

REPUBLIC OF TURKEY
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EXHAUSTION PRINCIPLE IN THE INTELLECTUAL PROPERTY LAW
IN THE TURKISH AND EUROPEAN UNION LAW

Master Thesis

AYSEL GÜLLE

İSTANBUL, 2009

REPUBLIC OF TURKEY
BAHÇEŞEHİR UNIVERSITY
INSTITUTE OF SOCIAL SCIENCES
EUROPEAN UNION LAW AND INTEGRATION

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Advisor of the Thesis: Assi. Prof. Dr. Selin Özoğuz

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T.C.
BAHÇEŞEHİR ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
AVRUPA BİRLİĞİ HUKUKU VE ENTEGRASYON

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AYSEL GÜLLE

Tez Danışmanı : Yard. Doç. Dr. Selin Özoguz

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Name/Last Name of the Student: Aysel GÜLLE

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Prof.Dr.Selime Sezgin
Director

I certify that this thesis meets all the requirements as a thesis for the degree of Master of
Science.

Prof.Dr.Eser Karakaş
Program Coordinator

This is to certify that we have read this thesis and that we find it fully adequate in scope,
quality and content, as a thesis for the degree of Master of Science.

Examining Committee Members

Signature

Title Name and Surname

Assi.Prof.Dr.A.Selin Özoğuz

.....

Assi.Prof.Dr.Selcen Öner

.....

Assi.Prof.Dr.Özgür Ünal Eriş

.....

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SOSYAL BİLİMLER ENSTİTÜSÜ
AVRUPA BİRLİĞİ HUKUKU VE ENTEGRASYON

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Prof.Dr.Selime Sezgin
Enstitü Müdürü

Bu tezin Yüksek Lisans tezi olarak gerekli şartları yerine getirmiş olduğunu onaylarım.

Prof.Dr. Eser Karakaş
Program Koordinatörü

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Jüri Üyeleri

Yard.Doç.Dr.A.Selin Özoğuz

Yard.Doç.Dr.Selcen Öner

Yard.Doç.Dr.Özgür Ünal Eriş

İmzalar

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ABSTRACT

EXHAUSTION PRINCIPLE IN THE INTELLECTUAL PROPERTY LAW IN THE TURKISH AND EUROPEAN UNION LAW

Gülle, Aysel

European Union Public Law and European Integration

Supervisor: Assistant Professor Selin Özoğuz

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In this study, the principle of exhaustion which has become important during the application of one of the basic component of free trade namely free movement of goods has evaluated in the scope of European Union Law and Turkish Law. Nevertheless, beneficiaries might sometimes expect superfluous and more than deserved protection while making use of intellectual property rights. Therefore there is need for to regulate such principles in order to determine the boundaries in between protected rights. The regulations and practices has been touched in order to evaluate the said subject both in the European Union and Turkey, and it is concluded that regional exhaustion principle, which is already adopted in the European Union, should also apply to Turkey, while international exhaustion principle should be adapted for parallel imports in Turkey until such a decision is awarded.

Key words: Exhaustion Principle in the European Union, Exhaustion Principle in Turkish Law, Parallel Import, Gray Trade

ÖZET

TÜRK VE AVRUPA BİRLİĞİ HUKUKU AÇISINDAN FİKRİ MÜLKİYET HAKLARININ TÜKENMESİ

Gülle, Aysel

Avrupa Birliği Kamu Hukuku ve Entegrasyonu

Tez Danışmanı: Yard.Doç.Dr. Selin Özoğuz

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Bu çalışmamızda; serbest ticaretin en temel unsuru olan malların serbest dolaşımı ilkesinin uygulaması sırasında gündeme gelen ilkelerden biri olan tükenme ilkesi Avrupa Birliği Hukuku ve Türk Hukuku kapsamında incelenmiştir. Fikri mülkiyet hakkı sahiplerinin haklarını kullanırken bazen gereğinden ve hak ettiğinden daha fazla koruma beklentisine girmeleri halinde hakların nerede başlayıp nerede sonlanacağı konusunda düzenlemeler yapılması gerekli olmaktadır. Çalışmamız kapsamında; hakkın tükenmesi konusu hakkında Avrupa Birliği ve Türkiye'deki düzenleme ve uygulamalara değinilmiş ve tükenme ilkesi konusunda Avrupa Birliği'nde benimsenen bölgesel tükenme ilkesinin Türkiye'yi kapsamaması gerektiği, bu şekilde bir karar verilene kadar da Türkiye bakımından paralel ithalatla ilgili uygulamalar sebebiyle uluslararası tükenme ilkesinin benimsenmesi gerektiği hususu tartışılmıştır.

Anahtar Kelimeler : Avrupa Birliği'nde Tükenme İlkesi, Türk Hukukunda Tükenme İlkesi, Paralel İthalat, Gri Ticaret

TABLE OF CONTENTS

ABBREVIATION.....	vii
1. INTRODUCTION.....	1
2. INTELLECTUAL PROPERTY RIGHTS.....	3
2.1. TYPE OF INTELLECTUAL PROPERTY RIGHTS.....	7
2.1.1. PATENT and UTILITY MODEL.....	7
2.1.2 TRADEMARK.....	10
2.1.3 DESIGN.....	14
2.1.4 GEOGRAPHICAL INDICATIONS.....	16
2.1.5 COPYRIGHTS.....	17
2.1.6 RELATED RIGHTS.....	20
2.1.7 DOMAIN NAME.....	21
3. FREE MOVEMENT OF GOODS AND EXHAUSTION PRINCIPLE.....	24
3.1. FREE MOVEMENT OF GOOD.....	24
3.2. EXHAUSTION PRINCIPLE.....	26
3.2.1. NOTIONS RELATED TO EXHAUSTION PRINCIPLE.....	28
3.2.1.1 Parallel Import.....	28
3.2.1.2 Reimport.....	31
3.2.1.3 Gray Market.....	32
3.3. RELATIONSHIP BETWEEN COMPETITION LAW AND EXHAUSTION PRINCIPLE.....	33
3.4 GEOGRAPHICAL DIMENSION RELATED TO EXHAUSTION PRINCIPLE.....	34
3.4.1 Nationwide Exhaustion.....	34
3.4.2 Regional Exhaustion.....	35
3.4.3 International Exhaustion	37
4. EXHAUSTION PRINCIPLE WITHIN THE SCOPE OF INTERNATIONAL AGREEMENTS.....	38
4.1 EFTA AGREEMENT AND EXHAUSTION PRINCIPLE.....	38
4.2 TRIPS AGREEMENT AND EXHAUSTION PRINCIPLE.....	39

**5. APPLICATION OF THE EXHAUSTION PRINCIPLE IN THE EUROPEAN
UNION LAW.....40**

6. APPLICATION OF EXHAUSTION PRINCIPLE IN TURKISH LAW.....55

7. CONCLUSION.....75

REFERENCES.....

CURRICULUM VITAE.....

ABBREVIATIONS

Association Council Decision	: ACD
Code of Obligations	: CO
Common Customs Tariff	: CCT
Domain Names	: DNS
General Agreement on Tariffs and Trade	: GATT
European Court of Justice	: ECJ
European Union	: EU
European Economic Area	: EEA
European Economic Community	: EEC
Intellectual and Artistic Works	: FSEK
Internet Corporation for Assigned Names and Numbers	: ICANN
Middle East Technical University	: METU
Small and Medium Sized Enterprises	: SMEs
Supplementary Protection Certificates	: SPC
The European Free Trade Association	: EFTA
The North American Free Trade Agreement	: NAFTA
Treaty on European Union	: TEU
Treaty on Trade Related Aspects of Intellectual Property Rights	: TRIPs
Treaty Establishing the European Community	: TEE
Turkish Patent Institute Head Department of Trademarks	: TPE
United Nations	: UN
World Intellectual Property Organization	: WIPO
World Trade Organizations	: WTO

1. INTRODUCTION

Intellectual property is a generic concept which covers both industrial and artistic forms of property rights. The common types of right included are patents, trade marks, copyright, trade names, and indications of origin.

Exhaustion is one of the basic principles of Intellectual Property Law throughout the globe, it is better known as the first sale doctrine. Once trade-marked goods are put on the market by the owner of trade mark or with his consent, the trade owner is no longer allowed further to control the distribution of those trade market goods. The right of distribution has been exhausted by the first sale of the goods. There are two essential elements in the exhaustion doctrine. One of the elements is the time limit, namely the right exhausts after the first marketing of relevant goods. Another element is the extension of the exhaustion. According to different scopes of the exhaustion, there are three kinds of exhaustion: national, international and regional exhaustion.

National exhaustion means that the trademark right is exhausted only with respect to the countries on the market of which the goods were put. This kind of exhaustion gives the wildest rights to the proprietors. International exhaustion means that the trademark right is exhausted by putting the goods on any market anywhere in the world. Regional exhaustion means that the exhaustion relates only to a market that is broader than the purely national market but is nevertheless limited to specific countries.

In this study, the “Exhaustion Principle” was evaluated in terms of the European Union legislation and Turkish legislation and practices. Apart from preamble and conclusion the “Exhaustion Principle” was evaluated under six principle parts; accordingly our knowledge and convictions as to which practices would inure to the benefit of Turkey until it finally becomes an actual member of the European Union were provided hereunder. The principle parts of this study are intellectual property

rights, type of intellectual rights, free movement of goods and exhaustion principle, exhaustion principle in the European Union Law, Exhaustion Principle in Turkish Law. The thesis was prepared to emphasize the Exhaustion Principle, which results in introducing principles and regulations as to what extent the intellectual property rights having significant economic aspects in addition to its legal aspect, of the proprietor would be protected; it is further indented in our thesis that economic consequences of this issue, which, in our opinion, was not considered adequately important during the negotiations between the European Union and Turkey in 2008 should be emphasized because they are important for Turkey, thus should be preserved on the agenda.

2. INTELLECTUAL PROPERTY RIGHTS AND EXHAUSTION

Notion of intellectual property means right ownership of a person on his own idea (thought) as regulated by international contracts and agreements as well as national intellectual property law. Article 27 of Universal Declaration of Human Rights, which was accepted in United Nations General Assembly on December 10, 1948, provides that anyone is entitled to right of claim for protection of any and all kinds of scientific, literary or artistic works that are owned. Accordingly, the notion bears a super concept consisting of property rights for the protection of rights arising from the literary and artistic works on the one side and the intellectual property rights that are used in industrial field on the other side.

Thus, Industrial Property Agreement of 1883 and Berne Convention for the Protection of Literary and Artistic Works of 1886 as well as separate Union Bureaux convened up as United International Bureaux for the Protection of Intellectual Property in 1893. This Bureaux was reorganized in 1967 to be called World Intellectual Property Organization (WIPO) and was admitted to the United Nations Organization as a specialized organization in 1974. On the other hand, “Trade-Related Aspects of Intellectual Property Rights”, which was accepted in 1994, co-exist intellectual property rights requirements and intellectual property rights that are used in industrial field. Article 2 of the International Treaty Establishing WIPO provides that the notion of “Intellectual Property” applies to literary, artistic and scientific works; works of artists and performers; albums and radio (television) broadcasting; any and all inventions in the field of man-made activities, scientific discoveries, industrial drawings and designs, factory, trade and service brands, commercial name and designations; rights of protection against illegal competition and industrial, scientific, literary and artistic property rights as well as any other rights (Baytan 2005, p.1).

In general, the most important feature of property is that the proprietor or owner may use his property as he wishes and that nobody else can lawfully use his property without authorization. Certainly, there are generally recognized limits of the exercise of this right. For example; the owner of a piece of land is not always

free to construct a building of whatever dimensions he wishes, but he must respect the applicable legal requirements and administrative decisions. There are three kinds of properties: (i) property of movable things, (ii) immovable things, (iii) intellectual property.

The objects of intellectual property are the creations of the human mind, the human intellect. In a somewhat simplified way, one can state that intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world.

The property is not in those copies but in the information reflected in those copies. Similar to property in movable things and immovable property, intellectual property, too, is characterized by certain limitations, for example, limited duration in the case of copyright and patents (WIPO 1988, Background Reading Material on Intellectual Property, p.3).

Intellectual property means -in business terms- people's proprietary knowledge. Intellectual property law regulates the creation, use and exploitation of mental or creative labour.¹

There are countless new inventions created for to serve making people's life more qualified. Productions of human mind starts with an idea which is suppose to be protected in order to encourage new productions.

The rights of people who make a new production should be protected by law because having no protection and award may prevent people creating or producing new objects or ideas. Innovations always take time and expense to be developed however once these innovations call into being in the trade area, unfair competition occurs almost inevitably.

¹ According to Art.2, para. viii, WIPO Convention (1967) 'Intellectual Property' includes 'the rights related to literary, artistic and scientific works –performances and performing artists, photographs and broadcasts-inventions in all fields of human endeavor-scientific discoveries- industrial designs,-trademarks, service marks, and commercial names and designations-protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific literary or artistic fields.'

Intellectual Property Rights has a great role in the world trade however every country instead of having international measures brings national measures, rules and regulations however the importance of such issue is much more in the international dimension. Almost all agreements between countries reserve the protection of national rules on Intellectual Property Rights (Article 6 of Agreement on Trade Related Aspects of Intellectual Property Rights “TRIPS” , Article 222 of Roma Agreement; Chapter 17 of North American Free Trade Agreement “NAFTA” Agreement allows nations to protect their own national regulations on intellectual property rights).

After the invention of printing press in 1440 (in Germany by Johann Gutenberg), authorship became more meaningful and profitable. This allowed the exact citing of references, producing the rule, “One Author, one work (title), one piece of information. Before, the author was less important, since a copy of Aristotle made in Paris would not be exactly identical to one made in Bologna. For many works prior to the printing press, the name of the author was entirely lost. Because the printing process ensured that the same information fell on the same pages, page numbering, tables of contents, and indices became common, though they previously had not been unknown. The process of reading was also changed, gradually changing over several centuries from oral reading to silent, private reading. The wider availability of printed materials also led to a drastic rise in the adult literacy rate throughout Europe. First printing press which had publishing right was in Venice in 1469. First regulation on film rights was made in England during the Queen Anne’s epoch in 1709. This regulation was effective for 65 years. It replaced with Copyright Act in 1775.

Starting the history of the Trade Marks’s may go back to 3500 years. We may start it with dried clay epoch. The history of regulations in modern forms starts from beginning of the 17th century.

There is evidence suggesting that something like patents was used among some ancient Greek cities. The creator of a new recipe was granted an exclusive right to make the food for one year, and a similar practice existed in some Roman cities.

Patents in the modern sense originated in Italy in 1474. At that time the Republic of Venice issued a decree by which new and inventive devices, once that had been put into practice, had to be communicated to the Republic in order to obtain the right to prevent others from using them.

England followed with the Statute of Monopolies in 1623 under King James I, which declared that patents could only be granted for “project of new invention.” During the reign of Queen Anne (1702-1714), the lawyers of the English Court developed the requirement that a written description of the invention must be submitted. These developments, which were in place during the Colonial period, formed the basis for modern English and United States patent law.

In the United States, during the colonial period and Articles of Confederation years (1778-1789), several states adopted patent systems of their own. The first Congress adopted a Patent Act, in 1790, and the first patent was issued under this Act on July 31, 1790 (and the subject matter of that patent was for the making of potash).

First protection on design in moderns’ sense was born during industrial revolution, in England, in 1770’s. First regulation for protecting came into effect in 1711, in Lion (France) for textile. After industrial revolution increasing speed in the international trade speeded up intellectual property protections as well. Having international rules for intellectual property right was necessary and therefore first multinational convention took place in the Paris, in 1883. This convention’s production was “Paris Agreement” which is still in force (Turkey participated to Paris Agreement in 1925 for the first time and Turkey also participated to amended version of Paris Agreement in 1995).

