THE REPUBLIC OF TURKEY

BAHÇEŞEHİR UNIVERSITY

ECONOMIC AND MORAL RIGHTS IN TURKISH AND EUROPEAN UNION COPYRIGHT LAW

Master Thesis

AYŞEGÜL TÜFEKÇİ

İSTANBUL, 2009

THE REPUBLIC OF TURKEY

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INSTITUTE OF SOCIAL SCIENCES

EUROPEAN PUBLIC LAW AND EU INTEGRATION

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Thesis Supervisor: ASSIST.PROF.DR.A.SELİN ÖZOĞUZ

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T.C.

BAHÇEŞEHİR ÜNİVERSİTESİ

SOSYAL BİLİMLER ENSTİTÜSÜ

AVRUPA İLİŞKİLERİ

Tezin Adı: Türk ve Avrupa Birliği Telif Hukukunda Mali ve Manevi Haklar

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ÖZET

TÜRK VE AVRUPA BİRLİĞİ TELİF HUKUKUNDA MALİ VE MANEVİ HAKLAR

Tüfekçi, Ayşegül

Avrupa Birliği İlişkileri

Tez Danışmanı: Yrd. Doç. Dr. A.Selin Özoğuz

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Avrupa Birliği üyelik sürecinde olan Türkiye, pek çok alanda kendi mevzuatını Avrupa Birliği Müktesebatı ile uyumlu hale getirme çabası içindedir. Fikri Mülkiyet haklarının ve özellikle telif haklarının etkin bir şekilde tanınması ve korunması Avrupa Birliği'ne uyum sürecinde Türkiye'nin temel ödevlerdendir. Türkiye, fikri mülkiyet alanında pek çok uluslar arası anlaşmaya zaten taraftır, ancak Avrupa Birliği'ne üyelik sürecinin, Türkiye'nin fikri mülkiyet alanındaki gelişimine ve değişimine farklı bir ivme kazandırdığı da açıktır.

Bu tez, Avrupa Birliği ve Türkiye müktesebatının uyumlaştırılması sürecinde, birbirini doğrudan doğruya etkileyen bu iki hukuk düzenin karşılaştırmalı olarak incelenmesi gerektiği fikrinden doğmuştur. Avrupa Birliği ve Türkiye müktesebatının uyumlaştırılma süreci hakkında bu tarz karşılaştırmalı çalışmaların sayısının azlığı da diğer bir etkendir.

Bu tezde temelde amaçlanan, yürürlükteki mevzuata göre, hem Avrupa Birliği cephesinden hem de Türkiye cephesinden Telif Hakları Hukuku'ndaki mali haklar ve manevi hakların incelenmesi ve değerlendirilmesidir. Bunun için de; tez fikri mülkiyet fikri hak ve kavramının değerlendirilmesi ile başlayacak ve telif hukukundaki mali ve manevi hakların Türk hukukunda ve Avrupa Birliği müktesebatında karşılaştırmalı olarak incelenmesi ile devam edecektir. Tezin son bölümünde Telif Hakları Hukuku açısından Türkiye'nin Avrupa Birliği müktesebatını uygulama ve uyarlama çalışmaları değerlendirilecektir.

Anahtar Kelimeler: Fikri Mülkiyet Hakları, Telif Hakları, Mali Haklar, Manevi Haklar, Komşu Haklar

ABSTRACT

ECONOMIC AND MORAL RIGHTS IN
TURKISH AND EUROPEAN UNION COPYRIGHT LAW

Tüfekçi, Ayşegül

European Union Public Law And EU Integration

Thesis Supervisor: Assist.Prof.Dr.A.Selin Özoğuz

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Turkey, on the way of European Union membership, is trying to harmonize its own legislation with the European Union Acquis in many fields. Within the scope of Intellectual Property Rights, the effective recognition and protection of copyrights are of the main duties of Turkey in the harmonization process to European Union. Turkey has already been a party to many international conventions related with intellectual property rights; however it is clear that the European Union membership process contributes to the development and change of Turkey in the field of intellectual property with a different momentum.

This thesis has arisen from the idea of the requirement to examine both directly interacting legal systems comparatively during the harmonization process of the legislations of European Union and Turkey. The insufficient number of such comparative studies regarding the harmonization process of the legislations of European Union and Turkey is also another factor which forms the main idea of this thesis

In this thesis, the main aim is to examine and evaluate economic and moral rights in Copyright law both from the perspective of Turkey and European Union in accordance with the existing legislation of Turkish law and European Union Acquis. For this purpose, it will start from the evaluation of intellectual property, intellectual rights and concept; and it will continue with the examination of economic and moral rights in Turkish law and European Union Acquis respectively. Finally, the enforcement and implementation of existing Turkish Copyright Law with European Union Acquis will be examined.

Keywords: Intellectual Property Rights, Copyrights, Economic Rights, Moral Rights, Neighbouring Rights

TABLE OF CONTENTS

ABBREVIATIONS

Agreement on Trade-Related Aspects of Intellectual Property Rights	: TRIPS
Berne Convention for the Protection of Literary and Artistic Works	: Berne Convention
European Union	: EU
Intellectual Property	: IP
Intellectual Property Right	: IPR
Law on Intellectual and Artistic Works	: FSEK
Paris Convention for the Protection of Industrial Property	: Paris Convention
Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations	: Rome Convention
World Intellectual Property Organization	: WIPO
World Trade Organizations	: WTO

1. INTRODUCTION

The requirement to examine both directly interacting legal systems comparatively during the harmonization process of the legislations of European Union and Turkey is the main idea of this thesis. With this study, it was evaluated the rights constituting economic and moral rights comparatively within the scope of Turkish Law and European Union Acquis and to determine whether they are compliant within the meaning of current legislation.

This thesis is composed of four parts. Comparative analysis method has been employed in this thesis on Turkish Law and European Union Acquis which are interacting continuously. For avoiding digression from the key subject, intellectual property rights have been mentioned in a nutshell as a fundamental concept and types of intellectual property rights have been briefly referred to in the Section 2. Copyright and Related Rights in Turkey and European Union have been touched briefly as the upper title of the thesis subject in Section 3. History of copyrights have been scrutinized from their development for offering a better understanding of the present status of intellectual property rights; the concept of copyrights including the term "work" as the protection subject of copyrights, types of works protected by copyright, separation as to which intellectual works would be eligible and which intellectual works would not be eligible under protection of copyrights have been noted in the same section. The main components of the thesis economic and moral rights have been assessed in Section 3. Types of economic rights and types of moral rights had been elaborately and separately studied and hybrid rights which bear the characteristics of both economic and moral rights have been put together under the title of other rights in the same section. In the last part of Section 3, problems of implementation of copyright law in Turkey have been examined. Lastly, Section 4 of the thesis throws light on the things which should be done in order to eliminate any deficiencies and problems; expounds comments and opinions and offers solutions.

2. INTELLECTUAL PROPERTY RIGHTS

2.1 CONCEPT OF INTELLECTUAL PROPERTY RIGHTS

The intellectual ideas formed by human being constitute the subject of intellectual property. Intellectual property rights protect the interests of creators by giving them property rights over their creations. So, "intellectual property is a creation of the intellect which is owned by an individual or an organization that can then choose to share it freely or to control its use in certain ways" (Current and Emerging Intellectual Property Issues for Business 2008, p.9).

The Convention Establishing the World Intellectual Property Organization dated 1967 has listed literary, artistic and scientific works, performances of performing artists, phonograms, 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 as subject matters protected by intellectual property rights.

"Intellectual property refers to creations of the mind such as inventions, literary and artistic works, and symbols, names, images, and designs used in commerce" (http://www.wipo.int, 2009). "Intellectual property is found almost everywhere-in creative works like books, films, records, music, art and software, and in everyday objects like cars, computers, drugs and varieties of plants" (Current and Emerging Intellectual Property Issues for Business 2008, p.9).

In Turkish law, "interests that are legally protected regarding the products produced as a result of any and all intellectual and mental efforts and labors and that grant the right holder to benefit from it at any time are called intellectual property rights"(Ateş 2003, p.93).

2.2 TYPES OF INTELLECTUAL PROPERTY RIGHTS

In general, "intellectual property is protected by giving the creator of a work or an inventor exclusive rights to commercially exploit his creation or invention for a limited period of time.

These rights can also be sold, licensed or otherwise disposed of by the rightholder" (Current and Emerging Intellectual Property Issues for Business 2008, p.10).

Mostly, intellectual property is divided into two branches, namely industrial property, which protects inventions, and copyright, which protects literary and artistic works such as creations in the fields of literature and the arts, such as books, paintings, music, films and records as well as software. On the other side, industrial property is a concept which pertains to the development and protection of human creativeness, inventions and original designs and it is a part of the wider body of law known as intellectual property.

According to Paris Convention for the Protection of Industrial Property Article 1(3), "Industrial" property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

"The purpose of the development and protection of the industrial property is to encourage the citizens to create their intellectual products in the most free and comfortable manner, to clarify the data for such products and guarantee the protection of the products, innovations, and technologies" (http://www.turkpatent.gov.tr 2009)

Some rudimentary knowledge about copyright and other main types of intellectual property rights will be outlined and overviewed in this part by the reason of not wandering away from the main subject matter of the thesis.

2.2.1 Copyright

Copyright and related rights, as being staple and crucial topic of this thesis, will be amplified later in the this thesis. However, by the reason of being handled as a branch of intellectual property rights, in muy opinion it will be useful to make a simple explanation of copyright hereby.

Copyright is a legal term describing rights given to creators for their literary and artistic works. “The purpose of copyright is to allow creators to gain economic rewards for their efforts and so encourage future creativity and the development of new material which benefits us all” (http://www.eucopyright.com 2009).

“The copyright system rewards artistic expression by allowing the creator to benefit commercially from his work. In addition to granting economic rights, copyright also bestows “moral” rights which allow the creator to claim authorship and prevent mutilation or deformation of his work that might harm his reputation” (Current and Emerging Intellectual Property Issues for Business 2008, p.10).

