceases to exist or the period expires. This provision shall not apply in case of death or bankruptcy of the acquirer of an economic right, transfer of which is not permitted under the contract, unless the nature of the work requires that the right be personally exercised by the acquirer.

Licenses granted for a specific purpose or a definite period of time shall terminate in the cases mentioned in the first paragraph.

B. Renunciation

Art. 60. The author or his heirs may renounce the economic rights granted them by law by an authenticated document and publication in the official gazette, provided that their previous disposals are not prejudiced.

As of its date of publication, renunciation shall produce the same legal effects as expiry of the term of protection.

C. ATTACHMENT AND PLEDGE

I. Not Permitted Subject Matters

Art. 61. The provisions of Articles 24 and 30 of the Law on Execution and Bankruptcy being reserved;

1. Drafts or originals of a work not yet made public that are in the ownership of the author or of one of his heirs;
2. Economic rights in works referred to in subparagraph (1), except cinematographic works;
3. Non-pecuniary claims of the author arising from transactions concerning his

economic rights;

may not be the subject matter of legal or contractual pledge, execution or lien.

II. Permitted Subject Matters

Art. 62. In accordance with the following provisions;

1. The draft or original of a work that has been made public;
2. Reproduced copies of a published work;
3. Economic rights in a work that has been made public, provided that the author's moral interests worthy of protection are not prejudiced;
4. Pecuniary claims of the author arising from transactions concerning his economic rights;

may constitute the subject matter of legal or contractual pledge, execution or lien.

In order to be valid, pledge contracts relating to the subject matters listed in the first paragraph must be stipulated in writing. The pledged items shall be specified in the contract individually.

Moulds and other devices for reproduction relating to the works of fine arts may be temporarily taken from their possessors to the extent deemed necessary for the purposes of execution on the economic rights referred to in the subparagraph (3) of the first paragraph.

Works of fine arts, except for works of architecture, and drafts of musical, scientific and literary works that belong to the author or to his heirs may be temporarily taken from their possessors to the extent deemed necessary for the enforcement of execution on the economic rights referred to in subparagraph (3) of the first paragraph.

Ç. Inheritance

I. In General

Art. 63. The economic rights granted by this Law shall be transferred by inheritance.

Making testamentary disposals on economic rights is permitted.

II. Death of One of the Joint Authors of a Work

Art. 64. If one of the persons who have created a work jointly dies before the work is completed or made public, his portion shall be distributed among the others. These are obliged to pay equitable remuneration to the heirs of the deceased joint author. Should they fail to agree as to the amount of such remuneration, it shall be determined by the court.

If one of the persons who have created a work jointly dies after the work has been made public, the other joint authors shall be free to decide whether or not they continue the union with the heirs of the deceased joint author.

In case they decide to continue the union, the surviving joint authors may request the heirs to appoint a representative to exercise their rights in respect of the union.

If it is not decided to continue the union, the provisions of the first paragraph shall apply.

III. Multiple Heirs

Art. 65. Where the estate of a deceased author contains economic rights granted by this Law and if a representative has been appointed in accordance with Article 581 of the Civil Code, the representative is obliged to obtain the consent of the heirs for any transaction on such rights.

PART FIVE

CIVIL AND CRIMINAL ACTIONS

A. Civil Actions

I. Action for Cessation of Infringement

(1) In General

Art. 66. Any person whose moral and economic rights have been infringed may bring an action against the infringer to cease the infringement.

If the infringement has been committed by agents or employees of an enterprise in the execution of their duties, legal action may also be brought against the owner of such enterprise.

It is not necessary that the infringer or the persons referred to in the second paragraph be at fault.

The court shall order appropriate measures as required by the force of circumstances for the cessation of the infringement, by assessing the moral and economic rights of the author, the extent of the infringement, whether there is fault and if there is, degree of fault, and the damages likely to be suffered by the infringer in case of the cessation of infringement.

(Addition: 7.6.1995-4110/19) The author may bring an action for cessation and

prevention of infringement in place of his residence as well.

(2) In Case of Infringement of Moral Rights

Art. 67. Where a work which has not yet been made public is disclosed to the public without the consent of the author or against his wishes, action for cessation of infringement may only be brought, if the reproduced copies have been disclosed to the public by way of publication. This provision shall also apply in cases where the author's name is shown on the work against his wishes.

If the author's name has not been shown on the work or has been shown wrongly or in such a way giving rise to confusion, and if the author has claimed the cessation of infringement in addition to the action for declaratory relief referred to in Art. 15, the infringer shall be obliged to show the author's name on the original work and on the reproduced copies already in circulation. The publication of the judgment in not more than three newspapers may be requested at the expense of the infringer.

The provision of the second paragraph shall apply in the cases set out in Articles 32, 33, 34, 35, 36, 39 and 40, if the source has been wrongly or incompletely designated or no source is given.

If the work has been unlawfully modified, the rightholder may claim the following:

1. The author may claim that reproduction, publication, performance and broadcasting by radio of the modified work be prohibited and that the modifications in the reproduced copies already in circulation be corrected by the infringer or restored to their original form. If the modification is made by publication in a newspaper or journal or by radio broadcasting, the author may claim the administrations of such newspapers, journals or broadcasting organizations that have published the modified work to correct the modification at the expense of the infringer.

2. (Amendment: 7.6.1995- 4110/ 20) In the case of works of fine art the author may claim an announcement be made declaring that the modification in the original work has not been made by him, or may claim that his name be removed or changed on the original. If it is possible to restore the work to its original form and if removal of the modification does not significantly prejudice the interests of the owner or of the public, the author may restore the work to its original form.

(3) In Case of Infringement of Economic Rights

Art. 68. (Amendment: 21.2.2001-4630/25) If a work has been translated without permission of the author, has been published outside the scope of the contract or in excess of the number stipulated in the contract, or has been adapted in an other way or broadcast by means like radio or television or performed, the author whose permission was not obtained, may claim the payment of compensation of up to three times of the amount that would have been determined, had the right been granted by contract or of the damages suffered on the base of imputed or current value. In determination of this amount the opinions of the concerned collecting societies shall be given prior consideration.

If a work is being exploited by reproduction without permission and the reproduced copies have not been put up for sale, the author may claim that the reproduced copies, films, moulds and similar devices enabling the reproduction be destroyed or be surrendered to him in return for equitable remuneration not exceeding their cost price or may claim the payment of three times of the amount he would have demanded, if a contract had been concluded. These claims shall not remove the legal liability of the person who has undertaken the reproduction without permission.