Paris Agreement consists of provisions on innovations, trade marks, designs, utility model, trade names and unfair competitions. There are two main characteristics of Paris Agreement, first of all it brings non-discrimination as a rule among its citizens and secondly it brings preferential rights for innovations, utility models, trade marks and industrial property. Paris Agreement gives right to claim protection of intellectual property rights in the other participant countries. There are different

multinational agreements signed after Paris Agreement in order to develop on such issues, for example WIPO Agreement (July,14 1967, signed in the Stockholm), TRIP's (April,15 1994, signed in the Marrakech, came into force on 1st January 1995), it led up to establish the World Trade Organization (WTO), European Union Agreement (Maastricht Agreement) and rest of the legislation of European Union.

2.1. TYPE OF INTELLECTUAL PROPERTY RIGHTS

2.1.1. PATENTS and UTILITY MODEL

There are two main groups for Intellectual Property Rights. First group is primary rights; which are including; copyright, patent, trade marks, industrial design rights, utility models, geographical indications, trade secrets, related rights, trade names, domain names. Second group is sui generis rights which are including; database rights, mask works, plant breeder's rights, supplementary protection certificate, traditional knowledge. It is possible to make different groups out of intellectual property rights for example; grouping them according to importance is possible. There are mainly three most important forms of intellectual property which are copyright for literary and artistic works and associated products, patents for inventions and trade marks and names for the goodwill attaching to marketing symbols. Industrial designs and confidential information are also important. In this dissertation there will be explanation for main headlines of the types of intellectual property rights.

Patent means "closed with seal". This word used in England as "letter(s) patent" (litterae patents) which means "open, not closed with seal, certificate". "Patent", open letters used for to give privileges, exclusive rights and some important positions. For example; if someone invents something or requires right of exploitation had to receive a "letter patent". Sealed document was representing authority for right of exploitation or having exclusive rights for an invention. These documents were not closed and enveloped therefore these are termed as

“letter(s) patent” (Currie 1972, p.449). As a word “Letter” is plural because it represents authority granting category of writing (Tekinalp 2002, p.445).

Article 28 of TRIP's:

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) Where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

(b) Where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

As stated above in the article 28 of TRIPS, patents are one of the must be protected rights. Patents are used to protect new product, process, apparatus, and uses providing the invention is not obvious in light of what has been done before, is not in the public domain, and has not been disclosed anywhere in the world at the time of the application. The invention must have a practical purpose. Performing a service in a special way may be protected under patent term. These types of patents can be described as procedural patent. Patents are registrable nationally; the patent granted by European Patent Office is a “bundle” of national patents. No EU-wide single patent system exists to date, although the Community Patent is in the final stages of enactment. Registration provides a patentee the right to prevent anyone making, using, selling, or importing the invention for 20 years. Patents are enforced by court proceedings. In addition, the Regulation on Supplementary Protection Certificates (SPCs), grants “patent extensions” of up to 5 years to

pharmaceutical and plant products, providing as much as 25 years of patent life for originator medicines.

In Turkish Law first regulation in respect of patent was dated in 1879 its name was “Letter Patent Law”. Last regulation for patent is dated 27.06.1995 and numbered 551 “Exclusive Order for Protecting Patent”.

First inventor of an invention has every right on invention without having any official document or applying any official way to obtain any official document. Every right naturally belongs to first inventor. Characteristic rule of a patent is having elucidative effect therefore having patent does not give any founder right. In case of incidentally two people inventing the same invention; there is precedence for first registration therefore in this case second application will be renounced. However if these two things made in different way which means if there is difference on procedure of creating the same thing every procedure will be protected with patent.

A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time. In its basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent. In fact, utility models are sometimes referred to as "petty patents" or "innovation patents" (www.wipo.int, 2008).

Utility model usually depends on simple terms and solutions which produces answers for technical needs of life (Tekinalp 2002, p.17). Utility model is different from design because utility model is not protecting the external appearance; it is protecting beneficial technical inventions.

Utility model is protected under “Exclusive Order for Protecting Patent” in Turkey. In respect of Turkish law; in order to be able to protect a utility model, that utility model should have new and applicable to industry. Moreover, it does not have to

past the “inventive step”. In case of not to have utility model, there would be no protection for the innovations which can not be considered as inventions.

The requirements for acquiring a utility model are less stringent than for patents. While the requirement of "novelty" is always to be met, that of "inventive step" or "non-obviousness" may be much lower or absent altogether. In practice, protection for utility models is often sought for innovations of a rather incremental character which may not meet the patentability criteria. The term of protection for utility models is shorter than for patents and varies from country to country (usually between 7 and 10 years without the possibility of extension or renewal). In most countries where utility model protection is available, patent offices do not examine applications as to substance prior to registration. This means that the registration process is often significantly simpler and faster, taking, on average, six months. Utility models are much cheaper to obtain and to maintain. In some countries, utility model protection can only be obtained for certain fields of technology and only for products but not for processes. Utility models are considered particularly suited for small and medium sized enterprises (SMEs) that make "minor" improvements to, and adaptations of, existing products. Utility models are primarily used for mechanical innovations. The "Innovation patent," recently launched in Australia, was introduced as a result of extensive research into the needs of SMEs, with the aim of providing a "low-cost entry point into the intellectual property system. Only a small but significant number of countries and regions provide the option of utility model protection.

2.1.2 TRADE MARKS

A symbol (logo, words, shapes, a celebrity name, and jingles) used to provide a product or service with a recognizable identity to distinguish it from competing products. Trademarks protect the distinctive components which make up the marketing identity of a brand, including pharmaceuticals. They can be registered nationally or internationally, enabling the use of the symbol ®. Trade mark rights are enforced by court proceedings in which injunctions and/or damages are available.

In counterfeiting cases, authorities such as Customs, the police, or consumer protection can assist. An unregistered trade mark is followed by the letters TM. This is enforced in court if a competitor uses the same or similar name to trade in the same or a similar field. Trade Mark is signals which allow people to distinguish the assets and products of commerce, industry or social or cultural institution from a different commerce, industry or social or cultural institution.

The drawing works which may include names of people, words, patterns, letters, numbers or similarly signified works that can be pressed published and expanded are called as “trade mark” (Baytan 2005, p.201).

Trademark rights are protected by the commercial and industrial rights and trademarks are not require intense intellectual effort therefore it is not protected for its moral rights. Trademark itself is not an intellectual product. Any word or any signal registered as trademark. Even though owner of trademark has right to prevent trademark from aggravation and amendment but the purpose of giving right for protection is not to give a moral right to owner of trademark, the purpose is not to damage function of trademark. Nonetheless, if a signal which has value as an intellectual product, design or graphic used as a trademark, the moral rights of owner’s rights can be infringed.

In Turkish Law, under the terms of the Executive Law which numbered 1/95, Trademark Law which numbered 551 abrogated and a new law came into effect which named as Protection of Trademarks in 1995 numbered 556. Under the terms of Executive Law, Turkey has become a member of Treaty of Madrid in 1997. By becoming a member of such Treaty Turkey obliged to protect trade marks which are registered by WIPO-OM-PI.

A trademark is a symbol which is intended to indicate who is responsible for the goods placed before the public. There may be many makers or sellers of the same goods and they may all use different trademarks. The public makes use of these trademarks in order to choose whose goods they will purchase. If they are satisfied with their purchase, they can then repeat their order simply by using the trademark.

It is not necessary that they know who actually owns the trademark. In other words, they will distinguish between the goods of competing traders solely by means of their trademarks. In order for this to work in practice, the trademarks must not only be different, but they must be clearly distinct from each other. In other words, they must be “distinctive”.

Trademarks may take many forms. They may consist of a single letter or numeral, usually presented in some fanciful or original manner. At the other extreme, a whole sentence, or slogan, may be used as a trademark. Many trademarks consist of pictorial devices, without any words at all. Quite a few trademarks consist of a combination of words and devices, perhaps on a label attached to the goods. Some trademarks are made an inherent part of the goods, e.g., a specially designed selvedge on a bolt of cloth, or a special moulding around the neck of a bottle. This last example is important because it shows that trademarks may be three-dimensional. Indeed, bottles (and other containers) may come within the definition of a trademark, subject to certain restrictions.

Where a trademark is used in connection with services, it may be called service mark. For example, service marks are used by hotels, restaurants, airlines, tourist agencies, car rental agencies, laundries, and cleaners.

A trademark serves several purposes. From the viewpoint of the person who is interested in buying goods, the trademark serves the purpose of guiding him in his decision to buy. Such a decision is based on the expected properties of the goods (size, weight, color, fragrance, taste, durability, degree of efficiency in the operations in which the goods are used, etc.). In a single word, one may say that what the prospective buyer is looking for is a certain quality. One of the functions of a trademark is to convey a feeling of a certain quality.

A second function of the trademark is to allow the manufacturer of the goods to identify the goods, once they are no longer in its or his possession but already in the possession of others, for example, the shops that sell it.

A third function of the trademark is that it allows the authorities responsible for controlling the quality of the goods sold under a trademark, as well as any other entity or person, to identify the owner of the trademark. All that one has to do to identify such owner is to look up in the trademark register in whose name the trademark stands registered.

Lastly, it is frequently said that the function of a trademark is to distinguish the goods of one entity from the goods of a similar kind of another entity. This is particularly true if the trademark consists of the name of the manufacturer or if the person looking at the trademark knows which manufacturer owns the trademark, or if, next to the trademark, the name of the manufacturer is also indicated.

Naturally, trademarks may be used not only by the manufacturer of goods but also by entities which are mere distributors. What has been said before in respect of the manufacturer will, and then applies to the distributor.

It is only in comparatively modern times that a trademark has come to be recognized as a species of property which its owner can take steps to protect. A register of trademarks provides the source of this protection by:

- i. making proof of registration equivalent to proof of title in all legal proceedings, and
- ii. Restricting to registered owners the right to prevent others from using their trademarks without permission. The transfer from the customer to the proprietor of the right to stop deception caused by false marking has had enormous benefit and has led directly to an expansion of trade without any loss of consumer protection.

2.1.3 DESIGN

Design is a pre existing product which is phenomenal by its shape, form, color, figure, texture, material and flexibility. A design also should be distinguished from other products with its appearance.

Design registrations are used to protect products distinguished by their novel shape or pattern. They are available for one-off items. The design itself must be new, although a 1 year grace period is allowed for test-marketing. Registration is not possible where the new form is dictated by function. The design is registrable either nationally or under a European Union (EU)-wide single right. It can also be protected by copyright.

The scope of the design system is delimited at the most fundamental level through the definition of the protectable design. Following the coming into operation of the Directive and Regulation, the definition of a registrable design at national and Community Levels, and indeed, the definition of design for the purposes of Unregistered Community Design Right is identical. This definition of a protectable design is exceedingly broad-broader than many of the definitions of design in the pre-existing laws of member states. More specifically, Article 1(a) of the Directive defines a design as: the appearance of the whole or part of a product resulting from the features of, in particular, the line, contour, colors, shape, texture and/or materials of the product itself and/or its ornamentation. In turn Article 1(b) defines a “products” as: any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get ups, graphic symbols and typographical typefaces, but excluding computer programs. These two definitions need to be considered in detail, before going on to examine certain mandatory exclusions from the concept of protectable design. The definition of design focuses on “appearance”. Despite the fact that the term “appearance” directs attention to the way a product looks, it is clear that there is no requirement that the design be attractive, decorative, or ornamental: functional and aesthetic designs are equally protectable. The definition of design provides a non-exhaustive

list of characteristics that can produce appearance: these include lindens, contours, shape, texture or materials (Bentley, Sharman, p.611).

Turkish laws order that designs shall not be protected unless they are innovative and have individual character. They require that designs, as in patents and utility models, must fulfill the criterion of being innovative worldwide to be eligible for protection. Therefore, an intellectual property created abroad cannot be registered in Turkey in favor of a person other than its original creator.

The patent and utility model laws protect useful advantages/advancements achieved in the industry, while the design law protects innovations as to appearance of products. In other words, the patent and utility model laws protect the original manufacturing techniques for products, while the design law protects original forms or shapes of products. Thus the notion ‘design’ is related with the appearance of a product, while the notion of ‘utility model’ and ‘patent’ is related with the operating principle of a product. It is observed that the notions patent, trademark, design and utility model are not sufficiently distinguished from each other in practice.

It must be emphasized at this point that if a product is eligible for protection under both the design law and the utility model law, its owner will be entitled to enjoy protection under both of said laws (Cumulative Protection Principle). Article 169 of Patent Decree Law reads: “The subject of a certificate of utility model can also be registered as an industrial design, in which case such registration shall be subject to the applicable laws.” In other words, a utility model can be developed for protection of certain functional properties (i.e. technical design) of a product. For example, the appearance of an automobile is protected under the design law. If said appearance also provides a functionality that affects the aerodynamic properties of that automobile, said functionality is eligible for protection under the utility model (or patent) protection.

Certain designs can also be eligible for the conditions set forth in Copyright Law. In this case, the design in question is considered eligible for protection under both the

design law and the copyright law (Cumulative Protection Principle). For example, if a graphical design has also aesthetic properties, it will be eligible for protection as a work of fine art under Article 4 of the Copyright Law. This right to protect their designs as works provides designers with a great advantage: For example, maximum protection period allowed for a design under the design law is 25 years, but the Copyright Law will ensure a protection period corresponding to the creator's lifetime plus 70 years for a design classified as a work of art. Furthermore, the design law requires a design to be registered, but protection under the Copyright Law begins when a work of art is created (Okutan 1996, p.111).

As in patents, utility models and trademarks, the design law stipulates legal and penal sanctions for violation of design rights.

2.1.4 GEOGRAPHICAL INDICATIONS

Geographical indications constitute another class of distinguishing signs. They are used for denoting the country, state or region of origin of a product. A "geographical indication" also refers to a region's name and is also subject to three conditions:

- i. the product must originate in that geographical area,
- ii. a specific quality, reputation or other characteristic that is attributable to that geographical origin, and
- iii. the production and/or processing and/or preparation of the product takes place in the defined geographical area.

Geographical indications are divided into two categories: Appellation of Origin (place of origin) and Method of Production. Place of origin denotes that the entire production or manufacturing process of a product, such as French wine or Amasya apple, is carried out in a certain region or country. French wine can only be produced in France. Method of production denotes that a product has been made in a given region or country by employing a method peculiar to a different region or country during its production or manufacturing process. For example, Isparta Carpet

can be woven in Istanbul by employing the carpet weaving method (number of loops, yarn used, etc.) originated in the city of Isparta, in which case the term “Isparta Carpet” can be printed as an indication of production method on such carpets.

It should be emphasized that patents, utility models and designs are considered to have originated from a person under the applicable laws, but geographical indications are considered to have originated from a region or even a country.

Therefore, protection of geographical indications is based on collectivity, but protection of other intellectual property rights is based on individuality. Therefore, geographical indications are different from other intellectual property rights in such a manner that they protect the producers and consumers located in a given region. For example, the “Amasya Apple” indication protects the farmers located in the city of Amasya. If a farmer located in the city of Kayseri prints the Amasya Apple indication on his own apples, both the farmers and consumers located in Amasya will suffer.

As in patents, utility models and trademarks, the law stipulates legal and penal sanctions for violation of geographical indication rights (www.iprturkey.com, 2009).

2.1.5 COPYRIGHTS

The protection of copyright and related rights covers a wide area of human creativity. Under the most important international convention, the Berne Convention, copyright protects all “literary and artistic works”. This term includes every original work in the literary, artistic and scientific domain, such as books, lectures, dramatic works, musical compositions, motion pictures and films, drawings, paintings, sculpture, architecture, photographic works, illustrations, maps etc.

Related rights protect the contributions of other persons who add value in the presentation of literary and artistic works to the public. The protection covers the

rights of performers, producers of phonograms and broadcasting organizations. Producers of audiovisual works are also beneficiaries of related rights according to the legislation of some European countries.