2.2.2 Trademarks

Any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors is called “trademark”. So, “almost any distinctive feature attached to a product or service which distinguishes it from another can be protected as a trademark” (Current and Emerging Intellectual Property Issues for Business 2008, p.12). “Words, letters, numbers, drawings, pictures, figures, colours, logos, labels and a combination of these used specifically for the purpose of distinction of such goods and services may be accepted as trademark” (http://www.turkpatent.gov.tr 2009).

Trademarks secure consumers and businesses to differentiate between goods and services from different producers and to choose products whose reputation they trust. A trademark holder can prevent others from using his trademark or a similar mark for the same or similar goods or services, if doing so is likely to cause confusion in the minds of the public.

In general, a sign must fulfill two different kinds of requirement in order to serve as a trademark. A trademark must be distinguishable among different products. So, the first kind of requirement relates to the basic function of a trademark, namely, its function to distinguish the products or services of one enterprise from the products or services of other enterprises. Distinctiveness of a trademark is bound to depend on the understanding of the consumers, or at least the persons to whom the sign is addressed. The second kind of requirement relates to the possible harmful effects of a trademark if it has a misleading character or if it violates

public order or morality. “For manufacturers or service providers who have invested the time, effort and money to build up a good brand image, trademarks are a way to prevent others from unfairly taking advantage of their reputation. This ensures fair competition between competitors in the marketplace and encourages producers to invest in the quality and reputation of their products or services” (Current and Emerging Intellectual Property Issues for Business 2008, p.12).

In most countries, the trademarks are protected mainly through registration. Registration of a trademark shall grant the holder of the said trademark the right of sole use of the trademark and protect unauthorised use of such trademark. Trademark registration prevents unauthorised use of any mark which may distort the distinctive character of any registered trademark, utilization from the creditability of any registered trademark in an unfair way or any confusion with respect to the similar or identical goods and services.

There are many international agreements on trademark protection. The most important and fundamental agreements are the Paris Convention for the Protection of Industrial Property (1883), the Trademark Law Treaty (1994), and the TRIPS agreement (1994), the Singapore Treaty on the Law of Trademarks (2006). The system of international registration of marks is governed by the Madrid Agreement, concluded in 1891 which revised several times and the Protocol relating to that Agreement, which was concluded in 1989.

The Nice Agreement concerning the International Classification of Goods and Services for the Purpose of Registration of Marks (1957) establishes a classification of goods and services for the purposes of registering trademarks and service marks (the Nice Classification). “Council Regulation (EC) No 40/94 on the Community Trade Mark (shortly CTM) allows a trademark holder to obtain a single trademark registration. The link made on October 1, 2004 between the CTM and the Madrid Protocol provides trademark owners with greater flexibility for obtaining international trademark protection” (Current and Emerging Intellectual Property Issues for Business 2008, p.16). In Turkey, trademarks are protected with the Decree-Law No. 556 Pertaining to the Protection of Trademarks as from June 27, 1995.

2.2.3 Patent and Utility Model

"Patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem" (http://www.wipo.int 2009).

Patents represent a social contract between society as a whole and inventors. "An innovation prefers to keep secret is known as know-how or a trade secret. These are protected under different rules than patents" (Current and Emerging Intellectual Property Issues for Business 2008 p.11). On the other hand, "patent means a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent" (Current and Emerging Intellectual Property Issues for Business 2008, p.17).

"Patent, granted to the inventor for an invention, is one of the industrial property rights and it grants the right to prevent the production, utilisation or sale of the invention by others without permission of the inventor" (http://www.turkpatent.gov.tr 2009). Invention means "a solution to a specific problem in the field of technology and an invention may relate to a product or a process" (http://www.wipo.int 2009).

An invention should have three conditions if it is to be patentable. First of all, it must be new, it should never have been published or publicly used before; secondly it should be capable of industrial application which means it must be something that can be industrially manufactured or used; and thirdly it should be non-obvious, that is to say it should not be an invention that would have occurred to any skilled person in the relevant field.

An invention must be of practical use; it must show an element of novelty**,** that is, "some new characteristic which is not known in the body of existing knowledge in its technical field. This body of existing knowledge is called prior art**.** The invention must show an inventive step which could not be deduced by a person with average knowledge of the technical field" (http://www.wipo.int 2009).

Patent systems have been adopted by many countries over the years because they encourage the disclosure of information to the public, increasing the public's access to technical and scientific knowledge. They also provide an incentive and reward for innovation and investment in research and development and future inventions.

Shortly, “the purpose of protection of patent is to encourage the invention activities and the attaining technical, economic and social progresses by means of application such invention to the industrial sectors” (http://www.turkpatent.gov.tr 2009).

Utiliy model which its definition may vary from one country (where such protection is available) to another, an utility model is similar to a patent. “The requirements for acquiring a utility model are less stringent than for patents” (http://www.wipo.int 2009). In other words, the utility model is a system which provides protection of the novel and industrially applicable inventions. “Novelty for utility model means the invention should not be explicitly expressed in written form or in any other means or used in the manner to be accessed by the people in all around the world” (http://www.turkpatent.gov.tr 2009).

“While the requirement of novelty is always to be met, that of inventive step or non-obviousness may be much lower or absent altogether” (www.wipo.int 2009). “Inventive step which means the invention should not be obvious to a person skilled in the field of the invention. The invention should have the ability of practical application rather than theory which can be defined as industrial applicability” (http://www.turkpatent.gov.tr 2009). In practice, protection for utility models is often sought for innovations of a rather incremental character which may not meet the patentability criteria. So, utility model allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time.

The Paris Convention for the Protection of Industrial Property (1883), the Patent Cooperation Treaty (1970), the WTO Agreement on Trade Related Aspects of Intellectual Property Rights-TRIPS (1994), and the Patent Law Treaty (2000) are most important international agreements on patent protection. The European Patent Convention (1973) has provided a legal framework for European patents and also obtained legal rules according to which European patents are granted. A revised version of the Convention (EPC 2000) and Implementation Regulations

came into force on 13 December 2007. In Turkey, the current law is Decree-Law No. 551 Pertaining to the Protection of Patent Rights in force as from June 27, 1995.

2.2.4 Industrial Designs

"The industrial designs are any product or pieces of such products which accompany us in our daily lives and facilitates our lives; the patterns, ornaments which make our lives colourful and address our senses" (http://www.turkpatent.gov.tr 2009). "An industrial design is the ornamental or aesthetic aspect of an article and must appeal to the eye. The design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or color" (www.wipo.int 2009).

So, "the design can best be expressed as the entirety of the various features such as lines, colour, texture, shape, sound, elasticity, material or other characteristics perceived by the human senses of the appearance of the whole or part of a product or its ornamentation" (http://www.turkpatent.gov.tr 2009). In other words; design rights protect new and original visual aspects of a product or its packaging. "Requirements for protection typically borrow concepts from both patent law (novelty) and copyright law (originality). The design eligible for protection must display aesthetic features and must not be predated by a known overall identical or similar design" (Current and Emerging Intellectual Property Issues for Business 2008, p.17).

"The regime for design protection differs from one country to another, although harmonization has been achieved within the European Union, leading to the introduction of Community design rights. In most countries, an industrial design must be registered in order to be protected under industrial design law" (www.wipo.int 2009).

"In order to register the designs, they should also first be fit to the definition of product. The product in law has an extensive meaning which include any industrial or handicraft item, parts of a complex system, sets, compositions of items, packaging, get-ups, graphic symbols and typographic typefaces, excluding the computer programmes and semi-conductor product" (http://www.turkpatent.gov.tr 2009).

As a general rule, “to be registrable, the design must be novel or, as it is sometimes expressed original. Different countries have varying definitions of such terms. Generally, new means that no identical or very similar design is known to have existed before” (www.wipo.int 2009).

In Turkey, to be registrable, the design must be new and have individual character. “If the design has not been made available to the public in the world prior to the application date or the priority date, such a design shall be deemed to be “new”. “A design shall be have an individual character. This means the overall impression it creates on the informed user shall be significantly different from the overall impression created on the same user by any design” (http://www.turkpatent.gov.tr 2009).

Design protection is an area which has benefited lately from significant and promising harmonization. The Hague Agreement (1925), amended by the WIPO Geneva Act allows centralized design application filing for protection in the various countries party to the Agreement (which includes the EU). Locarno Agreement (1968) grants the classification of goods. The protection of industrial designs in Turkey is ensured by Decree-Law No. 554 Pertaining to the Protection of Industrial Designs the entered into force as from June 27, 1995.

2.2.5 Geographical Sign

“The geographical sign is an industrial property right describing a product originated from any region or attributable to any region due to its quality, reputation or other characteristics” (http://www.turkpatent.gov.tr 2009). “So, a geographical indication is a sign used on goods that have a specific geographical origin and possess qualities, reputation or characteristics that are essentially attributable to that place of origin. Most commonly, a geographical indication includes the name of the place of origin of the goods” (http://www.wipo.int 2009).

“Any product, fruit, stone, mine of any region may be different from those in the other regions or any carpet, pileless carpet, fabric, tile etc may have attained reputation for whatsoever is the reason” (http://www.turkpatent.gov.tr 2009). “Agricultural products typically have qualities that derive from their place of production and are influenced by specific local factors, such as climate and soil” (http://www.wipo.int 2009).

Consumers may prefer the products sold with the name of the region because of their trust in the name of the region. “The geographical signs are dimensioned in the manner that they are shaped, packaged, purchased and sold through the traditional knowledge and they are the signs of guarantee evidencing the quality of the product, traditional production method and geographical origin” (www.turkpatent.gov.tr 2009).

The geographical signs are evaluated in two different ways as “designation of origin” and “geographical indication” Designation of origin expresses a name of a product, the quality or characteristics of which is essentially or exclusively due to the inherent natural and human factors of a place of which the geographical boundaries. Geographical indication indicates the product may be manufactured in any other location provided that at least one of the product characteristics to which a geographical indication is linked to the defined boundary should be originated from the said region.