If copies of a work reproduced without permission have been put up for sale or if the sale constitutes an unlawful infringement, the author may, as regards copies in the possession of the infringer, choose one of the alternatives mentioned in the second paragraph.

The person who claims remuneration may assert all rights and authorities he would have enjoyed, had he concluded a contract.

II. Action for Prevention of Infringement

Art. 69. An author whose moral or economic rights are in threat of being infringed may bring an action to prevent the probable infringement. The same provision shall apply in cases where the infringement is likely to continue or recur.

The provisions of the second, third and fourth paragraphs of Article 66 shall also apply in such case.

III. Action for Damages

Art. 70. (Amendment: 07.06.1995-4110/ 22) Any person whose moral rights have been infringed may bring an action for moral damages for the moral injury he has suffered. In place of or in addition to such pecuniary compensation the court may order another sort of compensation for moral damages.

Any person whose economic rights have been infringed may claim compensation under the provisions governing torts, if the infringer is at fault.

In the cases set out in the first and second paragraphs, the infringed person may, apart from the damages, also claim the profits gained by the infringing party. In such case, any sum demanded in accordance with Article 68 shall be deducted from this amount.

B. Criminal Actions

I- Offenses

(1) Infringement of Moral Rights

Art. 71. (Amendment: 1.11.1983- 2939/11)

Any person, who in contravention of the provisions of this Law, intentionally;

1. Publishes a work or discloses it to the public, irrespective of whether it has been made public, without the written permission of the author or his successor;
2. Gives a title to a work or to the reproduced copies of the work without the written permission of the author or his successor;
3. Gives the appearance that the work of another person is his own or his own work is that of another person or who acts contrary to the provision of second paragraph of Article 15,
4. Fails to cite the source in the cases covered by Articles 32, 33, 34, 35, 36, 37, 39 and 40, or cites the source in a wrong , incomplete or misleading way,
5. (Addition: 21.2.2001- 4630/ 26) Modifies a work without the written permission of the author,

(Amendment: 3.3.2004- 5101/ 17) shall be sentenced to imprisonment from two years to four years, or a judicial fine between fifty billion TL. and one hundred and fifty billion TL, or both considering the severity of the damages.

(2) Infringement of Economic Rights

Art. 72. (Amendment: 03.03.2004-5101/18) Any person, who in contravention of this Law, intentionally;

1. Sells or distributes the copies of a work or adaptations of such work that have been reproduced by him in contrary to the provisions of an existing contract with the rightholder shall be sentenced to imprisonment from three months to two years or a judicial fine between ten billion TL. and fifty billion TL. or both considering the severity of the damages;
2. Sells a work and its reproduced copies in places indicated in the seventh paragraph of Article 81 of this Law without the permission of the rightholder shall be sentenced to imprisonment from three months to two years or a judicial fine between five billion TL. and fifty billion TL. or both considering the severity of the damages;
3. Without the permission of the rightholder,
 - a) Adapts a work in any manner,
 - b) Reproduces a work in any manner,
 - c) Distributes a work in any manner,
 - d) Lets the copies of a work enter into the country through legal or illegal ways and puts them into commercial use in any manner,
 - e) Displays or performs a work in places open to the public, organizes such display or disseminates it by devices enabling the transmission of all kinds of signs, sounds, and/or images including digital transmission or acts as intermediary for such dissemination,

shall be sentenced to imprisonment from two years to four years or a judicial fine between fifty billion TL. and one hundred and fifty billion TL. or both considering the severity of the damages.

(3) Other Offenses

Art. 73.(Amendment: 3.3.2004-5101/19) The following provisions shall apply to the offenses other than those referred to in Articles 71, 72, 80 and 81 of this Law.

- 1- Any person, who intentionally;
 - a) Possesses for commercial purposes copies of a work, in the knowledge or with reasonable grounds to know, that they have been reproduced in contrary to the provisions of this Law,
 - b) Transfers or grants an economic right or a license or creates a pledge on, or disposes in any way of such right or license, in the knowledge or with

reasonable grounds to know, that such right or license does not exist or that he is not entitled to dispose of such right or license,

- c) Possesses for commercial purposes or distributes a technical instrument whose sole purpose is to facilitate the neutralization or unpermitted removal of any technical device used to protect a computer program,

shall be sentenced to imprisonment from two years to four years or a judicial fine between fifty billion TL. and one hundred and fifty billion TL. or both considering the severity of the damages.

2- Any person, who intentionally reproduces the copies of works, productions and phonograms, that have been reproduced and distributed in accordance with the provisions of this Law, by way of identical printing and production along with the distinctive title, trademark and identifying information of the rightholders of reproduction and distribution, by means of signs, writing, sound, devices or methods enabling repetition of the data or images which are moving or motionless or distributes the copies reproduced by such way shall be sentenced to imprisonment from three years to six years or a judicial fine between twenty billion TL. and two hundred billion TL. or both considering the severity of the damages.

II. Offender

Art. 74. If the offenses referred to in Articles 71, 72, 73 and 80 have been committed by the agents or employees of an enterprise, the owner, manager or the person who, irrespective of his name and title, actually operates such enterprise, who has not prevented the commitment of the offense shall be punished as the offenders. If the act requiring punishment has been committed on the instructions of the owner, manager or the person who actually operates the enterprise, such person shall be punished as the offender and the agent or employees as accomplices.

Any person who, in the knowledge of the unlawful nature of the performance of a work, provides premises for such performance with or without consideration or takes a role or part in the performance, shall be punished as an accomplice.

(Amendment: 3.3.2004-5101/20) If any of the offenses specified in Articles 71, 72, 73 and 80 are committed within the framework of business activities of a legal person, such legal person shall be jointly and severally liable together with the other offenders for the expenses and fines.

The provisions of Articles 64, 65, 66 and 67 of the Criminal Code shall be reserved.

III. Prosecution and Recidivism

Art. 75. (Amendment:3.3.2004-5101/21) The investigation of the offenses specified in Articles 71, 72, 73 and 80 shall be subject to complaint. Public prosecution shall be initiated upon a complaint, provided that the rightholders submit the documents and/or copies proving their rights to the Public Prosecutor. In case these documents and/or copies are not submitted within six months, a decision of non-prosecution shall be issued, the provisions of Article 76 of this Law are reserved. Subparagraph (8) of the first paragraph of Article 344 of the Code of Criminal Procedure, No. 1412 shall not apply to the implementation of the provisions of this Article.