Intellectual Property is a generic term that came into regular use during the twentieth century and is used to refer not only to copyright and related rights, but also to industrial property covering subjects, such as patents, trademarks, designs and geographical indications.

Copyright is related to technology, since technological progress was one of the main reasons that led to the adoption of the legal framework. Historically copyright appeared when Gutenberg discovered typography and was developed in parallel with the evolution of technology. Nowadays internet has brought about radical changes in communication and created not only new technological methods of diffusion of works, but also a new culture and the internet human being. Copyright is also related to culture, since authors contribute with their work to the international and national heritage.

The justification of copyright is;

- i. The principle of natural justice. The author is the creator of the work which is the expression of his personality. The author should be entitled to decide whether and how his work is to be published or exploited and to prevent any distortion or mutilation of his work.
- ii. The principle of economic importance. In the modern world considerable investment is needed to create or exploit the work. These investments will not be making unless there is an expectation of making a reasonable profit.
- iii. The cultural argument. The works produced by creators from important national assets. The encouragement of creativity is a contribution to the development of culture and cultural diversity.

Some of the above mentioned justifications can find considerable support in the 1948 Universal Declaration of Human Rights. Article 27 (2) reads as follows:

“everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic creation of which he is the author.”

Trying to define the essence of copyright is not easy because copyright regimes are the products of different philosophical and legal traditions. The term “copyright” refers also to the common law systems that protect the exclusive right of authors in essentially economic term (the rights to reproduce and publish the work). According civil law systems copyright is referred to as “authors’ rights” because the rights of authors are seen basically as the protection of authorial personality.

Copyright protects only the original forms of expression, not his ideas. The essence of copyright is the originality requirement which usually requires at least some creativity for a work to be protectable. Copyright denies protection to any idea, procedure, process, and system, method of operation, concept, principle or discovery.

As result of the idea/expression dichotomy copyright law does not preclude others from using ideas or information. Ideas, discoveries, principles and facts are freely accessible to the public in order not to impede future creative activity. However, the idea-expression dichotomy is sometimes difficult to apply in practice.

Copyright is not a real property right. The object of the right is intangible. Copyright protects the work as immaterial good, having a unique character and not the physical object in which the work is embodied.

Copyright protection arises automatically on creation of the work and does not depend upon a registration or other formalities. According to Art., 5 par. 2 of the Berne Convention “The enjoyment and the exercise of the authors” rights shall not be subject to any formality. Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Any registration or deposit requirement for works may provide some advantage, such as the date of creation, the ownership or the assignment and transfer of rights, but they cannot affect the enjoyment or exercise of copyright.

In Turkish law, Copyright is an exclusive right. The creator of works protected by copyright and their successors (referred as right holders) have the exclusive right to authorize or prohibit others to use the protected works.

Copyright is used to protect original creative works, published editions, sound recordings, films and broadcasts. It exists independently of the recording medium, so buying a copy does not confer the right to copy. Limited copying (photocopying, scanning, downloading) without permission is possible, e.g. for research. Publication of excerpts or quotes needs acknowledgement. An idea cannot be copyrighted, just the expression of it. Nor does copyright exist for a title, slogan or phrase, although these may be registered as a trade mark. Copyright applies to the Internet with web pages protected by many different copyrights, so that permission should be asked to copy or print a page, or insert a hyperlink to it. Material cannot be posted on a Web site (Intranet included) without permission from the copyright holder.

Copyright is not registrable because it arises automatically on creation. Copyright is protected in the EU for 70 years after the author's death for creative works, 50 years for broadcasts, etc and 25 years for published editions. Use of © is not required in most of Europe. Copyright is enforced by court proceedings.

2.1.6 RELATED RIGHTS

Intellectual Property Law, which was only consisting of Trademark, Patent and Intellectual and Artistic Works in the beginning, grew to include new type of rights and still continues to do so in parallel with the scientific and technological developments in the course of time.

As a consequence of the developments in genetic science, the gene structure of plants and animals were intervened, consequently the biotechnological right upon the resultant new breeds is a matter of another brand. Additionally, semi conductor product topographies that could be called micro-scale 3D designs, which are obtained as a result of extremely expensive investments and enable data

transmission from one unit to another within a mechanism, as well as new plant species, are deemed intellectual property rights under a separate protection scope. To this end, the Law No. 5042 on Plant Breeders' Right Protection dated 08.01.2004 and the Law No. 5147 on Protection of Integrated Circuit Topographies dated 22.04.2004 were accepted and executed. Article 39 of TRIP provides that know-how and all kinds of unexplained trade information and secrets should be protected. Many opinions have been put forward indicating that these rights failing to have a legal arrangement are possible to be protected within the scope of Article 56 of Turkish Commercial Code. Additionally, some authors argued that it is possible to suggest property rights for certain themes with specialty such as traditional folk songs and other asserted cultural properties and methods (folklore), sportive acts, media play formats, exhibiting and festival services, film sites (Aslan 2004, p.36).

2.1.7 DOMAIN NAMES

Developments in the field of computer technology bring into sharp relief domain names (DNS) which are not well established yet in the field of electronic trade. Internet is a network established between computers. DNS is address of computers which are members of World Wide Web (Nomer 2001, p.396).

In foreign laws, there are quite a few laws related to the internet and which is within the scope of private law. Directive no. 1999/93 for Electronic Signature was issued on December 13, 1999 and Directive no. 2000/31 for e-commerce was issued on June 8, 2000 in the EU. On the other hand, the Law on Electronic Communication passed in 2000 in England.

Internet DNS policy is currently being guided by US National Science Foundation and WIPO around the globe, and conducted by Network Solution Inc. There is no exclusive court assigned for settlement of probable disputes related to the internet domain. An "Arbitration and Mediation Council" has been incorporated within WIPO to settle the aforementioned disputes. There is neither an agreement nor a contract for incorporation of the said council. The applicable rules of procedure during adjudication were accepted by the Internet Corporation for Assigned Names

and Numbers (ICANN) on 24.10.1999 and came into force subsequently. For the complainant to succeed in his application to the Arbitration and Mediation Council, it is stipulated that he evidences that the domain name used by the defendant is either the same as or indistinguishably similar to the trademark or commercial name that is owned; that the defendant who is using the domain name in question has no legitimate interest in doing so; and finally that the DNS in question is registered maliciously and in bad faith.

No legal arrangement is yet available in our country that is directly related to the rights of the internet domain names. No legal disagreement has been brought to the appellate court so far. Nevertheless, provided that the domain names are captured maliciously and used in a way to put the rivals on the spot on commercial markets and to defame the rivals or to derive improper personal benefits out of it, it is possible to prevent such acts of using domain names included within the scope of “unfair competition” as regulated in Article 56 and onwards of Turkish Commercial Code.

Even though there is no legal arrangement, domain name allocations are made by DNS Center incorporated in Middle East Technical University (METU) in Turkey based upon the pre-application principles due to its contractual relation with the American company. The Center recognizes that any probable disagreements in this regard will be settled at courts, and the allocation will be abolished in case of existence of certain conditions such as failure to pay for annual maintenance fee and failure to certify the nature of relationship with the domain in question. DNS Center has not been accepting the allocation of transactions that could be defined as generics up until now. However, the Center has recently given up on this and resolved that the names that could be defined as generics are also allocated. In a recent announcement by METU’s DNS Center, it was made known that the internet domain names in addition to the generic names starting with the direct names of automotive, banking and various service sectors would be registered as well. In announcements published on the web site of the Center, it was resolved that drawing of lots would be used for determining those who will acquire a domain name for

which registration is requested especially with commercial names and trademarks thereof, out of the applicants who applied for registration (www.dns.metu.edu.tr, 2008).

3. FREE MOVEMENT OF GOODS AND EXHAUSTION PRINCIPLE

3.1. FREE MOVEMENT OF GOODS

The basic objective of the Treaty Establishing the European Community (TEC) relates to the formation of a shared/single market, which enables free movement of goods and services, persons and capital in a way inclusive of all economic fields of activity. In this context, quantity limitations of import as per Article 28 of the Treaty (ex Article 30) and of export as per Article 29 of the Treaty (ex Article 34), and all measures having equivalent effects are banned. Nevertheless, Article 31 of the treaty (ex Article 37) refers to the system exceptions intended for safeguarding free movement of goods, that is, under what circumstances free movement of goods may be restricted. In this context, “protection of industrial and commercial property” is deemed one of the reasons that could well constitute an exception for principle of free movement of goods.

Full text of Article 31 of the Treaty is as follows: “The provisions of Article 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures, possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States” (www.turkhukusitesi.com, 2009) .

Free movement of goods, which is the basic principle of free trade, is accomplished provided once the states mutually lift import/export taxes (customs tax) and taxes having equivalent effects and all other quantity limitations and restrictions with equivalent effects.

The goods that are traditionally manufactured in a state are in free movement within that state. If goods manufactured in a state are to enter into free movement in another, a certain amount of customs tax is collected in the receiving state of the

goods in question. However, as the world trade has become more liberal in the course of time, states started to lift import taxes and quantity limitations by means of preferential agreements (such as Free Trade Agreements, Customs Union etc.), allowing each other's goods in free movement.

TEC provides that goods should be in free movement within the scope of Customs Union. In this context, states do not only lift customs tax, taxes having equivalent effects and quantity limitations but also apply Common Customs Tariff (CCT) against any third countries.

These provisions contained in the Treaty of Rome (Articles: 9–37) also apply to Customs Union between Turkey European Economic Community (EEC) in the exact manner (Ankara Agreement, Article 4; Annexed Protocol, Article: 2-30; Association Council issued 1/95, Article: 2-11). Upon Annexed Protocol, the transition period for Turkey is accepted to be 12 years (Ankara Agreement, Article: 4/2) and free movement is provided for the given period regarding the goods that are not included in 22-year long-term protection list. With Custom taxes to be lifted in both periods, taxes having equivalent effects and quotas, rates of discount have been adjusted in the course of time for CCT harmonization process, and free movement of industrial goods has been ensured since December 31, 1995 by the end of given periods.

By their nature, intellectual property rights entitle the proprietor to a set of monopolistic authorization for manufacturing, distributing and marketing the goods. As the terms exist, proprietor of intellectual property right may prevent free movement of goods under protection of intellectual property even though they are put on the market of his own accord. The intellectual property rights (first sale right) of the goods in question must not have exhausted so that proprietor of intellectual property right could prevent free movement of goods. Subject to various fields of application in terms of concept, the exhaustion principle emerges as a common notion with a characteristic of equilibrant between the necessity of protection for monopolistic intellectual property rights and free trade requirements (Okutan 1996, p.111).

3.2. EXHAUSTION PRINCIPLE

The Principle of Exhaustion is a fundamental limitation on intellectual property rights, the legally created rights of the intellectual property holder that attach with a particular form of intellectual property, such as patents, trademarks, and copyrights. This limitation has historically been territorial, primarily national. Each nation creates and enforces its own Intellectual Property Rights solely within its jurisdiction. The exhaustion of rights principle is followed by many nations for their internal markets. This principle holds that a "first sale" of an item incorporating the protected intellectual property in the national territory will exhaust the rights of the holder of the intellectual property, thereby preventing him from further domestic enforcement of the related intellectual property rights against others regarding that item. This is known as "national exhaustion." Thus, a balance is struck between awarding a holder of intellectual property with intellectual property rights and ensuring that his intellectual property rights are not used to restrict the movement of goods within the territory's internal market. Essentially, once an intellectual property right holder has exhausted his right to exclude in the national territory by selling in some way the product embodying his intellectual property, he loses the right to exclude others from selling that product in some way in the same market. The practice of exhaustion has a longstanding history, and for good reason. Intellectual property rights cannot be globally granted on a forever basis, because it would restrict the growth of markets and thus, trade and economies (www.metrocorpounsel.com, 2009)

The manner in which intellectual property can be deployed to divide markets varies with the kind of right held, the question is accordingly one to which we must return at later points. But one general concept can usefully be introduced here. In every intellectual property law it is necessary to decide which steps in the chain of production and distribution of goods require the license of the right-owner: manufacture; first sale by the manufacturer; subsequent sales and other dealings; export and import; use. In the past, legislators have often left the answer to the courts. In many cases, the rights are "exhausted" after first sale by the right owner or

with his consent. However, often to a principle of domestic, rather than international, exhaustion. Accordingly, national rights that are subject to such limitation can still be used to prevent the importation of goods sold abroad by the national right-owner or goods which come from an associated enterprise.

In Britain, the relation between rights and distribution of goods has not in the past been dealt with by any general concept of exhaustion. The approach has varied with by any general concept of exhaustion. The approach has varied with the subject-matter. In the case of patent law (in contrast with other major patent systems), the British traditionally adopted the contrary position to “exhaustion”: in principle, subsequent uses and sales continued to require the patentee’s license. This, as we shall see, is an approach that is in process of being dismantled in all save exceptional cases. For this, basic policies of the European Community. are primarily responsible (Cornish 1996, p. 32).

Exhaustion principle regarding the trademarks came into use in United State of America for the first time. In *Adams v. Burke* decree awarded by the High Courts of America in 1873, basic judgment of the Court was grounded on the reward theory, more specifically on the fact that the beneficiary received his reward in offering genuine articles for sale within the border of the United States, and that from then on he could not interfere in movement of these goods in United State of America. The United State Court demonstrated with such decree that it actually recognized national exhaustion principle.

LUX decree awarded by the Switzerland Federal Court in Continental Europe, *Agfa* decree in Australia, *Grundig* decree in the Netherlands, *Maja* decree in Germany all give their opinion on international exhaustion principle.

In all kinds of intellectual property rights, it is only the tangible rights that are subject to exhaustion. Intangible rights cannot be subject to exhaustion. Additionally, intangible rights cannot be assigned due to its close relation with personal rights. Regardless of the exhaustion regime, it is out of question for

inalienable intangible rights to become exhausted even though tangible rights exhaust.

For what kind of rights and under what circumstances the intellectual property rights exhaust is determined by the rules of national law as part of sovereignty right of each state. Basically, it is quite a difficult task to convene up all states under a single exhaustion regime. However, as it is the case in Treaty on European Union (TEU), based upon the contractual liabilities, a Council or one of its organs can be assigned to determine what kind of exhaustion principle is applicable. In this context, based on European Court of Justice (ECJ) case laws, European Union (EU) member states developed exhaustion principle of intellectual property rights to the extent of Community in accordance with the principle of free movement of goods within the Community, as regulated by Articles 30-36 (New, 28-30) of Treaty of Rome.

Under which circumstances the intellectual property rights would exhaust, as well as the geographical aspects of such exhaustion are both important. It is a common incident in Turkish Law that proprietors of intellectual property rights claim against unfair competition rules thus make efforts to prevent sales of goods by unauthorized dealers and distributors.

3.2.1. NOTIONS RELATED TO EXHAUSTION PRINCIPLE

3.2.1.1. Parallel Import

Various parallel import definitions are referred below:

“Parallel import relates to the fact that original goods, which are under protection of intellectual property and are put on the market in a country through legal means are purchased from here and subsequently entered into another territorial market, without anybody’s permission where the right is protected and the same goods are already in circulation on the market.” (Aslan 2004, p.93)

“It relates to genuine articles with original qualifications, which are put on the market abroad by the trademark owner or a third person with his privities and consent, and are imported to the country without trade owner’s consent.”

(Tekinalp 2002, pp.366-379). “In a report prepared by Organization for Economic Co-operation and Development (www.oecd.org, 2009) import is defined as the fact that real goods, which are put on the market in an export country by the trade owner or any person duly authorized by him, are imported to another country by third parties without consent of the proprietor. In other words, the very same goods that are offered on the market in a country by the proprietor or anyone else upon proprietor’s consent, are acquired from another resource by third persons and subsequently imported in that county in accordance with the legal procedure. In United State of America, the term grey import is equally used in stead of parallel import.” (Tekdemir 2003, p.8).