The Paris Convention for the Protection of Industrial Property (1883) applies to industrial property, including geographical indications. The Lisbon Agreement, concluded in 1958, was revised in Stockholm in 1967, and was amended in 1979. In Turkey, geographical signs are protected by Decree-Law No.555 Pertaining to the Protection of Geographical Signs in force as from June 27, 1995.

2.2.6 Integrated Circuit Topography (Layout-Design)

Another field in the protection of intellectual property is that of layout-designs (topographies) of integrated circuits. “The layout-designs of integrated circuits are creations of the human mind. They are usually the result of an enormous investment, both in terms of the time of highly qualified experts, and financially” (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004, p.118).

“The integrated circuits which are also known as chip, microchip, silicon chip, computer chip are the electronical circuits produced in nanometer dimensions. In general, they are made of semiconductive, conductive and insulated layers” (www.turkpatent.gov.tr 2009). The Turkish law numbered 5147 describes the integrated circuit as any interim or end product integrated within and /or above the material pieces of any or all of the interim connections comprising of

at least one active element. “Integrated circuits are utilized in a large range of products, including articles of everyday use, such as watches, television sets, washing machines, automobiles, etc., as well as sophisticated data processing equipment” (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004 p.119).

An integrated circuit means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A layout-design (topography) is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

“Article 35 of the TRIPS Agreement requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty (the Treaty on Intellectual Property in Respect of Integrated Circuits), negotiated under the auspices of WIPO in 1989” (www.wto.org 2009). In Turkey, integrated circuit topographies are protected by Law No.5147 Pertaining to the Protection of Integrated Circuit Topographies in force as from April 30, 2004.

2.2.7 New Plant Varieties

Plant variety protection, also called a "plant breeder's right" (shortly PBR), is a form of intellectual property right granted to the breeder of a new plant variety. “According to this right, certain acts concerning the exploitation of the protected variety require the prior authorization of the breeder. Plant variety protection is an independent *sui generis* form of protection, tailored to protect new plant varieties and has certain features in common with other intellectual property rights” (www.wipo.int 2009). Act No. 5042 Pertaining to the Protection of Breeder’s Rights on New Plant Varieties was entered into force January 15, 2004. Turkey became member of International Union for the Protection of New Varieties of Plants (in short UPOV) in 2007.

3. COPYRIGHT AND RELATED RIGHTS IN TURKEY AND EUROPEAN UNION

3.1 HISTORICAL BACKGROUND OF COPYRIGHT IN TURKEY AND EUROPEAN UNION

The origins of copyright are closely related to the development of printing. The growth of literacy created a large demand for printed book, and the protection of authors and publishers from unauthorized copying. The first copyright laws were enacted as a result. In 15th century some privileges was issued to publishers which could be defined as first step copyright protection. First privilege for a particular book was granted by the Republic of Venice in 1486. Thus, Venice began regularly granting privileges for particular books in 1492. After the process of granting privileges; the process of passing into law started.

As a legal concept, copyright origins in Britain were from a reaction to printers' monopolies at the beginning of the eighteenth century. This was the beginning of first modern copyright legislation. England's Statute of Anne (1709) is widely regarded as the first copyright law. The statute's full title was "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned." Monopolies in the publishing business were restricted by Statute of Anne. Furthermore, this statute recognized the author as the holder of the right to authorize copying.

From this beginning, copyright spread into other countries. This Act had a certain effect in the British Colonies; therefore it affected the United States. After that, with the affect French Revolution, two decrees of 1791 and 1793 established for the protection of authors of literary and artistic works. Around the same time, Germany, Swiss, Austria, Spain and other European countries started to adopt copyright acts.

In 1883, the Paris Convention for the Protection of Industrial Property created an international integration framework for the other types of intellectual property, patents, trademarks and industrial designs. Following the Paris Convention, in 1886, the Berne Convention for the Protection of Literary and Artistic Works, the first international agreement for protection of the rights of authors, was adopted. It came out from result of the need for a uniform system of

protection. “With Berne Convention, an international “Union” with legal entity has been founded for the first time in order to protect literary and artistic works, which intends to provide protection for the author not only in his mother country but also in the borders of other member states. Although common national arrangements are foreseen by virtue of the contract, minimum rights are granted to all authors. Member states may entitle authors to more advanced rights than specified on the contract” (http://en.wikipedia.org 2009).

The Berne Convention was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979.

In 1961, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was accepted by members of the World Intellectual Property Organization. The Rome Convention provided protection for performances of performers, phonograms of producers of phonograms and broadcasts of broadcasting organizations. In 1971, the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms was adopted. In 1974, the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted By Satellite was adopted to prevent the unauthorized distribution on or from its territory of any programme carrying signal transmitted by satellite.

Agreement on Trade-Related Aspects of Intellectual Property Rights with its more common name TRIPS was administered by the World Trade Organization (in shorthand WTO). It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (shortly GATT) in 1994. The TRIPS Agreement attempts to form common international rules for protection of intellectual property rights. Therefore, it establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. “The agreement covers five broad issues 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” (http://www.wto.org 2009).

The TRIPS Agreement is known as the most comprehensive international agreement on intellectual property. It was first multilateral trade-related intellectual property agreement. Many copyright provisions of the Berne Convention and many trademark and patent provisions of the Paris Convention were transferred to the TRIPS Agreement.

In 1996, the WIPO Copyright Treaty (in short WCT) and the WIPO Performances and Phonograms Treaty (in short WPPT) were adopted and they concerned about the protection of authors' rights in the digital world.

As is seen, the desire to constitute a harmonized and integrated copyright law in European Union goes back a long way. Therefore many important international conventions and directives have been adopted by European Union. It is undeniable that with the help of all these legal arrangements the member states and European Union covered a great distance in the manner of forming a harmonized EU copyright law. However, up to now, European Union has not achieved to make an European Union Copyright Law.

In Turkey, the first step to protect intellectual property rights came about with the implementation in 1857 of the Copyright Act and, then, in 1910 of the Copyright Law. The Copyright Law of 1910 was then replaced in 1952 with the Intellectual and Artistic Properties Law.

Legal framework of intellectual property in Turkey was derived from Law on Intellectual and Artistic Works numbered 5846 which was approved in December 5, 1951. In 1995, as part of Turkey's harmonization with the EU in advance of the customs union, the Turkish parliament approved new patent, trademark and copyright laws. In 1999, after confirmation of Turkey as an EU candidate served to further strengthen the EU's position as Turkey's primary trading partner, Turkey has been committed to harmanization with EU legislation.

Many amendments were approved unanimously by Turkey's Parliament in late February 2001 to have TRIPS-compatible intellectual property right regime. This law was modified by Law No.4630 in 2001 and Law No.5101 in 2004.

Turkey strives for becoming closer to international standards and requirements of WIPO about copyright in order to align its intellectual property right regime with WIPO standards.

That is why Turkey is a party to many international conventions such as the Berne Convention, of which Turkey is a signatory of the Paris text of 1971, TRIPS, the Rome Convention, the WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty. However, Turkey is not a party to the Universal Copyright Convention.

3.2 SUBJECT-MATTER OF COPYRIGHT AND RELATED RIGHTS

"Copyright is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films, and computer programs" (http://www.wipo.int 2009).

Copyright and related rights are rights which ensure that right-holders (e.g.,writers, composers, lyricists, performers or record producers) get a share of the money earned from the commercial use of their creations" (http://www.europa.eu 2009).

Keeling (p.268) explains this matter as:

> *The specific subject-matter of (copyright and related rights), as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties.*

The subject-matter of copyright protection includes every production in the literary, scientific and artistic domain, whatever the mode or form of expression. The base point is that copyright protects only the form of expression of ideas, not the ideas themselves.

The creativity protected by copyright is creativity in the choice and arrangement of words, musical notes, colors and shapes. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed.

Every intellectual creation is not protected by copyright, "copyright protects intellectual creations if they are expressed in an original form and copyright may subsist in a wide range of creative, intellectual, or artistic forms or works" (http://www.wipo.int 2009).

Work as a term is the subject matter of copyright protection. In Turkish law, according to Article 1/B of FSEK, work is defined as any intellectual or artistic product is protected by bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work. In other words; work means all kinds of artistic and intellectual products of science and literary (including all types of photographic works of a technical or scientific nature and also critical and scientific publications), music, artistry (including the photographic works having an aesthetical value) or cinematography (including audio-visual) which are carrying the mark of its author.

So, originality and expression in a particular form (which also can be called recorded in a material form) are accepted as two components that a work should carry for eligibility to copyright protection both in Turkey and EU. In Turkish doctrine, originality is named as subjective component of the work and expression in a particular form is named as objective component of the work. In this point, the meaning of originality in copyright protection should be examined. The originality of a work for copyright protection means that "the author must have exercised the requisite intellectual qualities (in the European intellectual creation) in producing the work. More specifically, in determining whether a work is original, copyright law focuses on the input that the author contributed to the resulting work" (Bentley&Sherman 2004, p.88).

In other words, a work is original if it is marked by the personality of its creator and is existed through author's own intellectual creation The long and short of it is that the relationship between an author or creator and the work is concerned with originality. There are no precise criteria to assess the originality of a creation. In practice, "one must analyse the creator's role in the creation process. If the form of the work is determined solely by external factors (technical requirements, instructions of a third party.), it is not the expression from the creator's personality and therefore not original" (http://www.iprhelpdesk.org 2009).

In Turkish Law, a work is original, if it bears the characteristic of its author. In Turkish doctrine according to some authors, originality forms subjective component of a work. The originality can be defined as the relationship between the creator and the work as well. The issue of originality is assessed and evaluated on a case-by-case basis within the context, and in relation to, the characteristics reflecting the personality of the author. Works eligible for copyright protection are, as a rule, all original intellectual creations.