In addition to the persons whose rights have been infringed the following shall also be entitled to file complaints:

1. The Ministry of Education and the Ministry of Culture in the cases covered by subparagraph (4) of Article 71 with respect to acts contrary to the obligation to cite the source as required by Article 35;
2. The Ministry of Culture and the Directorate General of Press and Publication and the institutions representing the Turkish press in the cases covered by subparagraph (4) of Article 71 with respect to the acts contrary to the obligation to cite the source as required by Article 36.
3. The Ministry of Culture in the cases covered by the subparagraph (14) and (15) in the framework of the last paragraph of the Article 19.
4. Collecting societies for the fields in which they operate.

(Amendment: 3.3.2004-5101/21) In case of infringement of the rights of authors, related rights holders and other rightholders and upon request of persons who are entitled to file a complaint, the public prosecutor of the place where the infringement has occurred or where it has produced effect may request the competent court to have the unlawfully reproduced copies or publications seized, to have them destroyed, to have the technical devices used to this end sealed and sold and to close down the premises where unlawful reproduction has taken place.

(Amendment: 3.3.2004-5101/21) If the authors or rightholders fail to file a complaint or any other request to the competent court within fifteen days of the seizure of the copies and non-periodical publications, the competent court shall, upon the request of the

public prosecutor, order to have adequate number of copies preserved to provide basis for the case and the rest destroyed or, if there are possibilities enabling their re-use as raw material, to have them sold as raw material in their present form or after degrading their characteristics in such a way as to preclude their re-use. The provisions of the Article 68 of this Law shall apply in case the authors or rightholders file a complaint or request within the stipulated time period. The rules and procedures regarding the destruction of seized copies and non-periodical publications, their re-use as raw material, and their sale as raw material shall be set out in a by-law to be issued by the Ministry.

In cases where delay is considered to be detrimental, public prosecutor may, *ex-officio*, issue an order for seizure and sealing to be submitted for approval to the competent court within three days.

Rightholders may file a request to the Chief Public Prosecutor with the documents which prove their rights, within six months beginning from the date on which they acquired knowledge of the infringement and the identity of the perpetrator, provided that the offense remains in the prescription term of the action. As regards this offense the trial procedure of the Law on Procedure in Flagrant Offenses No 3005 shall apply regardless of whether the stipulation concerning place in the subparagraph (A) of the first Article of the said Law and the stipulation concerning time laid down in the Article 4 of the same law are met.

If a person who has been convicted (*res judicata*) of an offense specified in this Law re-commits the same offense within two years, the sentence for the new offense shall be increased by one fold. (Addition: 3.3.2004-5101/21) Sentences of imprisonment imposed upon a repetition of the offense may not be suspended and converted to a fine or an alternative measure for imprisonment. The related provisions of the Law on the Struggle against Organized Crime Aimed at Unlawful Gain and Benefit shall apply to the offenses referred to in this Law, provided that the requirements of the said Law are fulfilled.

C. Miscellaneous Provisions

I. Jurisdiction and Evidence

Art. 76. (Amendment: 21.02.2001- 4630/30) Specialized courts to be established by the Ministry of Justice shall be competent for litigations arising from the legal relationships

regulated by this Law regardless of the amount in controversy or the level of punishment prescribed by the Law. Until the specialized courts are established and until they commence their proceedings, The Supreme Council of Judges and Prosecutors shall, upon the proposal of Ministry of Justice, determine which criminal and civil courts of first instance are to be designated as specialized courts and the jurisdiction of such courts.

If a personal action is initiated, Article 358 of the Code of Criminal Procedure shall apply. If the criminal case is disposed of by acquittal and a claim for damages is also involved, the file shall ex-officio be referred to the civil court for a decision on these issues.

(Addition; 21.2.2001- 4630/ 30) In the litigations to be initiated under this Law, the court may order that documents of permissions and authorizations and/ or the lists of all protected works, phonograms, performances, films and broadcasts be submitted by those who use such works, phonograms, performances, films and broadcasts, if the plaintiff submits sufficient evidence to form a strong opinion as to the validity of his claims. The failure to submit such documents and/or lists shall constitute a presumption, that all works, phonograms, performances, films and broadcasts have been unlawfully used.

II. Precautionary Measures and Provisional Seizure at the Customs

Art.77. (Amendment: 21.2.2001- 4630/31) Upon the request of the person whose rights have been violated or are under threat of violation or the persons entitled to file a complaint, the court may order the other party, before or after the commencement of the proceedings on the merits of the case, to perform certain acts or to refrain from performing them as well as it can order closing the premise where the act is being committed or opening that place, furthermore as a precautionary measure the provisional seizure of the reproduced copies of a work or moulds and other devices for reproduction like these exclusively enabling the manufacture of such copies, if such an order is deemed necessary for the prevention of a substantial injury or an instantaneous danger or accomplished facts or it is necessary for any other reason and if the claims asserted are considered to be strongly probable. It shall be stated in the order that non-compliance with the order shall be resulted in criminal consequences as provided in Article 343 of the Law on Execution and Bankruptcy.

(Amendment: 3.3.2004-5101/22) The provision of Article 57 of the Customs Law and the related provisions of the Law No. 4926 on Combating Smuggling and Trafficking shall apply during the import or export of the copies, which require sanctions in case an infringement of rights is likely to occur.

The procedure regarding the seizure of such copies by the Customs Authorities shall be implemented in accordance with the related provisions of the Customs Regulation.

III. Publication of the Judgment

Art. 78. Except for the case referred to in the second paragraph of Article 67, the successful party may request that the final judgment (*res judicata*) be published, in full or in part, by newspaper or similar means at the expense of the other party, if he has a justified reason or interest.

The form and content of the publication shall be laid down in the judgment.

The right to request such publication shall lapse, if not exercised within three months from the date on which the judgment becomes final.

IV. Seizure, Confiscation and Destruction

Art. 79. Article 36 of the Criminal Code and Articles 392, 393 and 394 of the Code of Criminal Procedure shall apply to the seizure, confiscation and destruction of reproduced copies, manufacture or distribution of which are subject to punishment under this Law and of moulds and similar devices enabling the reproduction of these copies.

PART SIX

MISCELLANEOUS PROVISIONS

A. Related Rights and Prevention of Infringement

I. Related Rights

Article 80. (Amendment: 21.2.2001- 4630) The related rights are as follows:

1. Neighboring rights:

Without prejudice to the moral and economics rights of the author and with the permission of the author performers who interpret, introduce, recite, sing, play and perform a work in various ways and in an original form, phonogram producers that

make the first fixation of sounds that are the result of a performance or other sounds, and radio-television organizations shall have the following neighbouring rights.