In this context, in order to refer to a parallel import according to the aforementioned definitions;

- i. Products must have been put on the market legitimately,
- ii. Product should be exportable and importable without a non-tariff barrier,
- iii. Products must bear intellectual property right upon them,
- iv. Import should not be made to the free zone (Saraç 2003, p.41),
- v. Importer must not have an import-export relationship with the proprietor or a 3rd party duly authorized by the proprietor, (*the status of a third person who is licensed upon a court decision is disputable²*).

Based upon these definitions, it is possible to define concept of exhaustion according to the criteria obtained as follows; in liberal perspective, the basic reason behind protection of intellectual property rights is to encourage individuals or enterprises to create innovation, thus paving the ground for innovations to enhance social welfare. Within the scope of the assigned protection, an individual or enterprise that has been holding ownership for a while depending on the type of

² In literature, - beneficiary and any third persons upon his request- is used. However, Article 99 of STATUTORY DECREE ON THE PROTECTION OF PATENT RIGHTS No. 551, regulates the notion of “compulsory license”. “*Compulsory license can be provided for a patent that is not offered for issuing a license and in case of either of the following terms. a- that the patented invention is not in use in accordance with the provisions of Article 96; b- that independence of patent subjects specified in Article 79 is relevant; c- that public interest specified in Article 103 is relevant*”, therefore, status of the third persons that are the beneficiary also should be considered while making description within the scope of compulsory legal effects without consent.

right is entitled to a disposition on that right exclusively. The right owner can make use of intellectual right he has created on the one hand, but also can let the third persons make use of it being subject to certain conditions on the other hand.

However, owners of intellectual property rights might well seek to safeguard maximum protection on their rights, whereas the third persons, who acquired the goods in question through legal means, might well seek to make use of the goods in any way they wish under the title of new owners. Yet, it is recognized in the doctrine (Arkan 1998, p.131) that the right owner should be subject to certain limitations for exercise of the said right so that the expected social benefit from intellectual property rights is gained accurately. Otherwise, an absolute and limitless protection in the field of intellectual property law might lead to the fact that the right owners or enterprises control hand-owners and distribution of the goods after they are offered on the market by them or duly authorized persons. This case might result in a restrictive effect on free movement of goods and competition.

Within this approach, a doctrine comes forward intending to hold the balance between free trade and protection of intellectual property rights, and between public interest and freedom of personal use. This doctrine relates to the “exhaustion of right” or the first sale doctrine as in the case of United States practices (Tekdemir 2003, p.8).

Exhaustion principle which is defined in Article 13 of Statutory Decree No. 556 means that proprietor or any 3rd person, who is legally entitled so, cannot prevent circulation of genuine articles that are put on the market in a certain geographical territory on the grounds of their trademark right. This principle is based on the fact that proprietor or a 3rd person, who is legally entitled so, is deemed to have benefited from the monopoly right granted by the legal system when they put the goods in question on the commercial sphere for the first time; that the act of putting original goods with specific-origins on the market from different points would not incur damages to the proprietors.

In this context, exhaustion principle essentially intends to hold the balance between protection of intellectual rights and free trade order, and between private property use and protection of public benefit (Okutan 1996, p.112).

Two limitations are relevant to the exhaustion principle in trademark law. The first limitation is that exhaustion principle shall have a field of application not for all of the goods that are concretely marketed under that trademark, but also for genuine articles that are put on the market only in a specific region upon proprietor's consent.

The second limitation is relevant to trademark types. Namely, the exhaustion principle applies only to factory and trade marks. Exhaustion is out of question for service marks because service becomes exhausted by being rendered for once, therefore its circulation is irrelevant (Tekinalp 2002, p.385).

3.2.1.2 Reimport

Following the manufacturing and legitimate export of the goods under protection of intellectual property, import of the very same goods to the export country again for various reasons is what we call "reimport". Reimport occurs when the goods manufactured in Turkey and subsequently exported abroad are repurchased from the import country for commercial purposes and are reimported to Turkey. This definition is quite significant for our country, which has recognized exhaustion principle for the goods that are put on the market in Turkey. Even though existence of national exhaustion principle is recognized in a country, it is legitimate, and thus cannot be prevented under any circumstances that the goods, which are exported abroad after being put on the domestic market for the first time or being placed on the commercial sphere, are repurchased from the overseas market by third persons and reimported to the original country once again. Even though the goods that are subject matter of protection are manufactured at home, and if they are offered on the overseas market via export for the first time, in case of territorial and regional exhaustion principle, reimport of these goods to the original country is still subject to proprietor's permit. In Silhouette decree of the ECJ, because the first release of

the sunglasses that were the litigious question was realized outside US borders, reimport of these goods within the border of Community was subject to the proprietor's permit. It is clearly perceived from the counter conception of the wording included in the decree that reimport of the goods to the Community again that had been put on the market for the first time within Community, was not subject to proprietor's permit (Aslan 2004, p.56).

3.2.1.3 Grey Market

A grey market or gray market is the trade of a commodity through distribution channels which, while legal, are unofficial, unauthorized, or unintended by the original manufacturer. In contrast, a black market is the trade of goods and services that are illegal in them and/or distributed through illegal channels.

The two main types of grey market are imported manufactured goods that would be normally unavailable or more expensive in a certain country and unissued securities that are not yet traded in official markets.

Gray-market goods are not generally illegal. Instead, they are sold outside normal distribution channels by companies which may have no relationship with the producer of the goods. Frequently this form of parallel import occurs when the price of an item is significantly higher in one country than another. This situation commonly occurs with electronic equipment such as cameras. Entrepreneurs buy the product where it is available cheaply, often at retail but sometimes at wholesale, and import it legally to the target market. They then sell it at a price high enough to provide a profit but under the normal market price. International efforts to promote free trade, including reduced tariffs and harmonized national standards, facilitate this form of arbitrage whenever manufacturers attempt to preserve highly disparate pricing. Because of the nature of grey markets, it is difficult or impossible to track the precise numbers of grey-market sales. Grey-market goods are normally new and should be distinguished from used or second-hand goods.

Grey-market goods should also be distinguished from black-market goods, which are typically illegal. Importing certain legally restricted items such as prescription drugs or firearms would be categorized as black market, as would smuggling the goods into the target country to avoid import duties. A related concept is bootlegging, the smuggling or transport of highly regulated goods, especially alcoholic beverages. The term "bootlegging" is also often applied to the production or distribution of counterfeit or otherwise infringing goods.

3.3 RELATIONSHIP BETWEEN COMPETITION LAW AND EXHAUSTION PRINCIPLE

Intellectual Property Law entitles the inventor or innovator with an exclusive right of disposition regarding the invention or innovation in question in case of certain conditions in a specific market. This is a monopoly right in a sense. These rights that are vested in monopolies are protected by different institutions such as that of patent and trademark. In this context, the beneficiary is free to make use of this monopoly right within the range of intellectual property law. Thus, in principle the intellectual property law restricts static competition and provides market power with the enterprises in order to encourage investments under dynamic competition conditions. Otherwise, it is likely that enterprises would not be part of these investments due to sharking problems, which directly leads to the risk of curbing social welfare. On the other hand, competition rules intend to restrict monopolies owned by enterprises. In this way, Competition Law is basically related to the use of monopolies and supervision of emerging new monopolies.

Considered generally, both legal systems have ultimate purposes. In other words, both legal systems serve the purpose to enhance innovations, efficiency and social welfare. However, both deploy different methods. In the first, a monopoly right is vested in the inventor in order to achieve the purpose, whereas in the latter, new inventions and increased efficiency are intended for competition conditions rather than monopolies.

One of the significant conflicts between the two legal systems is the exhaustion principle. Depending on the accepted exhaustion principle, a set of prohibitive provisions in the context of competition law, particularly in licensing contracts, as well as limitations for parallel import in this regard fall into the scope of competition law.

However, it needs immediate emphasizing herein that what the competition law is interested in and seeks to protect is in-brand competition within the scope of exhaustion principle. In other words, any limitation that is imposed on competitions of the products with the same brand and that does not depend on any rationality is inspected outside the scope of competition law.

In parallel with the accepted exhaustion principle, limitation of in-brand competition by way of parallel import is evaluated within competition rules. In countries where a protective exhaustion principle is accepted, prevention of parallel import by a trademark holder based upon his rights arising from legal arrangements for trademarks, and contracts concluded for this shall be outside the scope of application for competition rules. Provided always that a liberal exhaustion principle is accepted, contractual provision to prevent parallel import might be evaluated within competition rules. If no valid ground and reasonable explanation are relevant to such restrictive provisions, it will be unallowable to execute such contracts that restrict in-brand competition (www.rekabet.gov.tr, 2009)

3.4. GEOGRAPHICAL DIMENSION RELATED TO THE EXHAUSTION

PRINCIPLE

3.4.1. Nationwide Exhaustion

In nationwide exhaustion system, the right upon genuine articles that are put on the market on trademark holder's consent is deemed to have exhausted only in the national market that adopts such system.

The right upon genuine articles that are put on the market in an extra-territorial manner is not deemed to have exhausted even though release to the market is made on trademark holder's consent (Okutan 1996, p.112). Consequently, there is a single market that is predicated on the legal system adopting nationwide exhaustion, which is one's own domestic market.

Reimport is an exception to this. That is, since genuine articles that are the subject matter of import are exported from national market that adopts nationwide exhaustion, they will have been put on the national market that adopts nationwide exhaustion upon such exportation and the trademark right upon them will be deemed to have exhausted (Pinar 2002, p.900).

The result of this principle is that it entitles the beneficiary with the arbitrariness of international market segmentation. According to such arbitrariness and considering the country-specific conditions for each nation, beneficiary might follow price and sales policies. In a country that has adopted this principle, in-brand competition is limited for the goods that are subject matter of Intellectual Property Rights due to lack of parallel import, and citizens of that country are deprived of enjoying the arbitrage arising from low prices in other countries (Tekdemir 2003, p.11).

3.4.2. Regional Exhaustion

Regional exhaustion system is a system that assembles borders of more than one country, thus accepting it as a single region and that provides the fact that only the rights upon the goods, as put on the market upon trademark holder's consent, in this region should be deemed exhausted (Anık 2001, p. 111).

In this framework, it is evident that there is no difference between regional exhaustion and nationwide exhaustion other than that "*the first applies to a specific region*".

As it is also closely related to us, it is necessary to examine Regional Exhaustion process in EU Law briefly.

There is no arrangement related to exhaustion principle in the TEC. However, the Court of Justice of EU has made a distinction between existence and exercise of industrial and commercial property rights after the issue was brought to it, and it provided that such exercise could neither be protected by the Community Law nor perceived under the exception specified in Article 30 in cases where it recognizes the existence of industrial and commercial property rights recognized by ECJ's member states, and yet exercise of these rights are in conflict with free movement of goods that are specified in Article 28, thereby it relied on "*exhaustion principle*" for this approach.

The case of Deutsche Grammophon GmbH / Metro GmbH (www.curia.eu.int, 2008) and cases of Centrafarm BV / Sterling Drug Inc. (www.curia.eu.int, 2008) and Centrafarm/Winthrop (www.curia.eu.int, 2008), ECJ considered that release of genuine articles in a commercial sphere only for the first time is relevant to the specific subject of the right; upon initial release to the market by the trademark holder or upon his consent, the trademark right upon goods will be deemed exhausted, thus ECJ accepted that parallel imports and reimports within the Community could not be prevented on the grounds of trademark rights.

ECJs approach to imports outside the range of Community came to light with decisions of EMI Records / CBS (www.curia.eu.int, 2008) and Polydor / Harlequin (www.curia.eu.int, 2008). With two of the cited decisions, the court held that trademark right could well be relied on for the goods that are parallel imported outside the range of Community, which explicitly put forward that it applied regional system in terms of geographical border of exhaustion.

Regional exhaustion, which finds a field of application under case law of ECJ, turned out to be a positive arrangement based on "*Regulation for Harmonization of Trademark Law of Member States*" dated December 21, 1988 and issued 89/104, which was published on Official Journal 11.02.1989 and issued OJ L 40.

However, discussions whether this arrangement is statutory or not did end upon "*Silhouette*" (www.curia.eu.int, 2008) decision. ECJ emphasized that the Regulation

aimed at an extensive harmonization for trademark law of member states; that the wording of Article 7 resulted in a restrictive arrangement; that common market operations might be adversely affected should some member states preferred regional exhaustion while others preferred international exhaustion, adding that, against Regulation provisions, common market operations could be adversely affected if member states preferred international exhaustion in internal law, and it provided that it was impossible for the member states, against Regulation provision, to preserve international exhaustion in internal law.

3.4.3. International Exhaustion

According to this system, regardless of the place of release of genuine articles, trademark right upon these goods will be exhausted provided that the release is realized upon trademark holder's consent (Okutan 1996, p.126). By virtue of its philosophical basis, this principle is apt to liberalization trend of international commerce. In this context, in addition to intrabrand competition on the market where those goods in the country of parallel import are placed, a heavy in-brand competition also becomes possible (Cornish 1996, p.17). Having examined the exhaustion principle within the scope of Intellectual Property rights and in its general terms, we will scrutinize as to how exhaustion regimes are evaluated in the field of competition law within the scope of protective and liberal formations. Nevertheless, it is necessary to underline that both approaches relate to maximize consumer welfare and both their arguments rest on this framework.

4. EXHAUSTION PRINCIPLE WITHIN THE SCOPE OF THE INTERNATIONAL AGREEMENTS

4.1 EFTA AGREEMENT AND EXHAUSTION PRINCIPLE

The European Free Trade Association (EFTA) is an intergovernmental organization set up for the promotion of free trade and economic integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway and Switzerland. The Association manages the EFTA Convention; EFTA's worldwide network of free trade and partnership agreements and the European Economic Area (EEA) Agreement.

The EEA Agreement explicitly states that a country which becomes a member of the EU shall also apply to become party to the EEA Agreement (Article 128). The terms and conditions for such a country to participate in the EEA Agreement shall be subject to an agreement. The latest enlargement of the EU took place on 1 January 2007 when Bulgaria and Romania joined the Union. Once the agreement on enlargement with these two countries becomes applicable, the EEA will comprise 30 countries with almost 500 million citizens (www.efta.int, 2009).

The EFTA Agreement has no specific provision regarding exhaustion principle. Nevertheless according to the Protocol, numbered 28 signed between EFTA and EU, exhaustion principle will be applied according to ECJ's interpretation. In respect of the Protocol 28 all EFTA countries –except Switzerland- establish European Economic Area and accept regional exhaustion principle (Aslan 2004, pp.84-85).

Mag Instrument Inc. v. California Trading Company Norway (E-2/97) “Maglite Case”, the EFTA Court sanctioned the rule of global exhaustion for EEA countries, arguing that the EU Trade Mark Directive (89/104/EEC) Article 7(1) only imposed regional exhaustion as a minimum rule. It was therefore within the discretion of the EEA countries to decide whether they would stay with the minimum or whether

they would allow for more, namely global exhaustion. In the *Silhouette International Schmied GmbH & Co KG v Hartlanuer Handelsgeschaft mbH (C-355/97)* case “*Silhouette Case*” ECJ stated that global exhaustion is contrary to Article 7 (1). According to the Court, Article 7 (1) intended to impose a rule of regional exhaustion only and, consequently, global exhaustion is not permitted. The EFTA Court has toed the line set by ECJ. In the *L’Oreal Norge AS and L’Oreal SA v Per Aarskog AS, Smart Club AS and Lille AS (E-9/07 and E-10/07)* the Court departs from its previous view and instead opines that Article 7(1) imposes a rule of regional exhaustion only, also for the EEA countries (www.managingip.com,2009).