Ateş (2003, p.58) states this as:

> *Hirsch argues that this very characteristic is due only if a creative intellectual product comes to existence. For a better understanding, here is a case law summary from Turkish Supreme Court. It is as follows: Our law defines the work as any intellectual and artistic production that bears the property of its owner and is included in any of scientific, literary, musical, fine arts and cinematic genres. Although it can be construed from Article 2/3 of the said law that any and all maps are included in the scope of work, whether or not it is a work that may benefit from legal protection depends on its evaluation with Article 1/B of the provision and its designation whether it bears the property of its owner." and this case law shows the importance of originality concept in Turkish law.*

"Protection is independent of the quality or the value attaching to the work (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004 p.42)". Originality does not mean whether the work is inventive, novel, or unique. "To be protected by copyright law, an author's works must originate from him; they must have their origin in the labor of the author. But it is not necessary, to qualify for copyright protection, that works should pass a test of imaginativeness, of inventiveness" (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004 p.42).

The second component to be protected by copyright law is the fixation of work in some material form. Berne Convention Article 2(2) states that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

Bentley&Sherman (2004,pp.87–88) says:

> *Artistic works, works of artistic craftsmanship, films, sound recordings, and published editions, expression ordinarily takes place in a recorded physical form. That is, it is impossible for someone to create, say, a sound recording or a film in a way in which it is not fixed.That is not the case, however, in relation to literary, dramatic, and musical works which can be expressed in ways in which they are not fixed or recorded: literary works can be spoken, musical works sung, and dramatic works performed….There is no requirement that broadcasts be fixed or embodied in any particular form...One question that has arisen in relation to the fixation requirement concerns works that change form,(such as databases or works of kinetic art). While works that continually change form may give rise to problems in other respects it seems that as long as a work is recorded it will be protected, even though it may subsequently change form.*

According to some authors in Turkish doctrine, expression of a work in a particular form to be protected by copyright forms objective component of the work. According to others; fixation of work in a material form has not been indicated as a component in Article 1/B of FSEK, because of that objective component is not a must for a work to be protected.

3.3 TYPES OF WORKS PROTECTED BY COPYRIGHT AND RELATED RIGHTS

In general, all copyright laws provide for the protection of the following types of work. One of them is literary works including novels, short stories, poems, dramatic works and any other writings, irrespective of their content (fiction or non-fiction), length, purpose (amusement, education, information, advertisement, propaganda, etc.), form (handwritten, typed, printed; book, pamphlet, single sheet, newspaper, magazine); whether published or unpublished; in most countries "oral works," that is, works not reduced to writing, are also protected by the copyright law; others are musical works including whether serious or light, songs, choruses, operas, musicals, operettas; if for instructions, whether for one instrument (solos), a few instruments (sonatas, chamber music, etc.), or many (bands, orchestras); artistic Works whether two-dimensional (drawings, paintings, etchings, lithographs, etc.) or three-dimensional (sculptures, architectural works), irrespective of content (representational or abstract) and destination ("pure" art, for advertisement, etc.); maps and technical drawings; photographic works irrespective of the subject matter (portraits, landscapes, current events, etc.) and the purpose for which they are made; cinematographic works; whether silent or with a soundtrack, and irrespective of their purpose (theatrical exhibition, television broadcasting, etc.), their genre (film dramas, documentaries, newsreels, etc.), length, method employed (filming "live," cartoons, etc.), or technical process used (pictures on transparent film, videotapes, DVDs, etc.), finally computer programs (either as a literary work or independently). "Many copyright laws protect also "works of applied art" such as artistic jewelry, lamps, wallpaper, furniture, etc.) and choreographic works. Some regard phonograph records, tapes and broadcasts also as Works" (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004 pp.42-43).

According to Article 2 of the Berne Convention, the expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic worksand entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving

and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

1. It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.
2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work
3. It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.
4. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.
5. The works mentioned in this Article shall enjoy protection in all countries of the Union.This protection shall operate for the benefit of the author and his successors in title.
6. Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.
7. The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Member countries of the Berne Union, and many other countries, provide protection under their copyright laws for the above mentioned categories of works. Other modes or forms of expression of works in the literary, scientific and artistic domain, not included in the list, are

also protected by many copyright laws. So, above-mentioned list is not an exhaustive list, it uses sample counting method.

WIPO (2009) illustrates this as:

> *Recent example of a type of work not listed in Article 2 of the Berne Convention, but which is clearly included in the notion of a creation "in the literary, scientific and artistic domain," is multimedia productions. While no acceptable legal definition has been developed, there is a consensus that the combination of sound, text and images in a digital format which is made accessible by a computer program, embodies an original expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright*
>
> *The other example is computer programs which are protected mostly as literary works or independently. Photographs are protected by author's rights if they are the intellectual creation of the author. Databases are protected as literary works if they are intellectual creations by reason of the selection or the arrangement of their contents otherwise; they have a sui generis protection.*

In Turkey, according to Article 2 of FSEK, literary and scientific works which covers works that are expressed by language and writing in any form, and computer programs expressed in any form together their preparatory designs, provided that the same leads to a computer program at the next stage; all kinds of dances, written choreographic works, pandomime and similar theatrical works without dialogue; all kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models, industrial, environmental and theatrical designs and projects, lacking in aesthetic quality; according to Article 3 of FSEK, works of music which cover all kind of worded and unworded compositions; according to Article 4 of FSEK, works of fine arts including oil paintings or water colors, all types of drawings, patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental in lay or similar methods, calligraphy, silk screen printing; sculptures, reliefs and carvings; architectural works; handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs; photographic works and slides; graphic works; cartoons; all kinds of personifications. The use of sketches, drawings, models, designs and similar works as industrial designs does not affect their status as intellectual and artistic works; according to Article 5 of FSEK, cinematographic works which are films of an artistic, scientific, educational or technical nature or films recording daily events or movies, that consist of a series of related moving images with or without sound and

which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices, are types of intellectual and artistic works protected under FSEK.

By way of addition, according to Article 6 of FSEK, intellectual and artistic products created by benefiting from another work but that are not independent of such work are called adaptations and of which the main types are listed as: Translations; converting a work like novel, story, poem or play, from said types to another type; the conversion of works of music, fine arts, science and literature into films or conversion of the same into a form suitable for taking into a film and broadcasting through radio and television; musical arrangements; conversion of works of fine arts from one form into other forms; the conversion of all works or works of the same kind of the owner of a work into a complete work; arrangement of selected and collected works in line with a certain purpose and within a special plan; making a work not published yet suitable for publication through scientific research and study (ordinary transcriptions and facsimiles which are not the product of a scientific research and study are excluded from this); description or commentary or abridgement of a work belonging to someone else; the adaptations bearing the characteristics of the adapter are considered works under this law; databases obtained by the selection and compilation of data and materials according to a specific purpose and a specific plan, which are in a form that can be read by a device or in any other form (This protection can not be extended to the data and materials contained in the database).

Adaptations bearing the characteristic of the person making the adaptation, which are created without prejudice to the rights of the author of the original work, shall be deemed works under this Law. In the Berne Convention the notion of adaptation is very important. Article 2(3) of the Berne Convention reads as follows: Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

Other types of works are not included in the list, are also protected by FSEK. So, the list in FSEK is not an exhaustive list, it also uses sample counting method. However, some creations are outside the scope of copyright. Some creations that do not meet copyright protection requirements such as ideas, information as itself, mathematical theories, and algorithms are

not protected by copyright. According to Article 2 of WIPO Copyright Treaty, copyright protection extends to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such.Political speeches, court decisions, and legal texts are also outside the scope of copyright.This has been confirmed by the Agreement on TRIPS Agreement as well as the WIPO Copyright Treaty.

In Turkish law, as per Article 2(4) of FSEK ideas and principles on which any element of a computer program is based, including those on which its interfaces are based, are not deemed works.

3.4 ECONOMIC RIGHTS

The owner of copyright in a protected work may use the work as he wishes, and may prevent others form using it without his authorization. "The rights granted to the owner of copyright in a protected work are normally exclusive rights to authorize a third party use the work, subject to the legally recognised rights and interests of others" (http://www.wipo.int 2009).

Copyright is divided into two kinds as economic rights and moral rights. As per Article 13 of FSEK, the economic and moral interests of authors in their intellectual and artistic works shall be protected. Simply; economic rights allow the rights owner to derive financial reward form the use of his works by others. "Moral rights allow the author to take certain actions to preserve the personal link between him and the work programs. The owner of moral and economic rights may be the same person. The owner of the property may assign the intellectual product to real persons or legal entities for economic use" (http://www.wipo.int 2009).

The rights give the copyright owner the opportunity to make commercial gain from the exploitation of his/her work are called economic rights. "Many creative works protected by copyright require mass distribution, communication and financial investment for their dissemination hence, creators often sell the rights to their works to individuals or companies best able to market the works in return for payment. These payments are often made dependent on the actual use of the work, and are then referred to as royalties" (http://www.wipo.int 2009).

The original creators of works protected by copyright, and their heirs, hold the exclusive right to use or authorize others to use the work on agreed terms. Under laws of many countries; copyright holders generally have the right to authorise or prohibit any of the following things in relation to their works copying the work in any way; issuing copies of the work to the public; renting or lending copies of the work to the public; performing, showing or playing the work in public; broadcasting the work or other communication to the public by electronic transmission; making an adaptation of the work, such as by translating a literary or dramatic work, transcribing a musical work and converting a computer program into a different computer language or code. Copyright is infringed when any of these acts are done without permission or authorization whether directly or indirectly and whether the whole or a substantial part of a work is used.

Berne Convention covers the right of translation (Article 8), the right of reproduction in any manner or form (Article 9), the right of public performance of dramatic, dramatico-musical and musical works (Article 11), the right of broadcasting and communication to the public by wire, by re-broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work (Article 11bis), the right of public recitation (Article 11ter), the right of adaptation (Article 12), the right of making cinematographic adaptation and reproduction of works, and the right of distribution of the works thus adapted and reproduced (Article 14) as economic rights.

Full definition of economic rights has not been made. Inside of this, the general cores of economic rights have been expressed. Some of general cores of economic rights have been stipulated in Article 18 of FSEK as authority to exercise economic rights belongs exclusively to the author.