A. Performers shall have the following rights:

(1) Independently of performers' economic rights, and even after the transfer of those rights, the performers shall as regards their fixed performances have the right to claim to be identified as the performer of their performances except where omission is dictated by the manner of the use of the performance and claim the prevention of any distortion and mutilation of their performances that would be prejudicial to their reputation.

(2) A performer who interprets a work in an original form with the permission of its author shall have the exclusive right of authorizing or prohibiting the fixation of such performance, reproduction, sale, distribution, rental and lending of such fixation, communication of such fixation to the public by devices permitting transmission of signs, sounds and/or images as well as its re-transmission and performance.

(3) A performer shall have the right of authorizing or prohibiting the distribution by sale or any other way of the original or the copies of his fixed performances which have not yet been put up for sale or distributed in any other way in the domestic market.

(4) A performer shall have the right of authorizing or prohibiting the sale of the original or reproduced copies of his fixed performance by wire or wireless means, or the distribution or other supply and communication of such performance or reproduced copies to the public by providing access to them at a time and place chosen by natural persons. Distribution and supply of performances by means of communication to the public shall not prejudice performer's right of distribution.

(5) Performers may transfer these rights to a producer by contract in return for equitable remuneration.

(6) Where the performance is carried out by an orchestra, a chorus or a theatrical group, the permission of only the conductor in case of orchestra or chorus or of the director in case of theatrical group shall be sufficient.

(7) As regards performances carried out as a result of the business activity of an entrepreneur and on the basis of a contract, the permission of the entrepreneur shall also be required.

B. Phonogram producers that make the first fixation of sounds which are the result of a performance or other sounds shall have the following rights after acquiring authority to exercise economic rights from the author and the performer.

(1) The right of authorizing or prohibiting the direct or indirect reproduction, distribution, sale, rental and lending to the public of the fixation which was made with the permission of the author and performer shall belong exclusively to the phonogram producer. Producers shall have the exclusive right of authorizing the communication of their fixations to the public by devices permitting the transmission of signs, sounds and/or images and re-transmission of such fixations.

(2) A phonogram producer shall have the right of authorizing and prohibiting the distribution by sale or any other way, of the original or the reproduced copies of his fixations which have not yet been put up for sale or distributed in any other way in the domestic market.

(3) A phonogram producer shall have the right of authorizing or prohibiting the sale of the fixations of the performances by wire or wireless means or the distribution or other supply and communication of such fixations to the public by providing access to them at a time and place chosen by natural persons. Distribution and supply of fixations by means of communication to the public shall not prejudice producer's right of distribution.

C. (Amendment: 3.3.2004-5101/23) Radio-television organizations shall fulfill the obligations prescribed by this Law. Radio-television organizations shall have the following exclusive rights on the broadcasts they produce:

- 1) Authorizing or prohibiting the fixation of their broadcasts, their simultaneous transmission by other broadcasting organizations, their delayed transmission, their re-transmission, and their distribution via satellite or cable;
- 2) Authorizing or prohibiting the direct or indirect reproduction and distribution by any technique or method of their broadcasts except for private use;
- 3) Authorizing or prohibiting the transmission of their broadcasts at public premises;

- 4) Authorizing the communication of their fixed broadcasts to the public by providing access to them at a time and place chosen by natural persons.
- 5) Authorizing or prohibiting the communication of their broadcast signals on communication satellites or signals directed at them to the public by another broadcasting organization or cable operator or other third parties as well as the decrypting of their encrypted broadcasts.

2. Film producers that make the first fixation of films shall have the following rights after acquiring authority to exercise economic rights from the author and the performer.

(1) A film producer shall have the exclusive right of authorizing or prohibiting the direct or indirect reproduction, distribution, sale, rental and lending to the public of the fixation, which was made with the permission of the author and the performer. Producers shall have the exclusive right of authorizing the communication of their fixations to the public by devices permitting the transmission of signs, sounds and/or images and their re-transmission.

(2) A film producer shall have the right of authorizing or prohibiting the distribution by sale or any other way, of the original or the reproduced copies of film fixations which have not yet been put up for sale or distributed in any other way in the domestic market.

(3) A film producer shall have the right of authorizing or prohibiting the sale of film fixations by wire or wireless means, or the distribution or other supply and communication of such fixations to the public by providing access to them at a time and place chosen by natural persons. Distribution and supply of fixations by means of communication to the public shall not prejudice producer's right of distribution.

In case performances fixed on phonograms and films are communicated to the public in any manner, persons using them shall be obliged to pay an equitable remuneration to the authors as well as the performers and producers or the collecting societies of the related field.

A natural or legal person whose name appears in the usual manner on a cinematographic work shall, in the absence of proof to the contrary, be presumed as the producer that has made the first fixation of the film.

After transferring their economic rights to the producer making the first fixation of films, joint authors of cinematographic works may not object to the dubbing or

subtitling of the film, provided that nothing to the contrary or no special provision is stipulated in the contract .

The author of a musical work shall maintain the right to broadcast and perform his work, provided that the provisions of the contract concluded between him and the producer making the first fixation of films are reserved.

The permissions granted by neighbouring rights holders and the producers that make the first fixation of films must be in writing.

The written permission of the neighbouring rights holders and the film producer shall not be necessary in the cases set out below;

1. Performance and communication of intellectual and artistic works to the public for purposes of public order, education and instruction, scientific research or news without aiming for profit;
2. Reproduction of intellectual and artistic works and radio television programs for broadcasting and personal use without aiming for profit;
3. Ephemeral fixations made by radio-television organizations by means of their own facilities and for their own broadcasts;
4. The cases specified in Articles 30, 32, 34, 35, 43, 46 and 47 of this Law.

However, such application may not prejudice the legitimate interests of the rightholders without good reason or conflict with the normal exploitation of the work.

Like authors, related rights holders shall also enjoy the right to bring actions for cessation and prevention of infringement as well as for compensation.

(Amendment: 3.3.2004-5101/23) Those, who violate the rights of related rights holders, shall be sentenced to,

- a) Imprisonment from three months to two years or a judicial fine between five billion TL. and fifty billion TL. or both considering the severity of the damages in case of violations pertaining to the sale at the places indicated in the seventh paragraph of Article 81 of this Law of the copies of a performance, phonogram, or production reproduced without permission;
- b) Imprisonment from two years to four years or a judicial fine between fifty billion TL. and one hundred and fifty billion TL. or both considering the

severity of the damages in case of a violation of the other rights specified in this article.