4.2. TRIPS AGREEMENT

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. The agreement covers how basic principles of the trading system and other international intellectual property agreements should be applied, how to give adequate protection to intellectual property rights, how countries should enforce those rights adequately in their own territories, how to settle disputes on intellectual property between members of the WTO, special transitional arrangements during the period when the new system is being introduced. The effect of the Provision 6 of the TRIPS Agreement that is relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge. However, according to Provision 4 of the TRIPS Agreement member countries will be liable regarding non-discrimination and all member countries accept most-favoured country clause. According to such clause, if one of the member countries signs a private agreement with another member country regarding applying the international exhaustion principle, such acceptance and application will cover all other member countries. The exception of said rule is regulated in the General Agreement on Tariffs and Trade (GATT). In respect of the Provision 3 of the TRIPS Agreement member countries is liable regarding non-discrimination against their citizens (Aslan 2004, p.83).

5. APPLICATION OF EXHAUSTION PRINCIPLE IN THE EUROPEAN UNION LAW

In pursuant to exhaustion principle in the EU where regional exhaustion principle is in force, the beneficiary's right to intervene in subsequent disposals regarding the goods after the relevant product is put on the commercial sphere by himself or a third person upon his consent within the Community, is eliminated within the borders of entire Community, that is, intellectual property right becomes exhausted.

In Community law, exhaustion principle appeared and developed for the first time with adjudications. The first problem that was closely related to exhaustion principle was the Grundig case, although parallel import was meant to be prevented on the grounds of intellectual property right, ECJ, without referring to exhaustion of the right, only made a distinction between existence and exercise of the right, and it was contented with emphasizing that exercise of the right was subject to Community law while member states were closely involved with the existence of intellectual property. ECJ referred to exhaustion of rights for the first time in *Deutsche Grammophon* case (C-78/70 *Deutsche Grammophon Gesellschaft mbH v. Metro*).

In the event that was the subject matter of decision, music albums were produced in Germany and subsequently imported to France there from, and offered for sale by the authorized dealer in France and reimported to Germany where they were sold more expensively, thereupon beneficiary in Germany objected to this. The problem was this: could it be possible for the beneficiary to prevent free movement every time on the grounds of asserting his paramount rights that were compulsory for protection now that Article 30 of the Treaty (ex, Article 36) evidently counted intellectual property rights in the exceptions of free movement of goods in member states. Above all, it is the primary objective of Community in accordance with Article 23 of the Treaty that the goods move freely and duty-free with no barriers between member states.

Provided that free movement is prevented on the grounds of intellectual property, the Community will diverge from main objectives. Considering such concerns, ECJ

invented a new concept called “specific subject matter”, which is interpreted as “specific subject, specific matter, specificity” in Turkish. ECJ made a distinction between existence and exercise in its decision in *Deutsche Grammophon* case, and subsequently specified, by benefiting from the exception referred in Article 36 (new, Article 30), that free movement of goods between member states could only be prevented on the grounds of specificity of intellectual property right.

Besides, it should be decided that isolating national markets by way of extending the exception here is also contrary to basic targets of the treaty, which serves the purpose of integrating national markets, and -without using the expression of exhaustion- according to ECJ, the specificity of intellectual property right must have incurred damages if free movement of goods is to be prevented.

Even though ECJ has not defined the specific subject in its decision, it made this definition in its *Sterling Drug* decision subsequently. Regional exhaustion principle, which was suggested by ECJ for the first time was greatly accepted by the Community, and regulations and directives issued in the course of time within the scope of harmonization of national laws are regulated in the exact form as included in Council’s decision. This has provided ECJ with coherent decisions that do not deviate from main principles and are related to different subjects. The ECJ decision that was criticized the most was *HAG I* decision, which related to “common origin discipline”.

For cases that included exhaustion principle, ECJ often applied to competition rules of Community (Articles 81 and 82) with which it were in close interaction by nature. Since the very first decision, it has felt the need to emphasize in particular that exercise of exception right due to intellectual property right specified in Article 36 would not avert Articles 85 and 86 (new, Articles 81 and 82) that formed competition policy of the Community (Aslan 2004, pp.95-96).

There is no regulation arising from the primary law of Community. ECJ put forward the concept of exhaustion based upon Articles 28 and 30 of the Establishing Treaty included in the primary law, as well as Articles 81 and 82 in part where competition

subject is regulated. According to Article 100 of the Treaty, Community organs are also assigned with performing secondary law studies during harmonization studies for national laws of member states. Legal arrangements that are the subject of exhaustion principle in European Union can be given as follows:

(i) Treaty of Rome, (ii) Community Trademark Directive, (iii) Community Trademark Public Act, (iv) Directive on the Protection of Semi-Conductor Product Topographies, (v) Directive on the Protection of Computer Software, (vi) Directive on the Protection of Database, Directive on Leasing and Lending, (vii) Community Patent Convention, (viii) Guideline on the Protection of Plant Diversity, (ix) Directive on the Protection of Biotechnological Discoveries, Community Design Convention (x) Guideline on Community Design, (xi) Harmonization Directive on Copyrights.

For exhaustion principle to exist, first of all there should be an intellectual property right that needs legal protection on goods as being subject to free movement. It is the member states that will decide which rights are to be protected under intellectual property. That right should be an intellectual property right recognized by the member state so that parallel import is prevented or intellectual property right is claimed to have exhausted.

The protected goods must have been put on the market within the borders of community so as to mention exhaustion principle within the community. Release to the market can be performed by beneficiary himself or the third parties by way of licensing.

Beneficiary's consent is required to mention exhaustion of intellectual property right. This is defined in specific subject. Based upon the type of rights to transfer for which beneficiary gives his consent, exhaustion will only be relevant to the right of transfer following the transfer. In the event that goods produced under compulsory licensing are produced so without beneficiary's consent, no exhaustion shall take place. Likewise, exhaustion shall not occur in case of import ban on producer that has obtained a compulsory license or royalties are paid unto patent right holder.

In Davidoff decision awarded by ECJ in 2001, it was specified that “the consent must be express and unwavering”. It thusly made clear that implied consent is inadequate.

Trademark means any and all marks that enable distinguishing goods and services of an enterprise from those of other. A mark does not only refer to form, it also has a broad meaning. Graphics, designs, personal names, words, letters, logos, numbers, forms of the goods and packages, slogans, 3D forms, melodies, colors and smells are all trademarks that bear distinguishing features. They provide trademark holder with exclusive authorities, property ownership (tangible) benefits and limited intangible rights (Tekinalp 2002, p.20).

Trademarks are among commercial rights that are worth protecting. As a consequence of the fact that trademarks are commercial rights that are worth protecting, they provide the holder with nationwide protection. Besides, it is possible to protect the right internationally by way of international contracts. Exhaustion of trademark right means that beneficiary can no longer interfere with legal disposal of the goods after genuine articles are put on the market for the first time either by the beneficiary or a third person upon his consent. That is, after the trademark holder puts his genuine articles on the market for the first time, buyer of the goods will be able to sell them in any country for any price, and the trademark holder will not prevent such sales.

Basically by virtue of nationwide protection, sales of goods should be made upon trademark holder’s consent once he puts his goods on the market or exports them for the first time. According to the Community Law, because goods’ not meeting with a customs barrier in any manner requires free movement as per the Treaty of Rome, another principle other than nationwide protection principle is relied on for protection, and this is regional protection principle. By virtue of this principle, after goods are put on the market in a member state by the beneficiary or any third persons upon his consent, the beneficiary will not prevent the goods from entering into another territorial market by the buyer.

European Court of Justice has touched on the concept of specific subjects for trade marks in Hofmann-La Roche, Wintrop decisions, and with a guarantee given to the beneficiaries for their genuine articles that are to be released for the first time, it provides protection to the beneficiary against his rivals who seek to put these genuine articles on the market illegitimately and to try to profit from their prestige and status unfairly.

European Court of Justice construed the rule of free movement of goods broadly in Hag I decision, thus a consequence to an extent that violates sovereignty rights of member states appeared. In this decision, it touched on the concept of common origin, stating that this very concept brought exception to the principle of free movement of goods on the one hand and only the specific exercise of industrial and commercial property rights was lawful on the other hand, that these rights were available and likely to be used for market segmentation, which would have an effect on free movement of goods between member states; it thusly decided that free movement of goods with the same common origin that are put on the market in another state legitimately could not be prevented on the grounds of trademark rights.

However, European Court of Justice changed its decision formerly awarded for common origin with the Terrapin decision. In the cited decision, the Court held that in case trademark and commercial names for the goods whose trademark rights and commercial names are under protection in two different member states lead to confusion, import prevention of the goods that have so led to confusion was not deemed incongruous with Article 36 of the Treaty, nonetheless the act of preventing import could not be performed in order to segment commercial markets among member states or to introduce disguised restrictions in commercial activities.

In HAG II decision, Deutsche Grammophon, Winthrop decision was referred to, and it was stated that the goods that are put on the market within the borders of a member state upon beneficiary's consent or by any third persons who bear economic or judicial bond to him would be prevented from entering into another member state by way of imports where the right is still under protection and from being marketed there on the grounds of trademark right of the beneficiary, and yet, trademark right

has the function to provide guarantee to consumers that the genuine articles are produced by a single enterprise that is responsible for production quality and services; it was thusly specified that the right of the beneficiary to put the genuine articles on the market for the first time was included in the specific subject so that the beneficiary is protected against his rivals. It was further stated in the decision that import of original goods that are likely to lead to confusion due to the fact that the same or similar branded goods that are put on the market by different enterprises belong to the same enterprise could be prevented on the grounds of national laws.

In its standard decision, European Court of Justice awarded that in accordance with the agreement made by and between them, beneficiaries in each member state were allowed not to let the goods coming from a member state in the other member state where the right of beneficiary in import country is under protection on the grounds of national laws, after both enterprises have right to exercise upon the same trademark in different member states. Yet, it was referred that such an agreement to be concluded by and between enterprises was compulsory to be evaluated within the framework of competition rules, thus abuse of right was intended to be prevented (C-9/93 IHT v. Ideal Standart GmbH).

In Hoffman La Roche case (C-102/77 Haffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH) Hoffman company holds trademark right and patent right of “Valium” branded medicines both in Germany and England. The same medicine is put on the market in 20 and 50 tablets in Germany while it is offered in 100 and 150 tablets in England. But the prices in England are much cheaper. In order to benefit from the price difference, Centrafarm company repacks “Valium” branded medicine in 1000 tables that it purchases from England and markets them to the hospitals in Germany. The name of Hoffman company and labels of medicine trademark are stucked on the new pack. It is also written on the label that repacking was made by Centrafarm. Hoffmann Company construes this as a trademark infringement and goes to law. On being confronted with the conflict, ECJ firstly reminds the distinction between exercise and existence of the right, emphasizing that exercise of right is subject to contractual restrictions,

and that specific subject of the right must have been violated in order to benefit from the exception of preventing free movement of goods on the grounds of industrial and commercial right in accordance with Article 36. In its decision, ECJ defines specific subject as a “guarantee” given to the beneficiary in releasing the goods of the trademark for the first time and preventing his rivals from having unfair profits from trademark’s prestige. ECJ further decided that acts of rebranding and labeling and packaging were lawful to prevent artificial segmentation of the market and to the extent it was required (Arkan 1998, p. 203).

ECJ also decided that the right to place one’s own trademark upon the produced goods is an issue to be designated by the trademark holder himself, that even the act of placing a trademark on a genuine article without notifying the beneficiary is deemed to have incurred damages on basic functions of that trademark, and the right to use different trademarks or the same product in different countries is an issue to be considered by the trademark holder, yet such exercise might mean measured restriction in commercial activities lest it segment the markets between member states artificially as specified in Article 36/2 of the Treaty, and that the competent authority to conclude so will be the national courts (C-3/78 Centrafarm BV v American Home Products Corporation).

However, ECJ decided that trademark holder’s objection to repacking wherever it is necessary would mean that the market is artificially segmented, thus it left the judicial conception to transfer it to the national courts entirely (C-143/2000 Boehringer Ingelheim KG, Gloxo Group Ltd. Beecham Group plc and SmitKline & French Laboratories Ltd, The Wellcome Foundation Ltd and Eli Lilly and Co v. Swinward Ltd and Dowelhurst Ltd -the defendants-).

ECJ also clarified under which cases repacking and labeling was required. Accordingly, it concluded that repacking was unnecessary wherever re-labeling was adequate. Otherwise, a difficult commercial success and adverse effects on parallel importer were deemed adequate for a lawful repacking and labeling in its absence.

In its decisions, ECJ explains the trademark function as providing guarantee to the consumer or end user about the origin of the goods they purchased in a way to avoid conflicts with the goods of other origins, and as providing guarantee to the consumer and end user that the product they purchased were sold to them with no intervention by anyone but the trademark holder until the actual purchase. In the light of these decisions, a trademark should also bear the belief and expectation that the goods and services will have the same qualification and quality. In addition to this, according to Cristian Dior decision of ECJ (C-337/95 Perfumes Christian Dior SA and Perfumes Cristian Dior BV v Evora BV); after a product that is under protection of trademark right is offered for sale upon beneficiary's consent within the community, the person who purchases the goods are entitled to resale that product for commercial purposes as well as to publicize that he offered that product he purchased for sale for the sake of more commercial benefits.

Trademark holder cannot object to the merchant of genuine articles in publicizing the products he offers for sale via common methods and means in his own commercial circle. Provided that the publicizing method might incur substantial damages to trademark prestige and its luxurious image, the beneficiary is allowed to raise his objection to such advertising. In the cited decision, the court pointed to the fact that trademark has a necessary advertising function to be protected. According to ECJ decisions, trademark should also be protected against the probability of implication. ECJ stated that in case of existence of implication, in addition to resemblance of trademarks, the fact that consumers might be mistaken that both genuine articles are owned by the same company should exist, and it thus developed its practices accordingly.

On examining Wintrop decision, Silhouette decision, Jean Bourdon (C-352/95 Jean Bourdon SA v Phyteon International SA.) decision, Davidoff-Levis joint case decision, EMI decision (C-51/75 EMI Records Limited v CBS United Kingdom Limited) as well as the Trademark Directive and arrangements of Community Trademark Regulation that form the basis for these decision; it is observed that decisions are made for implementing exhaustion principle of Community organs to

the extent of Community itself, and that it demonstrated stabilization in its decisions in this regard.

It refers to the right of the inventor to produce, use, sell or import the invented product for a definite period. The document indicating such right is called patent. "Patent right", which has a significant place among industrial property rights in traditional terminology is a right related to intangible merchandise that rather pertains to developing countries considering the mediating technological transfer in particular. After a patent right holder puts the patented goods on the market for the first time and benefits from it commercially, he cannot, without valid reasons, object to the fact that the same goods become subject to other commercial disposals by its buyer. After the patent protected goods are put on the market by the beneficiary for the first time, the patent right will be exhausted and the beneficiary will no longer manage to prevent the goods he offered for sale from becoming subject of other commercial disposals. However, the acts of buyer of the goods to amend or aggravate patent-protected goods, to act in a way to violate patent rights are excluded. In such cases, unlawful acts can be prevented by the beneficiary. After the patent protected goods are put on the market once in accordance with the community law, it is recognized that the patent right will become exhausted within the community. In case of any economic or judicial bond between the enterprises, it is accepted that the goods that are put on the market in different countries by different enterprises might be subject to parallel import throughout the community.

In *Sterling (C-15/74 Centrafarm v. Sterling)* decision of ECJ, it was resolved that free movement of goods could be deemed lawful only if the specific subject should be protected, that free movement of goods could not be prevented by the beneficiary on the grounds of any national laws after the relevant product is put on the market in a member state, accepting otherwise is dangerous for segmenting national markets of member states. It is further stated in the decision that in a country where no patent protection is available, the beneficiary is allowed to prevent imports if the goods are produced by third persons without beneficiary's consent and subsequently imported to a country where the rights are under patent protection.