Some others have been indicated in Article 20 of FSEK as the right to exploit, in any manner or form, a work that has not yet been made public belongs exclusively to the author. The exclusive right granted to the author to exploit a work that has been made public consists of the rights stipulated as economic rights by this Law. Economic rights are independent of one another. The disposal and exercise of one does not affect the other. The author of an adaptation may exercise the economic rights granted to him in such capacity, to the extent permitted by the author of the original work, except the cases where adaptation is free.

3.4.1 Right of Translation and Adaptation

In general, "the acts of translating or adapting a work protected by copyright also require the authorization of the owner of rights. Translation means the expression of a work in a language other than that of the original version" (http://www.wipo.int 2009). Adaptation is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture, or the modification of a work to make it suitable for different conditions of exploitation, e.g., by adapting an instructional textbook originally prepared for higher education into an instructional textbook intended for students at a lower level.

Bentley&Sherman (2004,p.147) explains this as:

> *Adaptation is defined differently for literary works, dramatic works, computer programs, databases, and musical works… In relation to literary or dramatic works, adaptation means a translation (such as a translation into French), or a dramatization of a non-dramatic work (such as where a novel is turned into a screenplay or ballet).The adaptation right in a literary or dramatic work will also be infringed where the stor yor action is conveyed wholly or mainly be menas of Picture(such as a comic strip).As regards dramatic works, adaptation means a version of a dramatic work that is converted into a non-dramatic work that(such as the conversion of a film into a novel).In relation to musical Works, an adaptation is defined as an arrangement or transcription of the work. Although an adaptation is only made when it is recorded in writing or otherwise, the public performance or broadcasting of an adaptation will infringe even if at that stage the adaptation has not been recorded in writing or otherwise… The adaptation right also applies to computer programs and databases. In relation to computer programs, an adaptation means an arrangement or altered version of the program or a translation of the program. In these circumstances, translation includes the conversion into or out of a computer language into a different computer language or code. In relation to databases, adaptation means an arrangement or altered version of the database or a translation of it.*

Translations and adaptations are works protected by copyright. Therefore, "in order to reproduce and publish a translation or adaptation, authorization must be obtained from both the owner of the copyright in the original work and of the owner of copyright in the translation or adaptation" (http://www.wipo.int 2009). Not only to make an adaptation, but also to reproduce an adaptation in any material form, issue copies of it to the public, perform it in public, or broadcast are restricted.

In Turkish law, according to Article 1/B of FSEK, adaption is an intellectual and artistic product bearing the characteristic of the adaptor, which is created by benefiting from another work but which is not independent of such work. Usually, it is not possible to draw a clear

line between an adaptation and a reproduction. In many cases the same act might be both reproduction and adaptation.

Article 6 of FSEK describes adaptations as intellectual and artistic products created by benefiting from another work but that are not independent of such work. The main types of adaptations are counted as: Translations; converting a work like novel, story, poem or play, from said types to another type; converting musical works, literary and scientific works or works of fine arts into films, or converting them into a form which is suitable for filming or for broadcasting by radio and television; musical arrangements and compositions; transforming works of fine arts from one form to another, making a collection of all or the same type of works of one author; making a collection of selected works according to a specific purpose and in accordance with a specific plan, making an unpublished work ready for publication as a result of scientific research and study (ordinary transcriptions and facsimiles that are not the result of scientific research and study are excluded); annotating, commenting or abridging the work of another person; adaptation, editing or any modification of a computer program; databases obtained by the selection and compilation of data and materials according to a specific purpose and a specific plan, which are in a form that can be read by a device or in any other form (This protection can not be extended to the data and materials contained in the database). Adaptations bearing the characteristic of the person making the adaptation, which are created without prejudice to the rights of the author of the original work, shall be deemed works according to Turkish law. An adaptation work should have the following components in order to benefit from legal protection.

Ateş (2003, p.73-74) notes adaptation as:

> *It must not be entirely independent from the original work: That is, it must be derivative from the original work. A new creation is essential by benefiting from an existing work. It must bear the idiosyncratic characteristics of the derivation individual. Adaptation which can also be called as derivative work must be included in the group of original work: This is a criterion accepted in principle. However, in derivative methods specified in paragraph 11 of Article 6 of FSEK, it does not escape attention that each of them has definitions in other forms and patterns that partake in certain basic types of work. In law, derivation is defined as "an original work's is converted to another form in its own category". Accordingly, if the resultant work can be included in either of the categories other that it actually belongs to, or if it is created based upon an intellectual property that is not recognized as a work under FSEK, they are not accepted as derivative works but an independent works. A piece of work that is produced in a different work category by having been inspired from a musical, final art or scientific and artistic work is recognized as an independent and original work. Furthermore, correlation between the derivative (adaptation work) and original works must be specified.*

3.4.2 Right of Reproduction

The first and most well-known right given to copyright owners is the right to copy the work. The right to copy the work is the oldest of the rights granted to owners of copyright. Simply, right of reproduction is a right that grants the creator of a copyright to prevent others form making copies of his works without his authorization. In other words; the right to control the act of reproduction is the legal basis for many forms of exploitation of protected works.

The right of authors, performers and phonogram producers to authorise or prohibit copying of their works and other protected material has been a longstanding feature of international instruments such as Rome Convention, Berne Convention, Geneva Phonograms Convention, TRIPS Agreement, WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. However, "the major achievement of the 1996 WIPO Treaties was to clarify and confirm the broad scope of the reproduction right particularly in its application to works and phonograms in the digital environment" (http://www.wipo.int 2009).

The right of reproduction has been mentioned in Article 9 of Berne Convention as authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention. "The right of reproduction is the right to authorize direct or indirect reproduction of the phonogram in any manner or formInfringement of reproduction right takes place whether the copy is permanent, transient, temporary, or incidental to some other use of the work" (www.wipo.int 2009).

"The Copyright Directive (officially the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights In the Information Society) which is enacted to implement the WIPO Copyright Treaty regarded by the academic community as a victory for copyright-owning interests (publishing, film, music and major software companies) over content users interests" (http://en.wikipedia.org 2009). The Copyright Directive distinguishes the reproduction right

from the right of communication to the public or making available to the public. According to Article 2 of Copyright Directive reproduction right is an exclusive right which provides to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in partfor authors, of their works, for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

In Turkish Law; the right of reproduction is a type of economic right and has been defined in Article 22 of FSEK as follows: The right to reproduce the original or copies of a work in any form or by any method, in whole or in part, directly or indirectly, temporarily or permanently belongs exclusively to the author. The making of a second copy of the original of the work or the recording of the work on all types of devices now known or to be developed in the future enabling the transmission or repetition of signs, sounds and images, all kinds of sound and music recordings as well as the application of plans, projects and sketches of architectural works are deemed reproduction. The same provision shall apply to molds with relief or perforation.

The right of reproduction also covers the acts of loading, displaying, running, transmitting and storing a computer program to the extent that such acts require the temporary reproduction of the computer program. So, reproduction right is an exclusive right which grants the author to reproduce his/her an original work or its copies in any form or method, either in part or in full, directly or indirectly, temporarily or permanently.

The author can reproduce his work in person, but he may also transfer reproduction right to another one. Reproduction right can be transferred in a limited quantity in order to prevent any possible taxable loss and to protect authorship rights. “The difference between reproduction and derivation is that, for the latter, another work is used to create an intellectual and artistic work that is relatively no independent from it, whereas for the first, a work is not created but an already existent work is repeated on a material means through duplicating techniques” (Ateş 2003, p.174).

3.4.3 Right of Distribution

"Exclusive right of the owner of copyright to distribute copies of the original work (book, illustration, photograph, record, software, etc.) to the public by sale, lease, or rental is, simply, called distribution right" (http://www.businessdictionary.com 2009).

Bentley&Sherman (2004,pp.137-138) explains this right as:

> *The distribution right is given in respect of the issuing of each and every copy (including the original)…Essentially the distribution right is a right to put tangible copies (which have not previously been put into circulation) into commercial circulation. Once copies are in circulation (at least where the first circulation was consensual), the right no longer operates. As the right of distribution does not include any subsequent distribution, copyright owners cannot control resale.*

Briefly, the right to authorize the making available to the public of the original and copies of the phonogram through sale or other transfer of ownership is called distribution right. According to Article 6 of WIPO Copyright Treaty, authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

According to WIPO (2009) comments:

> *Article 6(1) of the WIPO Copyright Treaty provides for authors to be afforded an exclusive right to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership, that is, an exclusive right of distribution. Under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly, and the TRIPS Agreement does not provide for a right of distribution. Article 6(2) does not oblige Contracting Parties to select any particular form of exhaustion (that is, national, regional or international exhaustion) or, in fact, to deal with the issue of exhaustion at all. Performers and phonogram producers are also granted similar exclusive rights of distribution with Articles 8 and 12 of the WPPT.*

In Turkish Law; right of distribuiton has been defined in article 23 of FSEK as the exclusive right to rent, lend, put up for sale or distribute in any other way, the original or copies of a work, belongs to the author. The author has the exclusive right to import copies of a work that have been reproduced abroad with his permission and to exploit such works by distribution. Copies that are reproduced abroad may not under any circumstances be imported without the permission of the author and/or the holder of the right of distribution who has the author's permission. Provided that the authorities of rental and public lending remain with the author, the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the rightholder shall not infringe the right of distribution granted to the author. The distribution of

a work or its copies by way of rental or lending, may not lead to a widespread copying of the work in a manner prejudicing the right of reproduction of the author. The rules and procedures regarding the application of this article shall be regulated with a by-law to be issued by the Ministry of Culture and Tourism.

Distribution, leasing or sale or any commercial use and exploitation of reproductions of the property or processed versions thereof solely belongs to the owner. In cases where reproductions produced overseas are brought into the country, the right to distribute and exploit the property is solely the right of the owner. The right to prevent the export of reproductions made without permission is the sole right of the owner.

Literally, distribution right is the power to put the original or copies of a work into circulation for commercial purposes or otherwise. Publishing and distribution are two different concepts in Turkish law.