II. Prevention of Infringement of Rights

Article 81. (Amendment: 03.03.2004-5101/24) It is compulsory to affix banderoles on the reproduced copies of musical and cinematographic works and on non-periodical publications. It is also compulsory, upon the request of the author or rightholder, to affix banderoles on the reproduced copies of other works that can be easily copied. Banderoles shall be printed and sold by the Ministry. Banderoles may also be sold through the agency of the collecting societies at the sale price determined by the Ministry.

In order to obtain banderoles for a work, the applicant must fill out an obligation form declaring him/her to be the legitimate rightholder. Applications shall be accompanied by other documents required by the Ministry. Upon this application the Ministry is obliged to issue banderoles within ten working days without the need for further action. The Ministry can not be held responsible for these procedures which are based on declaration.

Places which manufacture materials enabling the fixation and reproduction of copies on which the affixation of banderoles is compulsory and/or those which carry out the recording and reproduction of such materials shall be obliged to obtain a copy of the obligation form referred to in this Article, keep it, and submit it to the competent authorities when requested.

The Ministry and local representatives of central government may always inspect, whether the copies and non-periodical publications on which banderoles should be affixed, bear banderoles or not. In order to carry out such inspection the local representatives of central government may, ex-officio or upon the request of the Ministry, form an “inspection commission” in provinces when deemed necessary. When required, representatives of the Ministry and the representatives of the collecting societies in the relevant fields may also take duty in these commissions. In cases of violation as stated in this Article, the law enforcement authorities and the municipal police may ex-officio and/or upon notification by rightholders, inspection commission, collecting societies, the Ministry, and others authorized and assigned by other related laws shall collect copies and publications reproduced and distributed

unlawfully and without permission and all kinds of devices enabling the reproduction of these copies and other evidence, put the immovable ones under safeguarding, and deliver the collected evidence to the Public Prosecutor along with a denunciation.

The Public Prosecutor shall request the competent court, within three days, to have the unlawfully reproduced copies or publications seized, to have them destroyed, to have the technical devices used to this end sealed and sold and to close down the premises where unlawful reproduction has been undertaken.

If the authors or rightholders fail to file a complaint or any other request to the competent court within fifteen days of the seizure of the copies and non-periodical publications, the competent court shall, upon the request of the Public Prosecutor, order that copies in adequate number be preserved to provide basis for the case, the rest be destroyed or sold as raw-material in their present form or after degrading their characteristics in such a way as to preclude their re-use, if there are possibilities enabling their re-use as raw material. The provisions of the Article 68 of this Law shall apply in case the authors or rightholders file a complaint or request within the stipulated time period.

It is prohibited to sell lawfully reproduced copies bearing banderoles which are under the protection of this Law on roads, squares, open air markets, sidewalks, piers, bridges or similar places. Law enforcement authorities and municipal police must seize such copies wherever they are seen and deliver the seized copies to the competent authorities. The manner of making use of the seized copies and publications through sale or any other way shall be determined by the Ministry by taking the opinions of the collecting societies of the relevant field.

The rules and procedures regarding the application of matters laid down in this Article shall be stipulated in a by-law to be issued by the Ministry.

Those who, in contravention to the provisions of this Article, intentionally,

1. Commit the following offenses involving the works, carrying materials such as cassettes, CDs, VCDs and DVDs on which the performances and productions are fixed and non-periodical publications requiring banderoles shall be sentenced to:

- a. Imprisonment from three months to two years or a judicial fine between TL. five billion and TL. fifty billion or both considering the severity of the damages

for selling the said items in the places stated in the seventh paragraph of this Article without having obtained banderoles;

b. Imprisonment from two years to four years or a judicial fine between fifty billion TL. and one hundred and fifty billion TL. or both considering the severity of the damages for reproducing and distributing the said items without having obtained banderoles, or distributing them without payment in violation of the rights of the author or related rights holders, or distributing them with or without payment the banderoles obtained in accordance to this Law and the relevant legislation without affixing on them as prescribed in the legislation.

2. Obtain banderoles by deceiving the Ministry or the organizations authorized by the Ministry with forged papers or documents or in any other way without authority to get banderoles in accordance with this Law and the relevant legislation, or use for other than their intended purpose the banderoles issued for the works, carrying materials such as cassettes, CDs, VCDs and DVDs on which the performances and productions are fixed and non-periodical publications exclusively requiring banderoles shall be sentenced to imprisonment from two years to four years or a judicial fine between TL. twenty billion and TL. two hundred billion or both considering the severity of the damages;

3. Manufacture forged banderoles, use them, and/or obtain commercial profit from the forged banderole in any manner shall be sentenced to imprisonment from three years to six years or a judicial fine between fifty billion TL. and two hundred and fifty billion TL. or both considering the severity of the damages.

As regards persons, who intentionally commit any of the offenses requiring sanctions as regulated in the preceding paragraph, Law on Procedure in Flagrant Offenses No 3005 shall apply irrespective of the stipulation concerning place cited in Article 1, subparagraph (A) of the said Law and the stipulation concerning time in Article 4 of the same Law and public prosecution shall be initiated even if the requirement stipulated in subparagraph (8) of Article 344 of the Code of Criminal Procedure, Law No. 4212 is not fulfilled.

III. Scope and Term of Related Rights

Art. 82- (Amendment: 7.6.1995- 4110/ 28) The provisions of this Law pertaining to the performers shall apply to:

1. Performers who are nationals of the Republic of Turkey;
2. Performers not being nationals of the Republic of Turkey, whose performances are carried out on the territory of the Republic of Turkey, included in phonograms or in the first fixations of films to which the provisions of this Law apply and not being fixed in a phonogram or film, broadcast in radio-television broadcasts to which the provisions of this Law apply,

The provisions of this Law pertaining to the phonograms and the first fixation of films shall apply to phonograms and films:

1. Whose producers are nationals of the Republic of Turkey or;
2. Which are on the territory of the Republic of Turkey.

The provisions of this Law pertaining to the radio-television broadcasts shall apply to radio-television programs:

1. Whose place of origin is situated on the territory of the Republic of Turkey;
2. Which are broadcast from a transmitter situated on the territory of the Republic of Turkey.

The provisions of this Law pertaining to the related rights shall also apply to performers, producers and radio-television organizations that are protected under the provisions of an international treaty to which the Republic of Turkey is party.

The rights of performers shall last for 70 years from the date of first fixation of the performance. If their performances have not yet been fixed, the term shall begin with the date on which the performance is first made public.

The rights of producers shall last for 70 years from the date of first fixation.

The rights of radio-television organizations shall last for 70 years from the date on which the program was first broadcast.

B. Unfair Competition

I. Titles and Distinctive Signs

Art. 83. The title and distinctive signs of a work and the form of the reproduced copies of such work may not be used in another work or in its reproduced copies in such way as to give rise to confusion.