In ECJ decisions, it was resolved that patent rights will be protected, just like in case of trademarks, only when the invented product is put on the market by the beneficiary or any third parties upon his consent for the first time within the Community borders, and if such release is realized, patent right will become exhausted within the borders of the entire Community. ECJ accepts that the patent right of the beneficiary upon goods manufactured and released upon his consent, albeit for humanitarian purposes, will become exhausted throughout the Community by the date of first release to the market. Besides, according to the Community Patent Right Agreement (signed in 1975); in the absence of valid reasons, no rights arising from or connected to the Community Patent can be reasserted with regard to the goods that are put on the market within the borders of Community either by the patent right holder or any third persons upon his consent.

Intellectual property describes a notion that defines all tangible and intangible rights upon all kinds of intellectual and artistic works bearing the discriminative features of its owner and that are counted in science and literature, music, fine arts or cinematic works, and that is under protection of both national and international associations today. As it is evident from the description, it is a type of right with a quite comprehensive field of application. It does not only consist of original works but also the processed works.

In Community Law, some arrangements have been made in this regard with a set of directives within the scope of literary and artistic works. Directive on the Protection of Semi-Conductor Product Topographies (87/54), Directive on the Protection of Computer Software (91/250), Directive on Leasing and Lending (92/100), Harmonization Directive on Copyrights (2001/29) are some of them. However, it is still impossible to suggest that an accurate uniformity has been ensured in this regard.

For intellectual and artistic works, not only the tangible rights but also the intangible rights are evaluated within the scope of specific subject in ECJ decisions. In Christian Dior decree of ECJ, it was resolved that in the event of advertising by way

of low quality packaging and bottling or using poor quality brochures would incur substantial damages to Dior's luxurious and prestigious appearance by nature, to this end it would be possible to prevent such advertising and sale on the grounds that both trademark and rights arising from the intellectual and artistic works are violated. Upon this decision, the court paved the way for opposing to the rule of free movement of goods against violation of intangible rights. The Phil Collins decision³ and evaluating intangible rights within the scope of specific subject concept lie beneath such decision of the court.

Phil Collins sued a German phonogram distributor who was marketing records of a concert Collins had given in the U.S. German law of that time granted German performers full neighboring rights and in particular the right to prohibit the distribution of recordings made without their consent, regardless of the place the performance had occurred. At the same time, German law granted the same right to foreign performers only for their performances that had occurred in Germany. The ECJ decided on October 20, 1993 that this was a violation of the non-discrimination clause of article 7 of the EC treaty. It also clarified that the non-discrimination clause was indeed applicable to copyright.

The court stated that,

In prohibiting "any discrimination on the grounds of nationality" Article 7 requires each Member State to ensure that persons in a situation governed by Community law be placed on a completely equal footing with its own nationals and therefore precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State. And clarified that this non-discrimination clause was not about differences between national laws, but to ensure that in any EU country, citizens and foreigners from other EU countries were treated equally: Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the

various Member States, so long as those laws affect all persons subject to them, in accordance with objective criteria and without regard to their nationality.

According to the decisions of ECJ; in principle, it is not possible for the beneficiary to prevent the goods that are put on the market within the Community in conformity with the beneficiary's consent from entering into another member state (Arkan 1996, p.36)

In Pharmon Hoeschst decision (C-19/84, Pharmon v. Hoescht) with regard to the countries where protection period of the right has expired, the nature of the beneficiary's consent has been discussed. Being a German enterprise, Hoeschst has patents in Germany, England and the Netherlands for a medicine production management. In 1972, An English Company, DDSA Pharmaceuticals Ltd. acquired a compulsory simple license inclusive of export prohibition, however, it sold the prohibited products to Pharmon, a parallel importer in the Netherlands. Firstly, ECJ repeated its established case law regarding the freely moving goods upon beneficiary's consent, resolving that the same rules would not apply to the goods that are produced upon compulsory license. This decision was predicated on two reasons, the first of which is that a compulsory license issued by a competent authority of a member state did not depend on beneficiary's consent and yet it disposed him of his right to determine the marketing conditions for his product freely (consent criterion) and the second of which is that the patent, which could be described as a reward for creative efforts, needed to protect its specific subject. It was further resolved in this decision that beneficiary in a member state where protection period still continues could well prevent import and sales of these records.

In Plydor Limited decision (C-270/80 Polydor Limited and RSO Records Inc. V. Harlequin Records and Simons Records) the court resolved that beneficiary inside the Community could prevent legitimate and lawful goods in a non member state from entering into the Community by way of parallel import on the grounds of national legislation of a member state, that Association Agreement between the Community and Portugal would not prevent such right of the beneficiary inside the

community; besides such exercise of the right by the beneficiary could not be construed as imposition of disguised restriction upon commercial activities between the Community and Portugal or arbitrary discrimination. Upon this decision, the court went to a definite distinction between member and non-member states with regard to the goods released upon beneficiary's consent. Upon this decision, it is concluded that international exhaustion principle could be adopted between the third countries and the community. ECJ delivered an important judgment on the interplay between national and EU copyright law, a judgment which also has implications for the interplay between IP and antitrust in the EU. The *Laserdisken* case (C-61/97 *Forening af danske Videogramdistributører, acting for Egmont Film A/S Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. V. Laserdisken.*) concerned the import and sale in Denmark of DVDs lawfully marketed outside the European Economic Area.

The key legal provision is Article 4 (1) of EU Copyright Directive (2001/29) which enshrines the exclusive right for authors, in respect of the original of their works or of copies thereof, to authorize or prohibit any form of distribution to the public by sale or otherwise. Article 4 (2) of the Directive provides that the distribution right is not to be exhausted except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent. It follows that for the right in question to be exhausted, two conditions must be fulfilled: first, the original of a work or copies thereof must have been placed on the market by the right holder or with his consent and, second, they must have been placed on the market in the Community. The ECJ found that Article 4 (2) of the Directive did not leave it open to the Member States to introduce or maintain in their respective national laws a rule of exhaustion in respect of works placed on the market not only in the Community but also in non-member countries.

The WIPO Copyright Treaty does not affect the contracting parties' power to determine the conditions governing how exhaustion of that exclusive right may apply after the first sale.

The harmonization of national copyright laws promotes competition in the internal market. The rule of exhaustion in the Community is not a disproportionate measure in view of the fact that legal protection of intellectual property rights is necessary in order to guarantee an appropriate reward for the use of works and to provide the opportunity for satisfactory returns on investment, and is a way of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers (www.gibsondunn.com,2009)

ECJ specified in its decisions (C-262/81 Coditel SA. Compagnia Generale Pour La Diffusion De La Television, and others v.Cine-Vog Films SA and others⁷) that motion picture, like any other works, are included in literary and artistic works, however, unlike books and records, they have a qualification to be acquired by being broadcasted on televisions for countless times. According to ECJ, the objective expected from restriction of a pictures projection right to a specific person in a certain region is not contrary to contractual terms. Again, it is the national courts that will evaluate whether or not artificial barriers are imposed on commercial activities between member states regarding the exercise and life cycle of projection right to be valid for certain regions. It has been also specified in this decision that rules of internal law should apply to the competition rules.

A design is a form of already existent product that is manufactured in different features perceptible to humans in terms of shape, form, colour, line, texture, material and aesthetics. How to protect design rights is specified in Community Design Directive dated 1998.

Community design rights and exhaustion of national design rights are subject to the same rules. National design rights entitle its owner with nationwide protection while Community design rights provide protection throughout the entire Community. In ECJ decisions, abuse of rights is specified to be prevented. In Nancy Kean decision (Case 144/81 Keurkoop BV v Nancy Kean Gifts BV); protection of the goods

against free movement requires to examine the intended purpose for the protection of that right in accordance with Article 36 of the Establishing Contract for design rights. In case of more than one design rights, national courts will determine as to which design right will be deemed superior. In the event that goods, which are recognized to be existent by law and are subject matter of design, are put on the market in another member state for the first time by the beneficiary in person or other persons upon his consent, entering of those goods into the country where the said right is under protection cannot be prevented on the grounds of national laws. However, if other goods imported from other member states are not released by others in the import country in conformity with the beneficiary's consent, entrance of these goods into member states are preventable based upon the national laws. Nonetheless, exercise of such authority granted in accordance with Article 36 in order to segment the markets between the member states and to introduce disguised restrictions in commercial activities is contrary to Article 85 of the Establishing Contract. If the design work can be learned in ordinary course of commerce inside the Community, unlike Turkish law, this very design is understood to be old; otherwise, a design unknown by the relevant circles and existent in a distant corner of the world is understood to be new.

According to ECJ decisions, albeit existence of design rights designated by national laws, it was concluded that such right should be exercised on valid grounds, and it cannot be exercised maliciously. Unlike other two intellectual property rights, ECJ specified that this right will be protected according to intended purpose in terms of design law (C-238/97 AB Volvo v Eric Veng).

6. APPLICATION OF EXHAUSTION PRINCIPLE IN TURKISH LAW

Having commenced upon Trademark Regulations dated 1871 in Turkish Law; intellectual property protection is still developing upon Patent Right Law dated 1879 and Law No. 5846 on Intellectual and Artistic Works amended as 4630 for intellectual and artistic works.

Turkey also made some other internal arrangements in pursuant to international contracts that are binding, and it developed exercises in the light of these arrangements. Statutory Decree for the Law No. 556 on Trademark Protection, Statutory Decree for the Law No. 551 on Patent Protection, Statutory Decree for the Law No. 554 on Design Rights Protection, Statutory Decree for the Law No. 555 on Geographical Indications Protection, as well as Intellectual and Artistic Works Law and Law No. 5042 on Protection of New Plant Breeder's Rights and Law No. 5147 on Protection of Integrated Circuit Topographies came into force.

The basic factor that has triggered the exhaustion of intellectual property rights in Turkish Law is the Association Council Decision (ACD) issued 1/95 signed as the final annex of Ankara Treaty dated of 1964, which was made by and between Turkey and the EU and whose ultimate purpose was Turkey's admission to the Community. Exhaustion principle of intellectual property rights has been included in Turkish legislation of intellectual law since 1995. Before that date, practices in this regard were dependent on case laws.

For the first time in Turkish Law, exhaustion of intellectual property right is referred to in Article 10/2 of Annex-8 of ACD issued 1/95. The cited ACD provides for customs union between Turkey and the EU, and yet the rule that exhaustion of intellectual and industrial property right is irrelevant to commercial relationships is also introduced. Community organs sought that reentrance of goods that are sold in their domestic markets to the Community by way of parallel import from Turkey be subject to the beneficiary's consent inside the Community.

The right of intellectual property right holder in Turkey would not become exhausted regarding the goods that are put on the market for the first time inside the Community, likewise his right regarding the goods that are put on the market in Turkey for the first time would not become exhausted inside the Community, and beneficiary could prevent parallel import. Basically, it is evident that the fact that exhaustion principle is rejected for practices in Turkey paradoxically to the tenets of customs union is contrary to Article 10 of Ankara Treaty.

Decisions for exhaustion principle in Turkey are usually related to trademark law. Not many decisions are seen in practice with regard to the exhaustion principle.

In Turkey, there are different views as to which of the exhaustion principles is preferred. One of the point of view is the principle of “national exhaustion” prevails in Turkey. According to this view the rights that are acknowledged to the owner of the intellectual property rights should apply within the geographical boundaries of the country, and result in their having no influence outside its borders. The product has no boundaries but the authority is national (Arıkan 2002, p.754). On of the view regarding this subject states that acceptance of the principle of national exhaustion rights, the intellectual property rights is only exhausted for the specific amount of goods that are presented in Turkey. The right holder cannot have power over the distribution of these goods within the country (Kayhan 2001, p.62). In this case the right holder right over the goods in the foreign country is not exhausted. A third party can not be prevented from importing the goods into the country of origin based on his rights, so parallel importation is not possible. According to a different view regional exhaustion of rights that is valid according to Community Law becomes valid when the borders of Turkey are included in the resulting wider region. This determination makes parallel import of goods according to appropriate Turkish marketing procedures possible for Community member states (Pınar 2004, p.28).

In order to reach a conclusion with respect to the exhaustion principle in Turkey, it is necessary to study the current laws in effect in Turkey that regulate this subject. Consequently, by analyzing case decisions made with respect to this subject it will be possible to reach a conclusion about the validity of these articles of law.

However, as mentioned earlier, there are striking contradictions in judicial decisions. Turkey has made changes in its laws on the subject of intellectual property rights not only because of the Custom Union with the EU, but also because of the WTO's The General Agreements on Tariffs and Trade (GATT) and its TRIPS annex. As a result, the new legal arrangements being made in Turkey are not simply related to their function within the Customs Union, but with its global trade as well. It is for this reason that regional exhaustion of rights would be insufficient. Together with Turkey's strategic location and the international agreements it has entered, it is in a situation of open trade with countries outside the European Union as well. It is for this reason that, in our opinion, the adoption of the international exhaustion of rights principle appears more appropriate. Additionally, when we look at the ECJ rulings to date with respect to the EU, we see that, although the principle of regional exhaustion of rights has been accepted, there is a movement toward international exhaustion of rights within the EU as well (Özoğuz 2005, pp.61-62)

In accordance with Article 13 of Statutory Decree of the Law No. 556 on Trademark Protection; 'Acts for the goods stay out of the rights arising from the trademark registration after a registered trademark is put on some goods in the scope of registration and then put on the market in Turkey by the trademark holder or upon his consent. Trademark holder is entitled to prevent the goods, even after their release, from being altered or aggravated by any third persons, thus being used for commercial purposes albeit the provisions contained in the first clause. Accordingly, this should be construed that power to interfere with subsequent sales and transfers of the goods that are subject matter of trademark law will be removed, that is, it will become exhausted. Since the wording in the law is unclear, it is not understood precisely whether the article suggests nationwide exhaustion or international exhaustion in Turkey.

In order to refer to exhaustion of trademark right, it is required in accordance with 13/1 of Statutory Decree of the Law No. 556 on Trademarks that genuine articles bearing the trademark should be put on the Turkish market for the first time. The

method of release is also important. Burden of proof applies to the way of acquisition and retaining of genuine articles of the seller.

With the Law No. 3280 on Free Zones, free zones have been established in various points in our country in order to increase investment and production capacity for import purposes in Turkey, to accelerate foreign capital and technology inflow, to enable economic input requirement cheaply and regularly. Supreme Court is of the opinion that import to these regions is not considered as import to Turkey, and these regions are not to be accepted as a domestic market (www.kazanci.com,2009). However, some authors (Suluk 2003, p.119) argue otherwise.

Genuine articles can be put on the market by the beneficiary; likewise, in accordance with Article 20 of Statutory Decree of Law No. 556 on Trademark Law, the beneficiary is allowed to transfer the exercise of such right to third persons through a license agreement. This power may also include power of production and sale. The agreement establishing a relationship between a trademark holder and a third person may be Franchising or Exclusive Distributorship Agreement. In the event that the third person abuses license rights, he is deemed to have violated trademark rights in accordance with Statutory Decree of 61/1 of the Law No. 556, in this case exhaustion of the right becomes irrelevant. What is essential is to take action in conformity with the beneficiary's consent.

In Turkish Law, legal protection is provided to both registered and unregistered trademarks. That protection would be provided to the registered trademarks has been specified explicitly in Law No. 556. In order to benefit from the legal protection as foreseen in Statutory Decree in the Law No. 556, opportunities provided by the trademark right will be utilizable only to the same types of goods for which trademark registration is made (Arkan 1998, p.203). Otherwise, trademarks that are used for unregistered goods are evaluated as if an unregistered trademark. If it is a well-known trademark, it is not treated in this way. Well-know trademarks are also under protection with regard to the goods that remain outside registration.

Protection period of registered trademarks is ten years following the date of application. Given period is renewed on ten-year basis. It is deemed null and void per se in case of no renewal in due time. If registered trademark is not used for 5 years, it can be requested to be deemed null and void.