Ateş (2003, pp.172-173-174) evaluates distribution rights as:

> *Distribution relates to the will of distributing the work and its copies in any manner, and to exercise economic power in this regard. Publishing, on the other hand, means the actual state that is related to disclosure of the said will, it further means the work's being offered to public that is, publicizing for the first time. In order to acquire an economic value from the work by means of distribution, duplicated copies of the work, rather than its original, are put into circulation by selling, leasing and lending. Distribution right and reproduction right are very close concepts. As a rule, a work can be relevant to dissemination only after having been reproduced. First sale of a work upon author's consent does not prejudice other tangible right upon that work, it does not call off author's right to "lease and public lending" within the scope of his publishing right.*

In Turkish Law, rental and lending rights have been regulated within the scope of distribution right. So, rental and lending rights are not hold a place in an independent article.

Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright In the Field of Intellectual Property, (hereinafter defined as the Directive 92/100/EEC) harmonises the provisions relating to rental and lending rights as well as on certain rights related to copyright. Directive of the European Parliament and of the Council of 2006/115/EC of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright In the Field of Intellectual Property (hereinafter defined as the Directive 2006/115/EC) was adopted as a codified version of Directive 92/100/EEC. Directive 2006/115/EC harmonises the legal situation regarding rental right,

lending right and certain related rights. “It asks the Member States to provide for the right to authorize or prohibit the rental and lending of originals and copies of copyright works. It determines who holds these rights and lays down certain procedures for exercising them” (http://europa.eu 2009).

The owner of copyright does have the right to control the rental and lending of the work. Rental right which is achieving increasingly wide recognition, is the right to authorize rental copies of cretain categories of works, such as musical works in sound recordings, audionvisual works, and computer programs. “The right of rental is the right to authorize the commercial rental to the public of the original and copies of the phonogram” (http://www.wipo.int 2009).

Bentley&Sherman (2004,pp.139-140) distinguishes rental and lending as:

> *Rental and lending both involve the making of the original or a copy of a work available for use on terms that it will or may be returned. The distinction between rental and lending is that the act of rental involves a commercial advantage, whereas lending does not. More specifically, rental is defined as making the work available 'for direct or indirect economic or commercial advantage. In contrast, lending occurs where there is no such advantage… Lending does not become a rental, at least as regards loans between establishments accessible to the public, where payment does not go beyond what is necessary to cover the operating costs of the establishment… In a similar vein, neither rental nor lending covers situations where a work is made available for the purposes of exhibition in public. As a result, the owner of a painting does not need to seek permission from the copyright owner before lending the work to an art gallery for public display.*

According to Directive 2006/115/EC, rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage and lending means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public. The holders of the rental right and lending right are the authors, including the principal directors of films, performing artists, phonogram producers or producers of films.

> *According to Directive 2006/115/EC where an author or performing artist has transferred or assigned his rental right concerning a phonogram or an original or copy of a film, he is to retain the right to obtain an equitable remuneration for the rental. This right cannot be waived, but its administration may be entrusted to collecting societies representing authors or performing artists.Member States may derogate from the exclusive lending right, provided that at least authors obtain remuneration for such lending. Member States are free to determine this remuneration taking account of their cultural promotion objectives. Where they derogate from the exclusive lending right as regards phonograms, films and computer programs, they are to introduce, at least for authors, remuneration. As regards*

rights related to copyright, Member States shall provide for performing artists, producers of phonograms and films, and broadcasting organizations exclusive rights of fixation, reproduction and distribution. Rental, lending, distribution and reproduction rights are presumed to have been assigned in certain circumstances (http://europa.eu 2009).

3.4.4 Right of Performance

"The right of public performance covers the performance of works at a place, where the public or a substantial number of persons can be present" (http://www.juridicum.su.se 2009). It also includes performances by means of recordings. Any mode of visual or acoustic presentation of a work, such as by means of a sound recording, film, or broadcast is called as performance.

According to Article of 11 of Berne Convention; authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing the public performance of their works, including such public performance by any means or process; any communication to the public of the performance of their works. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

The denotation of performance is the act of performing a ceremony, play, piece of music, etc. and a musical, dramatic, or other entertainment presented before an audience.

The public performance right allows the copyright holder to control the public performance of certain copyrighted works. Under the public performance right, a copyright holder is allowed to control when the work is performed "publicly." A performance is considered "public" when the work is performed in a "place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered (http: www.bitlaw.com *2009).*

Performances in places which are open to the public should be authorized by the author or other owner of copyright. For an infringement of performance right, the performance must be carried on in public. Performances in places which are open to the public are performances in public. So, there is a fundamental distinction between the general public performance and a group of people who share a private or domestic link. The performance of a film on home before friends and family is not public performance and it is not under a ban. Other criteria for discernment of prohibited act under performance right is realization of profit from a performance without its authors authorization. If a person paid a fee to perform a ceremony, play, piece of music the performance was in public.

In Turkish Law, "distribution means offering the work to public in a fixed medium, whereas performance means offering the work to public in a way that directly addresses human perception. It is offering of the work in an intangible format" (Ateş 2003, pp.177-178).

Article 24 of FSEK defines right of performance as the right to exploit a work by performing it in such ways as reciting, playing, acting or displaying it on public premises either directly or by means of devices enabling the transmission of signs, sounds or images which belongs exclusively to the author. The right to transmit the performance, from the premises where the performance to the public took place to any other location by means of a technical device also belongs to the author. The right of performance may not be exercised by other natural or legal persons without the written permission of the author, or if the author is a member of a collecting society, the written permission given by such collecting society in accordance with the authorities set out in the authorization certificate. However, the provisions of articles 33 and 43 are reserved. So, there are two kinds of performances: First one is direct performance and second one is indirect performance.
Ateş (2003, p.180) explains these as:

> *The direct performance is to read, play, perform or display a work in a public place directly (with no intermediary mechanical means). Indirect performance refers to a person who executes a work in public places by reading, playing, performing, displaying; who designates it by using mechanical means that are used for transmitting signals, sounds or images; and who offers them to audiences and spectators in public places subsequently.*

3.4.5 The Right to Communicate the Work the Public

In many countries, authors have the exclusive right of authorizing public performance, broadcasting and communication to the public of their works. In Berne Convention, the exclusive right of the author or other owner of rights to authorize broadcasting is granted to authors. The exclusive right to communicate a work to the public arises with respect to literary, dramatic, musical, and artistic works, sound recordings, films, and broadcasts.

Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission which governs the application of copyright and related rights to satellite and cable television in the European Union. According to Article 2 of Directive 93/83/EEC an author has the exclusive right to authorise or to prohibit the broadcasting of his or her works by satellite. Furthermore; as per Article of 3(2) the said Directive, this right may

only be subject to a compulsory licensing scheme when the satellite broadcast is simultaneous with a terrestrial broadcast .

> *Satellite broadcasting is assimilated to terrestrial broadcasting for the purposes of related rights (rights of performers, phonogram producers and broadcasting organisations) (Art. 4): the protection of these rights is governed by Directive 92/100/EEC which creates a "rental and lending right" as a part of copyright protection, and sets out minimum standards of protection for the related rights of performers,phonogram and film producers and broadcasting organisation.The Directive also provides for mediation in disputes between cable operators and collecting societies and for measures to prevent abuse of monopoly powers (http://en.wikipedia.org 2009).*

The right to communicate the work the public which was recently introduced to implement the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. “According to said Directive, it should harmonise further the author's right of communication to the public” (http://eur-lex.europa.eu 2009).

“This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.This right should not cover any other acts” (http://eur-lex.europa.eu 2009). For example, converting sounds into electronic signals and broadcasting them is a communication to the public, but not a public performance, so that they can be received and heard on a radio. However, the sounds can be heard in a public place by operating the radio is a public performance, rather than communication to the public.

New questions on the rights of broadcasting, communication to the public and public performance have arisen as a result of technological developments, telecommunications and computer technology. Right of broadcasting which is a very important part of right to communicate the work the public will be evaluated in the following section: Broadcasting is the distribution of audio and/or video signals which transmit programs to an audience in its dictionary meaning.

Bentley&Sherman (2004 p.145) unfolds this as:

> *In legal field, the right of broadcasting covers the transmission for public recepition of sounds, or of images and sounds, by wireless means, whether by radio, television, or satellite only by persons who when a work is communicated to th public, a signal is*

distributed by wire or wireless means, which can be received possess the equipment necessary to decode the signal. Cable transmission is an example of communication to the public

The right of "broadcasting" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is "communicated to the public," a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of "communication to the public" is cable transmission (http://www.wipo.int 2009)

Because of the potential transnational nature of broadcasting, it has long been acknowledged that it is important to ascertain where a particular broadcast takes place. A person wishing to make a broadcast needs to obtain consents from copyright holders of works included in the broadcast, but only as regards those copyrights that are operative in the territory in which the broadcast occurs… On the one hand, it could be said that the broadcast occurs from the place where the signal was sent (the emission or introduction theory) Alternatively, it might be thought that the broadcast occurs in the places where it is received (the reception or communication theory).

Accordingly, section 6 of the 1988 Act defines the place of wireless broadcasting as the place where the broadcaster introduces programme-carrying signals into an uninterrupted chain of communication, including any satellite relay.

The second element of the communication right is the exclusive right to make the work "'available to the public" by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by the". A recital to the Information Society Directive explains that the right will cover interactive on-demand transmissions," such as "video-on-demand" services and so-called "celestial jokeboxes".But the new right should also be assumed to cover most internet transmissions (other than broadcasts) where a person places a work on a web site because members of the public can access the work from a place (their terminal, whether it be in their office, home, or on their mobile telephone) and "at a time"chosen by them.

In Article 11 of Berne Convention, authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing the public performance of their works, including such public performance by any means or process; any communication to the public of the performance of their works. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

According to Article 11 *bis* of Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; the public

communication by loudspeaker or any other analogous instrument transmitting,by signs, sounds or images, the broadcast of the work.

According to Article 11 ter of Berne Convention, authors of literary works shall enjoy the exclusive right of authorizing the public recitation of their works, including such public recitation by any means or process; any communication to the public of the recitation of their works. Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof. "Most national laws implement this right as a part of the right of communication to the public, although some do so as part of the right of distribution" (http://www.wipo.int 2009).