The provision of the first paragraph shall not apply to titles, distinctive signs and exterior forms that lack a distinguishing character and are in general use.

The application of this article shall not depend on the fulfillment of the requirements laid down in Parts One, Two and Three of this Law.

The provision of Article 14 of the Press Law pertaining to the titles of periodicals shall be reserved.

The provisions governing unfair competition shall apply to persons who infringe provisions of the first paragraph of this Article, even if they are not merchants.

II. Sign, Image and Sound

Art. 84. Any person who fixes signs, images or sounds on a device permitting the transmission of such elements or who lawfully reproduces or distributes the same for commercial purposes, may prohibit the reproduction or distribution of the same signs, images or sounds by another person using the same means.

The provisions governing unfair competition shall apply to persons who infringe the provisions of the first paragraph of this Article even if they are not merchants.

The provisions of this Article shall also apply to all kinds of photographs, images fixed by similar means and cinematographic productions that do not qualify as works.

III. Letters

Art. 85- Even if they do not qualify as works, letters, memoirs and similar writings may not be published without the consent of their authors or, in case of their death, without the consent of the persons referred to in the first paragraph of Article 19; consent shall not be necessary once ten years have elapsed after the death of the author.

In addition to the conditions prescribed in the first paragraph, letters may not be published without the consent of the addressee or, in case of his death, without the consent of the persons referred to in the first paragraph of Article 19; consent shall not be necessary once ten years have elapsed after the death of the addressee.

The provisions of Article 49 of the Code of Obligations and Articles 197 and 199 of the Criminal Code shall apply to persons who act contrary to the provisions of the preceding paragraphs. The provisions of Article 24 of the Civil Code shall be reserved in cases where publication is permitted in accordance with the first and second paragraphs of this Article.

D. Pictures and Portraits

I. In General

Art. 86- Even if they do not qualify as works, pictures and portraits may not be exhibited or disclosed to the public in any other way without the consent of the person depicted in such picture or portrait or, in case of his death, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed after the death of the person depicted.

The consent referred to in the first paragraph shall not be necessary for:

1. Pictures of persons who have played a role in the political and social life of the country;
2. Pictures of parades, official gatherings or public meetings at which the depicted persons participated;
3. Pictures relating to current events, radio and film news.

The provisions of Article 49 of the Code of Obligations and Articles 197 and 199 of the Criminal Code shall apply to persons who act contrary to the provision of the first paragraph.

The provisions of Article 24 of the Civil Code shall be reserved in cases where distribution is permitted under the provisions of the first and second paragraphs.

II. Exceptions

Art. 87. Unless otherwise agreed, the picture or portrait of a person made to order may be photographed by the person who ordered it, or the person depicted in it or their heirs. This provision shall not apply to pictures and portraits made by printing methods. However, if the supply of such pictures and portraits for the persons referred to in the first paragraph is impossible or causes serious difficulty, they may be photographed as well.

E. Conflict of Laws

Art. 88. The provisions of this Law shall apply:

1. Irrespective of the nationality of the author, to all works first disclosed to the public in Turkey and to all works in Turkey which have not been disclosed to the public, as well as to letters and pictures in Turkey;
2. To all works of Turkish nationals which have not yet been disclosed to the public or which have been first disclosed to the public outside Turkey;

3. To all works of foreigners which have not yet been disclosed to the public or which have been disclosed to the public outside Turkey, provided that an international treaty, to which Turkey is a party, has suitable provisions.

Where the state of which the author is a national, grants adequate protection to the rights of Turkish authors or an international treaty allows exceptions and limitations with respect to the matters concerning foreign authors, the Council of Ministers may agree certain exceptions to the provisions of subparagraphs (1) and (3) of this Article.

Additional Art. 1- The regulations and by-laws to be issued pursuant to this Law shall be prepared within six months and published in the Official Gazette.

Additional Art. 2- (Amendment: 7.6.1995- 4110/ 29) The protection granted by this Law shall apply to;

1- All works, fixed performances and phonograms existing in Turkey at the moment of entering into force of the amendment of this Article, which have been produced by authors and related rights holders who are nationals of the Republic of Turkey,

2- Foreign works, fixed performances and phonograms, which have been produced in other countries that are party to international conventions and agreements to which Turkey is also a party and which have not fallen into the public domain since the term of protection has not expired at the moment of entering into force of the amendment of this Article.

Persons, who own the legal copies of works, fixed performances and phonograms which fall under protection as a result of application of the first paragraph, may sell or dispose of such copies until the end of six months following the date of entry into force of this Law without the requirement of any written permission.

The exercise of rights granted to the authors and other rightholders within the framework of this Law concerning works, fixed performances and phonograms shall, however, be subject to the permission of authors or related rights holders.

The provisions of this Law pertaining to the ownership of cinematographic works shall apply to cinematographic works the production of which has been commenced after 12.06.1995 when the Law No. 4110 entered into force.

Additional Art. 3- (Amendment: 7.6.1995- 4110/ 30) The principles regarding the application of neighbouring rights shall be set out in a by-law to be issued within six months from the date of entry into force of this law.

Additional Art. 4- (Addition: 21.2.2001-4630/37) Information which identifies the work, the author of the work, the holder of any right in the work or information about the terms and conditions of use of the work, and any numbers or codes that represent such information attached to a copy of a work or appear in connection with the communication of a work to the public may not be removed or altered. The originals or copies of the works on which the information and numbers or codes representing this information have been altered or removed may not be distributed, imported for distribution, broadcast or communicated to the public.

The provisions of the preceding paragraph shall also apply to phonograms and performances fixed on phonograms.

(Amendment: 3.3.2004-5101/25) In case where rights of authors and related rights holders granted by this Law have been violated by providers of service and content through the transmission of signs, sounds, and/or images including digital transmission, the works which are subject of the violation shall, upon the application of the rightholders, be removed from the content. Natural or legal persons whose rights have been violated shall to this end initially contact with the content provider and request that the violation be ceased within three days. Should the violation continue, a request shall next be made to the public prosecutor requiring that the service being provided to the content provider persisting in the violation be suspended within three days by the relevant service provider. The service being provided to the content provider shall be restored, if the violation is ceased. Service providers shall submit a list of the names of their content providers to the Ministry on the first working day of every month. Service providers and content providers are obliged to submit all kinds of information and documents when requested by the Ministry. The rules and procedures regarding the application of the provisions of this Article shall be stipulated in a by-law to be issued by the Ministry.