For unregistered trademarks, right of objection to registration application is relevant based on the arrangements specified in Statutory Decree in the Law No. 556, in addition to Article 54 of the Trademark Law. No exhaustion principle applies to unregistered trademarks because it is explicitly specified in Statutory Decree of the Law No. 556 that the arrangement applies to registered trademarks (Ayoğlu 2001, p. 84).

According to the legislation; exhaustion of service marks is irrelevant as it is impossible for service marks to transfer the service to others once it is rendered. However, it is different for commercial marks. Exhaustion of right is relevant for commercial marks as the commodity transferred by selling, leasing or otherwise is transferable to others by its buyer (Arkan 1998, p.203).

Registration request for well-known trademarks by others in Turkey is an absolute ground for challenge. Nonetheless, in case of a registration somehow, in accordance with paragraph (a) of Article 42, it is possible to claim against invalidity of that registration. Therefore, even though they are not registered in Turkey, well-known trademarks can benefit from protection under Statutory Decree of the Law No. 556. However, such protection will be limited to the objection of registration and then request of invalidity of that registration within 5 years. In accordance with Article 13(d) of Turkish Patent Institute Law for well-known trademarks in Turkey, level of famousness of trademarks and other relevant principles are essential to be designated by TPE (Turkish Patent Institute) Head Department of Trademarks.

By virtue of the power arising from Article 19 of Paris Agreement, trademarks that are not registered in Turkey but in WIPO's International Office in accordance with the provisions of "Madrid Protocol on International Registration of Trademarks" will be protected as no different from registered trademarks in national laws in

countries of requested protection at the time of application, and provided that the said registration is not objected by those countries within 12 month (Aslan 2004, pp.172-173).

In pursuant to 13/2 of Statutory Decree of the Law No. 556 on Trademarks, even after transfer of genuine articles to a third person legitimately, trademark holder is still entitled to prevent goods from being altered or aggravated and thus being subject to commercial activities again. However, this right is not inclusive of alteration and aggravation of the goods for personal use. It is essential that alteration and aggravation be made for commercial purposes. Right to intervene as cited is arranged in a broader manner in the EU Directive on Trademarks. According to the EU Directive on Trademarks, in case of existence of other lawful reasons other than alteration and aggravation, trademark holder is allowed to intervene.

There are two decisions available by Supreme Court 11th HD published on exhaustion of trademark right and parallel import. The Police decision of Supreme Court (www.kazanci.com, 2009) is the first known decision in this regard. The other is “Dexter” (www.kazanci.com, 2009) decision for which principles of Police decision were repeated exactly.

Briefly, in the concrete decision of Police: Turkish distributor of Police, Sting and Vogart trademarks that are owned by an Italian company, DE Rigo SPA, and registered in so many places throughout the world is SESA Dış Ticaret. An exclusive trademark licensing agreement was made by and between the trademark holder, DE Rigo SPA and SESA Dış Ticaret in 1996. Upon this agreement, licensor SESA was going to import the cited goods to Turkey and market, promote and advertise them throughout Turkey. According to the agreement, in case of unfair competition and breach of these trademarks, SESA was duly authorized to file court case solitarily. This agreement has been registered in TPE.

On the other hand the defendant imported Police branded eyeglasses of 1996 and 1997 creation to Turkey and offered them for sale in its own store, which was also

identified by a notary public. According to this identification and expert opinion, there were no differences whatsoever between the eyeglasses put on the market by the defendant and those of the complainant license holder.

The complainant claimed that he was exclusively authorized to import and market Police branded eyeglasses in Turkey, and that it was legally impossible to import these eyeglasses from another country other than the country of origin without his consent and to sell them in Turkey afterwards, thus acts of the defendant constitutes trademark infringement and unfair competition. Thereupon, the defendant claimed that there was no unlawful point in parallel import and that the defendant's claim was against the Law on the Protection of Competition.

The Supreme Court acknowledged the defendant to be right in terms of exhaustion principle and parallel import. The decision goes as follows: "Statutory Decree issued 556 and relevant article of the establishing Directive issued 89/104/AET provide that "after the genuine articles are put on the market by trademark holder or upon his consent, the trademark holder cannot prohibit further use of that trademark with regard to the goods". This is called exhaustion of trademark right in practice and in legal arrangement. For this principle to become applicable, as it was referred above, after the goods of registered trademark are put on the market in Turkey by the trademark holder or upon his consent, if the trademark holder sells these goods to the overseas market (or produces them in another country other than the country of origin) he cannot prevent them from being purchased by third parties from an overseas market and subsequently imported to Turkey (parallel import). The same principle also applies to the person who is in status of single vendor (exclusive license holder) of the foreign trademarked goods in Turkey and has registered the trademark on his name upon trademark holder's consent.

However, in accordance with the relevant article of Statutory Decree, trademark holder is authorized to prevent the goods, after they are released to the market and imported from other countries by third persons, from being altered, aggravated or

changing the original quality and making use of it for commercial purposes subsequently.

In the light of these principles, provided that the eyeglasses that were same as those of complainant's and that were also of original quality with no imitation are produced in other countries other the country of origin in accordance with the legal procedure and imported to Turkey from those countries, and they are further sold by the importer or purchased from the import company and offered for sale against invoice, provision 9/II-c of Statutory Decree issued 556 will not apply." In article 9/II-c of Statutory Decree, it is provided that the trademark holder may prohibit import or export of the goods that bear his trademark without his consent. In our law, nationwide/national exhaustion principle has been adopted. Accordingly, beneficiary, who is deemed to have exhausted his right at home, is entitled to prevent genuine articles of intellectual and industrial right that are put on the market abroad from being reimported to his own country (ww.parentpatent.com, 2009).

The Supreme Court defines "specific subject" as power to use trademark holder's right arising from the trademark itself. The Supreme Court required that existence of justifications for the protection of trademark be researched, thus adopting a comment that is likely to eliminate supremacy of intellectual property right.

It is acquired by real or legal persons residing or having industrial or commercial activities within the borders of Republic of Turkey or rightful applicants within the provisions of Paris Agreement or Treaty Establishing the WTO. Real or legal persons of foreign states who have granted Turkish nationals trademark protection either legally or actually also benefit from trademark protection in Turkey in the scope of reciprocity principle.

In case a country grants its own citizens in other countries a right in certain issues, and that other country grants its citizens similar rights in return or applies national treatment principle is called "reciprocity principle". This principle can apply legally

or actually. Reciprocity can be provided based upon a law, contract or de facto application.

Protection is nationwide. In accordance with this principle, every state provides trademark protection only in its own territory – provided that material and formal conditions in law are fulfilled; every state may allow, in case of breach in its territory, to the individual who was exposed to an act of breach and who is the beneficiary in one's own laws to recourse to remedies in one's own state. Accordingly, trademark holder may only prevent his trademark from being used without his consent within the borders of Republic of Turkey alone, otherwise he cannot prohibit further use of trademark outside Turkey depending on the registration in Turkey. If the trademark is registered abroad, power to prohibit also arises from the laws of the countries where registration has been made.

Imported goods fall within the scope of power to prevent. The Supreme Court describes the said principle in Bahman decision as follows: “In pursuant to Statutory Decree issued 556, protection of trademarks is valid within the borders of Republic of Turkey in principle. This principle, which is called the principle of territoriality of the protection of trademarks, expresses the policy of each state to protect the registered trademarks within its borders and in accordance with the legislation. In its decision, the “High House” did not accept that bringing of Bahman cigarettes registered in Bulgaria to Mersin free zone would constitute infringement of Bahman cigarettes registered in Turkey because these cigarettes that were destined to another country are not imported to Turkey.

If the same trademark is registered on someone else's name abroad, protection within the borders of Turkey cannot be eliminated by way of importing these goods and services of that trademark that are produced abroad to Turkey. For instance, “Rainbow” trademark, which is registered in Turkey and owned by *A* is not infringed when *B*, which has registered the same trademark in Spain, imports its goods to Turkey. *A* can prevent *B* from importing his goods to Turkey. In Supreme Court's decision of Vitra/Vitra Knoll (www.kazanci.com ,2009) it was resolved that

Vitra, a well-known trademark in Turkey was infringed by the goods bearing Knoll Vitra trademark, which is not registered in Turkey, is not of a well-known trademark status and imported from overseas market, and that this infringement was against Statutory Decree on Trademarks.

In accordance with the principle of territoriality, should the same mark is registered as a trademark in quite a lot of countries as per national laws of those countries, trademark right arises as per governing laws of the countries of registration and it is limited to the sovereignty borders of them. Right granting and protecting effects of registration may not go beyond the borders of the country of registration. Principle of territoriality of trademark protection is universal.

In Alvorada decision (www.kazanci.com, 2009), the Supreme Court made a decision that did not accord with the notion of well-known trademark and principle of territoriality. In this case, domestic court identified that Alvorada trademark owned by the complainant was not a well-known trademark in Turkey.

Statutory Decree issued 556 on Trademarks does not include the arrangement of Article 9 in EU Trademark Directive, provided that the concerned party keeps silent for usage of trademark for a long time and then claims for trademark rights maliciously only after the trademark is made known and used by all means. According to the arrangement of the EU Trademark Directive in this regard; provided that holder of a previously registered trademark inside the Community keeps silent for 5 years after he becomes aware of a company that has the same trademark registered on its name and makes use of it, thus he enables the subsequent registration holder to use the trademark, that holder of a previously registered trademark will not be able to use his rights arising from it against the subsequent registration holder. If the subsequent trademark registration is malicious, the previous trademark holder is always allowed to use his rights arising from the trademark against the subsequent registration holder with corrupt intentions. The Supreme Court seeks to satisfy the blankness in this regard as per case law and rules of good faith specified in Article 2 of Civil Code. Referring to Article 9 of

Trademark Directive, the Supreme Court stated that period of objection to a subsequent registration with regard to well-known trademarks should be recognized as 5 years and yet given period does not apply to malicious registrations in pursuant to Paris Agreement. In the event that defendant does not object to the defendant's malicious registration and usage of trademark for a long time in the first place and yet files a claim afterwards, corrupt intention of the claimant is removed, that is, it is eliminated by a counter-corrupt intention. However, this commentary is contrary to paragraph 1 or Article 9 of the Directive issued 89/104. Accordingly, it is foreseen that right of litigation survives even though 5-year period of remaining silent is over.

In Valeo decision of the Supreme Court (www.kazanci.com, 2009), defendants' counsel asked the Supreme Court to examine the decision dated 23.09.2004 and issued 2003/158-2004/529, which was awarded by Istanbul 1st Court of Intellectual and Industrial Rights with regard to the case between the concerned parties. Claimants' counsel stated and claimed that upon a Know-How License Agreement with Valeo S.A. whose headquarter is located in France, Valeo Ot. Sist. End. A.Ş, one of the clients, produced automotive components and clutch system with 'Valeo' trademark in Turkey; that other client was an incorporation in charge of marketing, distribution and sales of the same branded products based upon the agreement concluded with Valeo Distribution; that 80 per cent of clutch component requirements of domestic automotive industry was met by the manufacturing company while 10 per cent of it was met by the other marketing company by means of import; that domestic and overseas sales were quite extensive; that the trademark was a well-know one; that the defendant company collected Valeo trademarks from junk market, subjected them to a simple revision process and made production by giving the products a new appearance sometimes by erasing the trademark and patent marks on them and sometimes erasing them only in part; that they sold them in packs and boxes owned by the client or other demanded trademark holders in the market; that the other defendant was in charge of shipment and management; that they kept on with unfair competition by using their own title in the ongoing commercial activities and by advertising that they could renew old clutch pressure plates and discs as good as new so that they would have a longer life than a new

one for less money; that they did not ask for permission to do so; that they acted against not only the provisions of Turkish Commercial Code but also statutory decree issued 551 and 556; that they deceived the consumers; therefore the clients incurred a lower market share; that they incurred tangible and intangible damages; to this end, it was demanded and claimed that unfair competition by the defendants against the clients be prohibited and eliminated with all consequences thereof, and 25 billion TL indemnity for tangible damages and 25 billion TL indemnity for intangible damages be collected.

Defendants' counsel defended that their clients collected clutch pressure plates and discs scrapped for various reasons and reprocessed them and put them on the market under a different trademark; that they did not use trademark under any circumstances whatsoever; that unfair competition was irrelevant, that indemnity was excessive and that the result of criminal file be awaited, thus they asked for dismissal of action.

In the light of claims, defenses, evidences collected and expert's reports adopted, it was concluded by the court that the defendants renewed clutch pressure system whose economic life was already completed and put them on the market even without erasing 'Valeo' trademark on some of them, which bears exception to the exhaustion of trademark in Article 13 of Statutory Decree issued 556; that the renewed commodity would not be expected to give in productive results in comparison to the original; that the consumer would be deceived as some of the products would bear claimants' trademark, which would constitute breach of trademark and unfair competition; that the report prepared by the accounting expert found the demanded indemnity sufficient, thus it was resolved that the case was partially accepted, that defendants' acts constituted breach of complainants' trademark and unfair competition, and further exercise of the defendants would be prevented, and 25 billion TL for tangible damages and 10 billion TL for intangible damages be collected.

Considering that there was no contrary point to the applicable methods and governing laws in terms of documents and papers included in the case file while discussing and evaluating the evidences predicated on the reason of court decision, other objections to appeal of the defendants' counsel required to be dismissed, which was not deemed appropriate and remained outside the scope of the following paragraph.

The case was related to the prevention of unfair competition, elimination of it with all consequences thereof, and to claim for tangible and intangible damages.

In concrete event, the complainants' counsel demanded that unfair competition be prevented and eliminated with all consequences thereof, in addition to their claims for tangible and intangible damages. They basically leaned such claims of theirs against provisions of Turkish Commercial Code on unfair competition. One of the issues likely to be demanded by the injured party in Article 58 of Turkish Commercial Code due to unfair competition is specified to be intangible indemnity. In principle, the complainant must evidence the damage incurred so that such demand is accepted. What is essential in such claim for damages is to claim and evidence that complainant's assets has been decreasing due to unfair competition. However, considering the difficulty of evidencing such damages, lawmaker leaves it up to the discretion of the judge to adjudge for intangible damages for consideration of possible benefits to be gained by unfair competitor so that his action is not unreturned in pursuant to Article 58/e of Turkish Commercial Code.

In concrete event, even though complainants' counsel stated that his clients' market share decreased due to material damages, he particularly attracted attention to the benefit gained by the defendant, thus he claimed for damages. Not objecting to the examination of defendant's books and records solely, he adopted that benefit gained by the defendant due to unfair competition required to be considered and accordingly decided as material damages.

Giving credit to the report prepared by the accountant expert as a consequence of examining defendant's corporation records, the court decided for material compensation. However, expert's report, which was predicated on the decision, did not rely on adequate research and examination, plus it was not appropriate for the inspection. Besides, only the purchase invoices of scrapped clutch discs that were purchased were evaluated, yet sale invoices were not taken into account. On the other hand, it is not true to accept that all of the scrapped commodities were processed and recycled to the market but no appropriate discount is given. Besides, the profit to be ensured should be net profit. In this case, considering serious objections of the defendants' counsel to the accountant report, the court decided it was not right to make judgment in the light of deficient examination in writing while it was actually necessary to have a new expert perform a new examination, and the judgment be reversed.

The first protection related to the first patent right in Turkish Law was issued in Patent Law dated March 13, 1879. The first law of Republic of Turkey in this regard is Statutory Decree on the Protection of Patents issued 551. Turkey participated in European Patent Convention and issued its ratification act.

According to Statutory Decree on the Protection of Patents; no third parties can benefit from, produce, sell, let in the country by imports or otherwise release on the commercial sphere the patented invention for commercial purposes without patent holder's consent. The beneficiary's not preventing the goods from being sold to others on the ground of patent right after the goods under protection of patent right are sold upon beneficiary's consent, is called exhaustion of patent right.