According to Article 25 of FSEK, the author shall have the exclusive right to communicate the original of a work or its copies to public by way of broadcasting by organizations that broadcast by wire or wireless means such as radio and television, satellite or cable, or by devices enabling the transmission of signs, sounds and/or images including digital transmission, or by way of re-broadcasting by other broadcasters that obtain the work from such broadcasts.

The author has the right to permit or prohibit the sale or other distribution or supply of the work or its reproduced copies to the public by wire or wireless devices and the communication of the work to the public by providing access to it at a time and place chosen by natural persons. The distribution and supply of works by means of communication to the public as regulated under this article, shall not prejudice the author's right of distribution. The right to retransmit property that has been transmitted to the public through symbolic, aural, and visual media or, representatively, using speakers or other means belongs solely to the property owner. FSEK has achieved to be in line with the arrangements of Article 25, Article 11, repeating Article 11 of Berne Convention, Article 9 of TRIPS text and Article 11 of WIPO Copyright Agreement.

3.4.6 Right to Have Payment of a Share of Sale Proceeds of Works of Fine Arts

"The right, for the benefit of the author of an original work of art, to receive a percentage of the price obtained for any resale, made by professionals from the art market, of this work (auction houses, galleries or any other art market) is called as resale right" (http://europa.eu

2009). The resale royalty right has orginated from French law which is sometime known by its French name droit de suite.

> *The central theme of resale right is to protect the author in situation, for example, an artist who originally sold a painting for a little money might thus receive considerable royalties many years later when the work is resold several times for several millions, sharing in the increased value of the work and enjoying an ongoing incentive for creation (http://www. ipo.gov.uk 2009).*

Article 14ter of the Berne Convention which explains right to an interest in resales is as follows: The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed. The procedure for collection and the amounts shall be matters for determination by national legislation.

According to Berne Convention, "resale right is not a minimum right that must be reflected in the national legislation of all signatories to the international agreement but instead is one that can be linked to reciprocity in national regimes"(http://www.caslon.com 2009). "According to Berne Convention the author of an original work of art has the resale right, however Member States do not apply it by the reason of it is not binding. Therefore; Member States' legislation needs to be harmonised at Community level by introducing a compulsory resale right for the benefit of the author" (http://www.europa.eu 2009).

"Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art (hereinafter defined as the Directive 2001/84/EC) came into force for generalising and harmonising resale rights in the internal European market" (http://www.europa.eu 2009).

> *According to Directive 2001/84/EC, the resale right applies to works of graphic art or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided that:they are made entirely by the artist; or they are copies considered to be original works of art according to professional usage (limited productions or signed works, for example). The resale right does not apply to original manuscripts of writers or composers.*

The resale right is normally payable by the seller. Nevertheless, Member States may pass legislation permitting a professional other than the seller to be the sole person responsible for paying the resale right or to share this responsibility with the seller.

Member States may also determine that the resale right does not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10 000.

The term of protection is provided for by Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights and lasts for a period of 70 years after the death of the author.

To enable them to adapt to these new requirements, Member States which do not apply the resale right on the date on which the Directive enters into force (13 October 2001) are not required, up until 1 January 2010 at the latest, to apply the resale right for the benefit of those entitled under the artist after his or her death. This period can be extended for a further two years if appropriate justification is presented.

Member States are obliged to set a minimum sale price as of which sales will be subject to the resale right. This minimum sale price may not exceed EUR 3000. Artists receive royalties calculated as a percentage of the sale price of their works.The sale price is divided into five portions and the rate of the royalty ranges from 4% to 0.25%, depending on the portion. However, the total amount of the royalty may not exceed EUR 12 500 (http://www.europa.eu 2009).

Shortly, "by resale right it is attempted to equalise the copyright status of visual artists with that of other authors by enabling artist to share in the appreciation in value of their works when the works are sold after the initial sale" (http://www.cinoa.org 2009).

"Resale right aims to provide visual artists with a share of revenue from sales of their work after initial sale of that work to a dealer or other buyer. It has been criticised as an inappropriate or ineffective tax. It has also been characterised as a measure of justice for creators and as an extension of intellectual property" (http://caslon.com.au 2009).

Directive 2001/84/EC grants "right to obtain information in the context of resale right which means for a period of three years after the resale, the persons entitled to receive royalties have the right to demand of any art market professional any information that may be necessary to secure payment of royalties from the resale" (http://www.europa.eu 2009).

In Turkish law; resale right shows a full generalization and harmonization with EU Law. Because of providing harmonization of FSEK to Directive 2001/84/EC, Article 45 of FSEK had been amended in 2004.

In Turkish law; “resale right entitles the author for any resale of the original works or accepted to be original works in the term of protection subsequent to the first sale of the work byhim/her which provides economic benefits to him/her” (www.abgs.gov.tr 2009).

Resale right takes place in Article 45 of FSEK as each time the originals of works of fine arts, excluding architectural works, mentioned in Article 4 of this Law or their copies which are deemed to be original works due to the fact that they were produced by the author in limited numbers or under the supervision of the author and with his permission and were signed by the author or marked by him in another way, and the originals of works listed in subparagraph one of article 2 and article 3 that are handwritten by authors and composers change hands, within the protection period, by sale at an exhibition or auction or at a store that sells such goods or in other ways subsequent to the sale by the author or his heirs, if there is a substantial disparity between such sale price and the previous sale price, at each sale, the natural or legal person who effects the sale is obliged to pay an appropriate share of the price difference to the author, or, if the author is deceased, to his legal heirs up to (and including) the second degree and to his spouse and if such persons do not exist, to the collecting society of the relevant field, in accordance with the rules and procedures to be laid down by a decree to be issued by the Council of Ministers. The decree shall stipulate; a share tariff to be determined in proportion to the amount of the price difference, not to exceed 10% of such difference; that sales whose proceeds do not exceed the amount laid down in the decree shall be exempt from the payment of a share; which branch of the collecting society is to be deemed the relevant one for each type of work The owner of the enterprise where the sale took place shall be jointly and severally liable with the seller. In the event of an executionary sale, the share shall be paid only after all other debts have been fully paid. The prescription period for the obligation to pay a share is five years from the sale that gives rise to such obligation.

Sale within the meaning of Article 45 of FSEK contains the sales at an exhibition or an auction or in a shop engaged in the sale of such items or by other means. “Works of fine arts and their copies produced in limited numbers by the author himself or by other persons under the author’s permission and considered as original works for having been signed or marked otherwise by the author (excluding architectural works); scientific and literary works’ original manuscripts of an author” (www.abgs.gov.tr 2009).

There must be a considerable disproportionality between the first and the following price. The author's royalty on resale will be paid by the seller (natural or legal person). The owner of the enterprise where the sale takes place is jointly liable with the seller. The royalty will be paid to the author of work, author's heirs of first and second degree and the author's spouse after his/her death, the collecting society in the absence of spouse and legal heirs of first and second degree.

The provisions of the Law No 5846 shall apply irrespective of the nationality of the author, to all works communicated to the public for the first time in Turkey and to all works existing in Turkey but not yet communicated to the public.

To all works of foreigners which have not yet been communicated to the public or which have been communicated to the public outside Turkey, subject to the relevant provisions of the international conventions which Turkey is a party (Article 88 of FSEK)

Authors can manage their resale right either on an individual basis or through relevant collecting societies. FSEK envisages the adoption of secondary legislation concerning the threshold amount exempted from royalty and calculation of royalty (which should not exceed 10 % of the difference between the first and the following prices) to be paid to the rightholder. The secondary legislation has not been adopted to date (www.abgs.gov.tr 2009).

3.5 MORAL RIGHTS

Right which protects creator's personality which is expressed through the work is called moral rights. Moral rights seek at least to protect the integrity of a work and the author's connection with it. "These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights" (http://www.wipo.int 2009).

It is worth noting that moral rights are only accorded to human authors; even if someone else is the owner of economic rights in a work (for example, a film producer or a publisher), only the individual creator has moral interests at stake).

Simply, "moral rights allow the author to take certain actions to preserve the personal link between himself and the work" (http://www.wipo.int 2009). "Moral rights protect an author's non-pecuniary or non-economic interests" (Bentley&Sherman 2004, p.231). "Moral rights,as that term is used in copyright law, are not concerned with morals and are not a form of censorship on the basis of indecency or other morality" (http://www.caslon.com.au 2009).

The scope of that right varies from one country to another over content and scope of moral rights. However, in many countries, mostly, moral rights are paternity right (which enables

the author to have his name on the work) and the integrity right (which enables the author to refuse any modification to the work or its context).

Cornish (1996, p.387) refers to the issue as:

> *Each law within the fold of authors rights countries differs over the precise content and scope of moral rights, but they are likely to include: a right to decide upon first publication or other release; a right to be named as author; a right to object to modifications of the work and to its presentation in derogatory circumstances. There may also be provision for an author to insist on completion of the original where that depends on the execution of others, to withdraw works of which he no longer approves and to object to destruction or removal of the original.*

Moral rights aim to give creators exclusive rights on their creations. Moral right expresses a right group which is connected with personality of author. Article 6 bis of the Berne Convention states that independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where the protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death cease to be maintained.

In other words, in Berne Convention Article 6 bis, it has been noted that authors have some rights which are apart from economic rights, but these rights have no special name. These said second group rights with the exception of economic rights and are not named, generally called as moral rights. Moral rights are enshrined the centre point of the global copyright regime.

Bentley&Sherman (2004, p.232**)** states as:

> *Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to distortation, mutilation or modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.*

Independency from the physical object is one of the characteristic feature of moral rights. This means, the artist for example retains moral rights even though she has sold the creation. Moral rights still survive, even though economic rights of the author expire for work. Owners of holders of a work are allowed to make any disposition of the work provided that they do not debase author's credit and prestige. So, they are inalienable, they cannot be sold or waived. Moral rights cannot be transferred.