(Amendment: 3.3.2004-5101/25) The provisions in subparagraph (2) of Article 72 of this Law shall be applied to those who commit the acts indicated in the first paragraph intentionally and without authority and to the content providers who persist in violation of the rights granted by this Law.

Additional Article 5-(Addition: 21.2.2001-4630/38) The reproduced intellectual and artistic works which are protected under this Law shall be collected by the Ministry of

Culture for the purpose of protection and maintenance of the cultural heritage.

Natural or legal persons, who reproduce intellectual and artistic works and are authors or rightholders, are obliged to submit at least five copies of the reproduced works within one month from the date of reproduction.

The rules and procedures regarding the works to be collected, those who shall submit such works and their responsibilities, the units to carry out collection procedures, the quantity of copies to be collected, the institutions where such copies shall be submitted and other rules and procedures regarding the collection shall be stipulated in a by-law to be issued by the Ministry of Culture.

Additional Art. 6- (Addition:21.2.2001-4630/39) The expression “Culture and Tourism” as referred to in this Law has been amended as “Culture”.

Additional Art. 7- (Addition: 03.03.2004-5101/26; Amendment: 14.7.2004-5217/17):
The fees to be received;

- a) For recording and registration in accordance with Article 13;
- b) For recourse to the Conciliatory Commission in accordance with Article 41;
- c) For obtaining banderoles in accordance with Article 81 of this Law

shall be deposited in the account of the Central Accounting Office of the Ministry of Culture and Tourism and shall be entered as revenue in the budget. An allocation for banderole costs shall be charged in the budget of the Ministry.

An amount to be calculated by multiplying the index value of 2000 by the monthly coefficient for civil servants shall be paid per meeting day as attendance fee to the members of the commissions to be set up in accordance with Article 41 – not exceeding ten meeting days per annum.

Additional Art. 8- (Addition: 03.03.2004-5101/26) The maker of a database who has made qualitatively and/or quantitatively substantial investment in either creation, verification or presentation of the contents shall have the right of permitting or prohibiting;

- a) Permanent or temporary transfer to another medium by any means and in any form,
 - b) Distribution or sale, rental or communication to the public in any way,
- of all or a substantial part of the content of the database contents with the exceptions specified in this Law and required by purposes of public security and administrative and judicial procedures.

Term of protection granted to the maker of a database shall be 15 years from the date of being made public of the database.

After every qualitative and quantitative addition, removal, or modification producing a substantial change in the contents of the database and requiring a new investment, the new database resulting from such investment shall qualify for its own conditions of protection.

The provisions of Article 72, subparagraph (3) of this Law shall apply to those who violate the rights granted by this Article.

Additional Art. 9- (Addition: 3.3.2004-5101/26) For the purpose of ensuring the pursuit and protection of intellectual property rights and in order to use in investigations and prosecutions, the Ministry shall form a joint database including the collecting societies, public premises, the radio-television organizations mentioned in this Law, and the places which manufacture materials enabling the fixation and reproduction of intellectual and artistic works and/or carry out the recording, reproduction and sale of such materials or distribute them in any way.

All other matters relating to the technical infrastructure and equipment required, access, use, authorization, and formation of the database shall be stipulated in a by-law to be issued by the Ministry.

Additional Art. 10-(Addition: 3.3.2004-5101/26) An administrative fine shall be imposed in cases set out below:

1. A fine of three billion TL. shall be imposed to those who sell on roads, squares, open air markets, sidewalks, piers, bridges or similar places lawfully reproduced copies bearing banderoles protected under this Law,

2. A fine of ten billion TL. shall be imposed to small enterprises, thirty billion TL. to medium-sized enterprises, and one hundred billion TL. to large enterprises that operate without having obtained the certificates which should have been obtained in accordance with Article 44, reproduce intellectual and artistic works requiring banderoles without having obtained a copy of the obligation form indicated in Article 81,

3. A fine of five billion TL. shall be imposed to those who in contravention of the provisions of Additional Article 5 fail to submit the works to be collected within the stipulated time period.

Administrative fines prescribed in this Article shall be imposed by the local representatives of central government by stating their justification.

Fines must be paid within ten days as of the date of notification of the record. Fines not paid within ten days shall be increased by two fold and the payment period shall be extended for an additional period of ten days. Fines not paid during the extended period shall be increased by three fold. Payment of a fine shall not mean relief from obligations. The fines imposed pursuant to this Article shall be collected in accordance with the provisions of Law No. 6183 on the Procedures for the Collection of Public Receivables.

Fines shall be duly notified to the persons concerned. Objections may be raised against fines to the competent administrative court within ten days of the date of notification. Objections shall not suspend procedures. Court decisions relating to the objections shall be final. Objection shall, where not deemed necessary, be finalized promptly as a result of a review on the documents.

Additional Art. 11-(Addition:03.03.2004-5101/26) It is permitted to reproduce or lend scientific and literary works in writing including school books that have been made public or published, without obtaining the permissions prescribed by this Law and without any commercial purpose in the form of cassettes, CDs, Braille alphabet, and similar formats by a person with disability for his/her own use or by another person acting on behalf of him in a single copy, or by educational institutions, foundations, associations, and the like providing services for the benefit of the people with disability in the quantity required, provided that no such copies have already been produced for the use of people with disability. Such copies may in no way be sold, put into commercial use and used and allowed to be used for other than their intended purpose. Furthermore, it is compulsory to show information relating to rightholders and indicate the purpose of reproduction on the copies.

Additional Art. 12- (Addition:13.01.2007/3)- **Premium-** In case where copies and publications which have been reproduced in contravention to the Art. 81 of this Law are captured, the president and members of the inspection commission, charged with the duty of prevention, monitory and investigation, who are public servants and have actually participated in the process of capture of the materials constituting the subject of the offense within the framework of the provisions of this Law and other related

legislation, shall be paid a premium.

The aggregate amount of the premium to be paid to the president and members of the inspection commission as a result of the seizures made in the framework of an operation of inspection may not exceed the amount calculated by multiplying the index value of 50000 by the monthly coefficient for civil servants. The premium shall be shared equally among the persons concerned. The annual aggregate amount of the premium to be paid per person may not exceed the amount calculated by multiplying the index value of 40000 by the monthly coefficient for civil servants.

Fifty percent of the premium shall be paid after the decision of confiscation of the court, if copies and publications have been captured without their possessors, and after the public prosecution has been initiated, if they have been captured with their possessors, the remaining fifty percent shall be paid within one month from the final decision of confiscation or conviction from the relevant item of the Ministry budget.

No premium shall be paid in case legal copies which have been sold at the premises, where sale is prohibited according to subparagraph (7) of Article 81 of this Law, are seized.