Acts related to patented product that is offered for sale in Turkey by the patent holder or upon his consent are excluded from the rights arising from the patent itself. Once the patented product is put on the market in Turkey for the first time the patent right will expire throughout Turkey. What is the subject of exhaustion is not the invention but power of disposition upon the invented product. What is transferred to others is not this patent but the patented product.

According to Statutory Decree on the Protection of Patents, these patents do not grant an endless protection power to the holders. Legal protection is given to the examination patents for 20 years, to non-examination patent for 7 years and to utility model for 10 years. Given period cannot be extended. However, non-examination patent application can be converted to an examination patent. In this case, the total period cannot exceed 20 years. Patented invention should be registered in Turkey so that it is protected.

Principle of territoriality is accepted for registration of patents (Tekinalp 2002, p.508). If the release is not made in Turkey but in a foreign country, patent right in Turkey does not become exhausted.

Nevertheless, after any sample of a patented product is put on the market in Turkey, the beneficiary may not prevent the goods from entering into the country via overseas import, reimport to the country or from reentering the goods that are put on the overseas market by the same beneficiary into the country via parallel import. Basically there is no available arrangement in Statutory Decree on the Protection of Patents in this regard. However, the explanation for trademark rights should be accepted to be valid also for the patents. There is no available case law since patent protection is relatively less developed than that of trademark rights in our country.

In order to mention exhaustion of patent rights, patented product must have been made a commercial subject by the beneficiary in person or any third persons upon his consent. The patent right will not become exhausted if the patented subject is released by stealing or finding without beneficiary's consent, The right upon the patent, which is impossible to circulate and repeat upon ad-hoc application, is impossible to become exhausted.

There is no available case law since patent protection is relatively less developed than that of trademark rights in our country. Indeed, it is plausible to evaluate that Supreme Court's approach to the patents does not differ from that of trademark.

The first law enacted for Turkish Intellectual and Artistic Works in Turkish Law is the Privy Council Regulation of 1850. Later on, Copyright Law of 1910 was enacted. Finally in 1951, Law No. 5846 on Intellectual and Artistic Works became effective. The latter law was amended as the Law No. 4110 in accordance with Article 8 of ACD Appendix of 1/95 in 1995 and quite a lot of alterations were made on it. After Turkey's admission to Paris Agreement was approved in 1979 and it was published in the Official Journal dated 12.07.1995 and issued 22341, the Law No. 5846 on Intellectual and Artistic Works (FSEK) was amended in 2001, amendments were made based upon the Law No. 4630 and new amendments were added to the law based upon the Law No. 5101 in 2004.

According to Article 1/B of FSEK; any and all kinds of intellectual and artistic productions that bear the feature of its owner and recognized as science and literature, music, fine arts or cinematic works are recognized as works. Accordingly, right upon intellectual and artistic works will be gained, without registration, once they emerge for the first time. It is adequate for them to be original and to reflect owner's features. The term "work" includes scientific and literary works, any and all kinds of musical works with and without words, any and all kinds of fine arts with an aesthetic value, computer software, design and cinematic works that bear owner's features.

It is not required for intellectual and property works to have been created for commercial purposes so that they are protected. Neither a notification to a competent authority nor a formal disposition is required for the work. For evidence, however, records and registration are foreseen to be necessary for musical and cinematic works.

For exhaustion of the right arising from the intellectual and artistic works, it is required that either the original or a copy of the work is put on the market in Turkey by the beneficiary of any third persons (upon beneficiary's consent). Once the work is so released, the right becomes exhausted for resale of the work. If the original or a copy of any intellectual and artistic work under protection is put on the overseas market, no exhaustion of these works will become relevant in Turkey in accordance

with Article 23/II of FSEK. Holder of the work will be able to use his right separately for each country. National exhaustion principle becomes valid in this regard.

For the rights arising from intellectual and artistic works, both tangible and intangible rights are defined to survive as long as the holder is alive and for 70 years even after his death. If a work is owned by more than one person, the given period will commence as of the death of the last holder. Upon expiration of given periods, all rights of the work will become exhausted per se.

Unlike patents and trademarks, geographical dimension of exhaustion principle of the right arising from intellectual and artistic works has been arranged in the relevant law. Accordingly, exhaustion principle for intellectual and artistic works applies in nationwide dimensions.

As for intellectual and artistic works with regard to the exercise of exhaustion principle, the Supreme Court has made a different evaluation than that of trademarks. It is explicitly specified in law that bringing back to the motherland the copies reproduced abroad upon holder's consent and exclusive right to enjoy them is granted to the holder of the work, and copyright is deemed to have exhausted for reproductions of the works that are sold or distributed for the first time within country borders. Nevertheless, holder of the right cannot prevent reproductions of the works that are sold for the first time within the country borders from being sold by way of exporting abroad and reimporting to the country afterwards. Holder of the right is no longer authorized to intervene in subsequent sales after the first sale in Turkey.

The Supreme Court (www.kazanci.com, 2009) recognized that singing the song called "çile bülbülüm çile" in a non due style is a modification. In this decision, although Safiye Ayla is the royalty holder who took over the royalties of the song from Sadettin Kaynak, the claimant claimed against her on the grounds of intangible infringement. That the defendant interpreted the song in a non due form was recognized to be infringement, whereas claimant, S.A., the successor of the actual

holder of the work was recognized to be the trustee of the work, consequently the person who is rightfully authorized to enjoy intangible right after the death of actual holder of the work. The Supreme Court referred in its decision that essentially, the distinction between tangible and intangible rights was artificial, and that usage of the two was interrelated. Period of protection or indefinite protection has perpetuated to be an issue the law maker will evaluate on social, economic and cultural grounds.

In Supreme Court's Zeki Faik decision (www.kazanci.com, 2009), complainants' counsel claimed that the defendant party used the painting called "İstihsal/the Production" by Zeki Faik, the deceased painter that was in the possession of his client, in a calendar issued for the year 1993 without permission, thus it was claimed and litigated that total of 900.000.000.-TL and 200.000.000.-TL be collected along with the charged interest from the defendant respectively as financial compensation in accordance with Article 68/1 of FSEK and as compensation for the violated intangible rights in accordance with Article 70/1 of FSEK. As a consequence of the evidences collected and inspections conducted by the Domestic Court, it was decided for partial acceptance of the case on the grounds that the complainants might ask for a financial compensation threefold as the current value and by virtue of the adopted expert reports, and it also resolved that 450.000.000.-TL for tangible compensation and 100.000.000.-TL for intangible compensation be collected from the defendant along with the charged interest thereof.

Defendant's counsel appealed the decision. The case was related to the compensation of tangible and intangible rights that were violated because the painting created by the deceased painter of the complainants was used for the calendar issued by the defendant. It is obvious that intellectual rights owned by the holder of the painting are not transferred to the defendant. It is understood that acts of the defendant were related to the act of pressing the reproductions of the said painting on calendars, thus multiplying and offering it to the public; in this respect reproduction rights specified in Article 22 of FSEK and power to offer to the public

in accordance with Article 14 of the said law were both violated, and that there was no irregularity whatsoever in calculation and discretion of the compensations.

Considering that there was no contrary point to the applicable methods and governing laws in terms of documents and papers included in the case file while discussing and evaluating the evidences predicated on the reason of court decision, it was resolved that the decision be assented upon dismissal of appeal objections of the defendant's counsel, thus independence of rights were referred to. There is no Supreme Court decision available that is directly related to exhaustion principle.

Statutory Decree No. 554 on the Protection of Industrial Design applies to designs in Turkish Law. This provides protection for registered designs. The design should be new and distinctive for registration. Design rights are protected for 25 years for general view of the product and for 3 years for each component of the product.

Exhaustion principles of patent and trademark rights should basically apply to design as well. In the scope of Statutory Decree on the Protection of Industrial Design, designs can be evaluated as being subject to international exhaustion regarding trademark or patent, and to nationwide exhaustion regarding intellectual and artistic works. And yet, as an intellectual and artistic work, a utility model, a distinguishing mark, it is still possible for a design to be protected under the rules of unfair competition. Design right is deemed to have exhausted after the product that is designed or onto which design is applied is put on the market in conformity with the beneficiary. The Supreme Court has not yet any case law in this regard.

There is no specific and separate law on computer software in Turkish Law. Protection in this regard is also provided under "FSEK".

With regard to the computer software, right upon the software becomes exhausted limited to only the personal use of that person who buys it. Nationwide exhaustion is realized following the first sale in Turkey. Beneficiary in Turkey cannot prevent the software from being sold to anyone else following the first lawful sale. As a matter

of fact, it is specified in Article 23 of FSEK that exercise of nationwide exhaustion principle applies to computer software.

Exhaustion principle is irrelevant to technological developments that are not reflected in a concrete piece of furniture and that is not in commercial sphere.

7. CONCLUSION

According to Article 6 of TRIPS Agreement, contracting states are free as to under which dimensions the intellectual property rights become exhausted. In this connection, the EU countries developed and used regional exhaustion principle. As already referred in above explanations, it is not clear and in focus under which dimensions the exhaustion principle is applicable. For conflicts arising from the exhaustion of trademark rights, the Supreme Court has adopted an exhaustion regime, which enables parallel import and finds it sufficient even if a single piece of protected product is put on the market in Turkey. It is plausible to refer to the existence of international exhaustion principle since release to the Turkish market is accepted as a minimum requirement and to the existence of nationwide exhaustion principle since parallel import cannot be prevented. Once the transition period of the EU is completed, Turkey will also make its evaluations in accordance with regional exhaustion, however the transition period is not completed yet.

If accepted in the borders of one state alone, nationwide exhaustion is applicable; if states that are part of a region established by more than one state, like the EU, accept exhaustion principle for that region, regional exhaustion is applicable; and for exhaustion of internationally accepted rights that are not confined to these two geographical borders, international exhaustion is applicable.

Intellectual property law was opened as the 7th session between Turkey and the EU on June 18, 2008 within the scope of membership negotiations. Prime Ministry and Secretariat General of the EU published the answers and questions section of the negotiation on the internet site. On taking a look at these answers and questions, the concept of “exhaustion”, which is only remembered in connection with copyright law, is not referred to in any other sections of intellectual property.

Upon ACD issued 1/95, quantity limitations at customs between Turkey and the EU and measures having equivalent effects were lifted thoroughly, which has paved the way for free movement of goods. Yet, there is a prohibitory provision in the decision that is mistranslated to Turkish. This prohibition was included in ACD

issued 1/95 upon effect of the EU delegates. And it relates to the fact that parallel import, as an integral part of free movement of goods, is indirectly prohibited between Turkey and the EU. This prohibition is foreseen in Annex-8 Article 10/2, which regulates the laws to be enacted by Turkey within the scope of intellectual property law so that harmonization to the EU legislation is ensured. This prohibition is unilateral and against Turkey. Arrangements included in intellectual property law: provisions for intellectual property in Turkish law during Customs Union process were renewed very quickly. In addition to extensive modifications in intellectual and artistic works, legal arrangements were made for the protection of patent, utility model, trademark, design, geographical indications, plant variety and topographies of integrated circuits during this process that started in 1995. It is certain that systems depending on limitation and pirated productions have now come to an end. Be it on the country-level or corporate level, ownership of intellectual property rights has a distinctive role for international competitive power. Intellectual property rights grant the beneficiary an absolute and monopolistic power. Being a beneficiary provides advantages to the companies competing on commodity or service markets in comparison to their rivals. Furthermore, being equipped with knowledge, which is accepted as an indicator of development level, is possible only if intellectual property rights are developed, used and protected in that society.

Parallel import is relevant to two markets of price difference. Goods that are purchased for a lower price is resold with no dealership chain with the manufacturer, that is, by way of third person dealers in the market where the price is higher. Developed countries sell their goods at a cheaper price in order to compete with their native rivals, whereas they sell them more expensively in their domestic market. But for the geographical restriction of exhaustion principle, it would be a parallel import from low-priced market to higher-priced market, which is against the manufacturing companies. The legal procedure to prevent this is to define the limitations of exhaustion principle within the scope of intellectual property. What is preferential here is economic rather than legal. Albeit one century-old history of the exhaustion principle, discussions about it still continue both on international level and European level. Having accelerated due to globalization in particular, parallel

import added to the weight of this principle. What is determining between the efforts made to protect national industry and domestic market against liberal parallel import is the exhaustion principle.

Exhaustion principle marks out the absolute right, which is granted to the beneficiary by the intellectual property rights, for manufacturing of the relevant goods and the first sale thereof. The right upon these goods will be deemed to have exhausted once the goods within the scope of intellectual property rights are put on the market for the first time by the beneficiary in person or a third person upon his consent. Hereafter, the beneficiary will not be entitled to claim for audit privileges against the third persons who resale the goods on the market. For parallel import of medicines, repacking in conformity with the language of import country is evaluated within the scope of exhaustion principle in accordance with ECJ decision.

The EU Commission procured a detailed market research on the effects of preferring international and regional exhaustion principle in the field of intellectual property on the EU's domestic market. In National Economics Research Associates research of 1999 it was concluded that there was a significant price difference encouraging parallel import among shoe and leather products; that technical barriers of motor vehicles have an important effect on preventing parallel import; that parallel import would be realized on very high levels for cosmetics and perfumery; that price difference is quite high in garments market especially in first-quality branded products, and that parallel import, likely to be relevant to first-quality products alone, might still restrict the market as a whole; any yet parallel import would not be affordable for beverages simply because freights push up the cost. Opinions of industrialists and various establishments were taken afterwards. Nonetheless, not a full consensus has been achieved for the current situation, that is, alteration of regional exhaustion principle in the EU.

According to Article 22 of the Association Agreement between Turkey and the EU, the Council of Association is duly authorized to take a decision, wherever deemed appropriate by the Association Agreement, in order to achieve the objectives specified in the agreement. Article 29 of the Annexed Protocol is regulated in

accordance with Article 30 of the Treaty of European Union. Second sentence of this article forms the basis of exhaustion principle. With this sentence, it has been explicitly prohibited that measures for valid reasons specified in Article 30 of TEC and Article 29 of Annexed Protocol are used as a means of arbitrary discrimination or disguised restriction in commercial activities.

Parallel import within the scope of free movement of goods in the Customs Union is only possible upon acceptance of exhaustion principle. However, it was also referred above that this principle was not foreseen between the EU and Turkey in Article 10/2 of Annex-8 of ACD issued 1/80. In our opinion, the Council of Association exceeded its authority granted by virtue of this clause because it has established a judgment contrary to the primary law that reduces the applicable field of this law. Therefore it is legally impossible to exercise 2nd clause.

The borders of Turkey should also be included in regional exhaustion principle, which is in force in the EU, enabling the member states to have parallel import for the goods that are duly put on the market in Turkey. Considering the current conditions in Turkey, it is understood that exercise of international exhaustion principle will inure to the benefit of Turkey. In this way, cost of raw materials will reduce in the country as a consequence of parallel import, which will bring in cheap labor force and more foreign investment. As current practice of the Supreme Court enables parallel import, we are of the opinion that this is an applicable method, if not the optimum solution, that does not aggravate the current situation of our country, which is not in the scope of regional exhaustion yet.

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CURRICULUM VITAE

Name/Surname: AYSEL GÜLLE

Address: Harmanlı Giz Plaza K:16 Levent-Istanbul

Date/Place of Birth: 19.06.1977

Foreign Language: English

Primary School: Bakırköy Ressam Şevket Dağ Primary School -1989

Secondary School : Bakırköy İbrahim Turhan High School-1995

University: Istanbul University Law Faculty-2000

Postgraduate: Bahçeşehir University

Name of Institution:Bahçeşehir University- Institution of Social Sciences

Name of Programme : European Union Law and Integration

Work Experience :

Aksu&Savaş&Çalışkan Law Firm	- 2005- (-)
Saving Banks	- 2003–2004
Gürer&Bilge Law Firm	- 2001–2003
Tunca Law Firm	- 1999–2001