The premium to be paid in accordance with this article shall not be subject to tax and other deductions.

The rules and procedures regarding the formation and principles of operation of inspection commissions and indexes to be determined in the calculation of premium by taking into consideration the nature and quantity of the seized material and other rules and procedures regarding the implementation of this Article shall be stipulated in a by-law issued by the Ministry upon the approval of Ministry of Interior and Ministry of Finance.

F. Provisional Articles

I. Transitional Provisions

(1) In General

Provisional Art. 1. Unless otherwise determined in the following articles, the provisions of this Law shall also apply to works first disclosed to the public on the territory of the Republic of Turkey or entered in the register prior to the entry into force of this Law. This provision shall apply even where the Copyright Law of May 8,

1326 (1910), did not apply to such works or products.

The term of protection for works which had been made public prior to the entry into force of this Law shall be calculated in accordance with this Law.

The terms "copyright," "literary property," "property of fine arts" and similar expressions used in other laws and treaties shall be deemed to mean rights and authorities granted by this law in similar conditions.

If the rights in a work or exercise of such rights have been granted in whole or in part to another person prior to the entry into force of this Law, the new and broader rights and authorities granted by this Law to the author shall not be deemed to have been transferred. The same provision shall also apply, if the term of protection under this Law is longer than the term granted by the former Law or, if the former Law did not protect works and products protected by this Law.

(2) Protection of Acquired Rights

Provisional Art. 2. If the term of protection granted by the former Law is longer, such term shall apply to works published prior to the date of publication of this Law.

If a lawful translation or adaptation of a work was published prior to the entry into force of this Law, the rights and authorities acquired in accordance with the former Law by the person who translated or adapted shall not be prejudiced.

If the publication of a translation permitted by the former Law but prohibited by this Law was commenced prior to the entry into force of this Law such publication may be completed. Such publication period may however not exceed one year. This provision shall also apply to translations delivered to be performed by performing organizations in the public premises.

If the reproduction was permitted under the former Law, but is prohibited under this Law and the reproduction of a work had been commenced at the date of entry into force of this Law, reproduction may be completed and the reproduced copies may be distributed.

The distribution of copies existing at the date of entry into force of this Law and whose reproduction was permitted under the provisions of the former Law may be continued.

The same provision shall apply to devices enabling the transmission of signs, images and sounds and to moulds and similar means enabling the reproduction of works of

fine arts.

Any person desiring to exercise the authority granted by the preceding paragraph shall be required to declare such copies and devices to the competent authority and have them sealed within six months of the date of entry into force of this Law.

Where necessary, details may be specified in a by-law.

Provisional Art. 3. (Addition: 01.11.1983- 2936/17) The president and members of the boards of the compulsory organs of the collecting societies and the federation shall be determined by a Decree of the Council of Ministers, upon the proposal of the Ministry of Culture, until the number of members required by the regulation for convening the first general assembly has been attained and an election can be held.

Provisional Art. 4. (Addition: 01.11.1983- 2639/17) Decree of the Council of Ministers No. 8/423 of March 15, 1980, issued pursuant to Article 43 of Law No. 5846 on Intellectual and Artistic Works, and the payment tariffs to be issued pursuant to that Decree, shall, being effective as from March 15, 1980, apply until to December 31, 1985.

Payments made in accordance with the payment tariffs to be issued under the Decree of the Council of Ministers shall be made to the relevant collecting society to be distributed to the rightholders in case of works which have been transferred to the collecting society through a certificate of authorization and, in other cases, directly to the holders of the economic rights. Such payment shall be finalized by the Turkish Radio and Television Corporation not later than December 31, 1985.

After deduction of its own share from the amount set in the payroll sent by the Turkish Radio and Television Corporation, the collecting society shall pay the remaining amount to the rightholders who are its members within two years following the date on which payment has been made to it.

Royalties that have not been claimed by members within two years shall be deposited in accordance with Article 44 in a special account to be opened with a national bank in the name of the Ministry of Culture.

Provisional Art. 5. (Addition: 06.07.1995- 4110/ 31) Collecting societies founded before the entry into force of this Law shall under the supervision of the Ministry of Culture be converted to new collecting societies within one year from publication of their uniform statutes in accordance with the related provisions of the Law and with the

principles of uniform statutes and shall form their new organs in a general assembly to be held within that period.

Collecting societies that have not complied with the provisions of the first paragraph shall be considered automatically dissolved on expiry of the first year.

Provisional Art. 6. (Additional: 3.3.2004-5101/26) The procedure prescribed in Articles 41 and 43 of this Law regarding the determination of tariffs and the conclusion of contracts shall, irrespective of periods stipulated in these articles, apply as of the date of publication of this Law by considering the current year as basis.

The broadcasting contracts concluded between collecting societies on the one hand and public premises and broadcasting organizations on the other hand prior to the date of publication of this Law shall remain effective with all their provisions until the expiry of the periods stipulated in the contracts.

The classification mentioned in Articles 41 and 43 of this Law shall be made not later than one month from the date of entry into force of this Law. Public premises and/or broadcasting organizations that apply to collecting societies to obtain permission and conclude a contract within six months from the initial announcement of the tariffs by the collecting societies made within no later than one month as of the date of such classification may continue to use and/or transmit works, performances, phonograms, productions, and broadcasts for a maximum period of six months by paying $\frac{1}{4}$ the tariff of the collecting societies for periods of three months at a time. The provisions of this paragraph shall not preclude the application of the procedure prescribed in Articles 41 and 43 of this Law.

Provisional Art. 7. (Additional: 3.3.2004-5101/26) All instruments, equipment and materials of inspection commissions formed in provinces before the date of publication of this Law whose operations are no longer needed within the framework of Article 81 shall be transferred to the provincial Directorates of Culture and Tourism.

Provisional Art. 8. (Additional: 03.03.2004-5101/27) The by-laws provided for in the articles amended by this Law shall be prepared and put into force within six months as of the date of publication of this Law. The database indicated in Additional Article 9 of this Law shall be formed within one year as of the date of publication of this Law.

II. Revoked Provisions

Art. 89- The Copyright Law of May 8, 1326 (1910), and any provisions of other laws contrary to the provisions of this Law are hereby revoked.

G. Final Provisions

I. Entry into Force

Art. 90- Articles 42 and 43 of this Law shall enter into force from the date of publication of this Law and the remaining Articles shall enter into force on January 1, 1952.

II. Authority Entrusted With the Implementation of this Law

Art. 91- This Law shall be implemented by the Council of Ministers.