In Turkish law, the idea of protection of work against unjust attacks by any third parties as well as the individuality of the author are the reasons of moral rights' protection. A publicized work is now intellectual asset of all humanity; however author reserves a set of rights upon publicized and disclosed work. Accordingly, it is among the absolute rights of the author to be known and recognized as the author of the work and to demand that no damages incurred on the work.

3.5.1 Authority to Disclose the Work to the Public

Article 14 of FSEK which has authority to disclose the work to the public has been stated, is as following: The author shall exclusively determine whether or not his work shall be disclosed to the public and the time and manner of its publishing. Only the author may give information on the contents of a work of which the whole or a substantial part has not yet been made public, or whose main features have not yet been introduced to the public in any way. The author may prohibit, even if he has given written approval to others, the promotion to the public or the publishing of both the work and its adaptation, where the manner of disclosing to the public or publishing of the work is of such a nature as would damage the honor and reputation of the author. Waiving such power of prohibition by contract shall be null and void. The other party's right to compensation is reserved.

According to Article 7 of FSEK; if a work disclosed to the public with the consent of the rightholder shall be deemed to have been made public and a work shall be deemed to have been published, if copies obtained by reproduction of the original are supplied to the public by way of selling, distributing or otherwise putting into commercial circulation with the consent of the rightholder. This authority relates to the fact that intellectual and artistic work is taken out of the scope of author's privacy and is rendered visible, readable, treatable, listenable, playable and performable or tangible to any third persons. Disclosure of the work is referable

once it is taken out of the author's privacy and is rendered perceptible to any third person's sense organs. It is sort of birth of the work.

Naturally, the right of disclosure of work which have not been made public exclusively belongs to its author. Furthermore, the author may prohibit, even if he has given written approval to others, the promotion to the public or the publishing of both the work and its adaptation, where the manner of disclosing to the public or publishing of the work is of such a nature as would damage the honor and reputation of the author. Waiving such power of prohibition by contract shall be null and void.

In other words, moral rights can not be transferred from author to another person, they are untrasferrable. It can not be waived from moral rights beforehand, otherwise, waiving such power of prohibition by contract shall be null and void. Collecting societies can not have power regarding the prosecution of moral rights. Legal restrictions imposed on the author's property rights become a current issue as the work is disclosed. Provided that a transferred tangible right is exercised de facto in the event that the work is offered to public, then it becomes compulsory to transfer the right to offer the work to public.

According to Article 14/2 of FSEK, providing information about content of the work can only be realized before the work is offered to public. The offer of a work to public without a name, does not entitle any third persons to a free disposition upon the work. The author has the exclusive authority to decide whether the work shall be disclosed to the public or published with or without the name of the author or under pseudonym.

The author has an absolute right on these matters. In fact, even it is not an advisable behavour to disclose his work to the public without putting his name, with this legal provision a wholly moral right protection is provided to author.

Ateş (2003, p.140) expresses this as:

> *Even in the absence of specific statement that this power has long been transferred, it is essential to accept that those who are entitled to offer the work to the public have the power to provide information about content of the work because the one who has major power to exercise has also minor power. Knowing about the person who creates a work is akin to the arbitrariness of knowing about the parents of a child*

3.5.2 The Authority to Designate the Name

The right to be identified as author of a work, alias the right of paternity or the right of attribution, provides the creators of certain types of works with the right to be identified as the author of those works.

In other words; the right of the author of a work to be identified as such whenever the work is used in one of the ways corresponding to the exercise of rights under copyright law is called right of attribution. This means, it allows an author to prevent misattribution of a work, and to require that the authorship of the work not be disclosed (i.e. remain anonymous).

"Right of attribution is a guarantee to an author of fine arts or exhibition photographs the right to claim or disclaim his authorship in the work. In some legal systems, it may include an author's limited rights to prevent distortion, mutilation, or modification of a work" (http://www.conservapedia.com 2009).

The right to be named as author of a work carries with it a number of symbolic, economic, and cultural consequences such as facilitation the management of intellectual, the channelling of royalties, the interpretation of the work, the celebration, reward, and sustainment of authorial talent or genius, and the construction of the individual as the creator of an intellectual working. Assertion is a necessary preliminary to enjoyment of the right to be named. Assertion may have been necessary in order initially to secure the enactment of this moral right.

Bentley&Sherman (2004 pp.236-237-238) elaborate this as:

> *The right of attribution does not arise until it has been asserted... The imposition of the article 6 bis merely requires members of the Union to confer on authors the right to claim authorship. However, it has been suggested that such an interpretation is unsustainable given that article 5(2) of the Berne Convention requires that an author's enjoyment and exercise of these rights shall not be subject to any formality." As the TRIPS agreement does not require that Article 6 bis of Berne be implemented, the merits of these arguments are unlikely to be tested before the WTO.*
>
> *In general, the right can be asserted in one of two ways. First, when copyright in a work is assingned, the author or director includes a statement that asserts their right to be identified. Second, the right may be asserted by an instrument in writing signed by the author or director. The form of assertion has an important impact on the extent to which third parties are bound to comply with the right… The identification of the author must be in accordance with the author's wishes or, if these wishes are not known, in a form that is reasonable. The identification must also be clear and reasonably prominent. The name of author should appear in a manner which is likely to bring their identity to the*

notice of a person acquiring a copy of the work. If in asserting the right of attribution, the author specifies that a pseudonym, initials or some other form of identification such as a symbol be used, then that form of identification should be adopted." Otherwise any reasonable form of identification may be used… Songwriters are treated slightly differently. The author of the music or lyrics of a song has the right to be named on commercial publication of copies of the song such as the issue of songbooks, sound recordings or films containing a recording of the song. However, the right of attribution given to the author of a song does not extend to circumstances where the song is performed in public or broadcast… The author of a work of architecture has the right to be identified on the building as constructed. If a series of buildings are made, however, the architect only needs to be identified on the first building to be constructed.

The right of attribution provides authors which grants its author the right to be named upon works which they have created, also provides the author to object to false attribution which means not to be named on works which they have not created. The right to object to false attribution applies to persons wrongly named as the authors of literary, dramatic, musical, and artistic works and as the directors of films.

In Turkish law; because the work is an intellectual or artistic product bearing the characteristic of its author, it should disclose the work to the public with the person's name creating the work. The central theme of this provision is to present the author of work to public. This authority also includes the adjudication of whether the work shall be disclosed to the public or published with or without the name of the author or under a pseudonym.

According to Article 15 of Berne Convention, in order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner.

As per Article 15 of FSEK, the real author of a work may ask the court to establish his rights, if the creator of the work is disputed or if another person claims to be the author of the work. This right in FSEK is a reflection of the right to object to false attribuiton mentioned in article 15 of Berne Convention.

The authority to decide whether the work shall be disclosed to the public or published with or without the name of the author or under a pseudonym is exclusive right of author with the inclusion of the name or mark of the original author must be shown in the manner which is agreed upon or is customary, on copies of a work of fine arts created by reproduction and on

the original and copies of an adaptation, and it must be clearly depicted that the work is a copy or an adaptation. These are the main principals of the authority to designate the name.

Article 15 of FSEK which says that for architectural constructions that have the quality of a work, the name of the author shall be inscribed in an indelible way with material considered suitable by the author on a visible part of the work, upon written request.

3.5.3 Prohibition of Modification

The work is a whole with its form and content and without dispute a least modification may lead the work to lose its qualifications as the work. It is clear that modification on the work means changing its form and content more or less. So, after a modification; the original work changes and wraps to another work. Additionally, a modification on a work can damage author's prestige and credit. That is why no modification on the work is allowed to damage author's credit and prestige whether it depends on the author's special permission or not. The desire to protect the reputation of authors and author's personality reflected to work were also a factor used to support the right.

The right of integrity is the right to object to derogatory treatment of a work, or any part of it. In some cases, this carries with it the corollary that the artist feels some degree of responsibility for the work. The right of integrity of authorship is the right of an author not to have his or her work subjected to derogatory treatment. Derogatory treatment would involve doing anything in relation to a work that was prejudicial to the author's honour or reputation, including mutilating or materially distorting or altering a work. It is a right which draws upon Article *6bis* of the Berne Convention, objection may be raised to derogatory treatment of the work, which requires demonstration that the work is subject to addition, deletion, alteration or adaptation;and that this amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.

In Turkish law; this right has been placed in Article 16 of FSEK, goes under the name of prohibition of modification as following: No abbreviations, additions or other modifications may be made to a work or to the name of its author without his consent. A person who adapts, discloses to the public, reproduces, publishes, performs or otherwise distributes a work in any manner under the permission of the law or the author may make modifications that are

deemed indispensable due to the technique of adaptation, reproduction, performance or publication, without special permission by the author. The author may prohibit all modifications, which prejudice his honour and reputation or damage the nature and characteristics of the work, even if he has given written and unconditional permission. Waiving the power of prohibition shall be null and void even if agreed by contract.

The scope of this right is intellectual and artistic works excluding architectural work. Not allowing any modifications on architectural works is contrary to the intended purpose of creation thereof because, unlike other works, architectural works are used to satisfy a certain requirement. In this case, any modification on architectural work must be in line with objective good faith principle.

Ateş (2003, pp.145-146) explains this as:

> *The work is a whole with its form and content. A least modification may lead the work to lose its qualifications as the work. Modification on the work means changing its form and content more or less. No modification on the work is allowed to damage author's credit and prestige whether it depends on the author's special permission or not. Not allowing any modifications on architectural works is contrary to the intended purpose of creation thereof because, unlike other works, architectural works are used to satisfy a certain requirement. In this case, any modification on architectural work must be in line with objective good faith principle. One should comprehend the arrangement in law as relevant to fine art works, excluding architectural works.*

3.5.4 Right of Access to Original Work

Article 17 of FSEK adapts author's has right of access to her/his original work. The wording of said article, entitled rights of the author against persons who own or possess a work as following: Where necessary the author may, provided that the conditions for protection are fulfilled, demand the owner or possessor of the original to temporarily avail him of the original of works of fine arts listed in the first and second subparagraphs of article 4 and works that are listed in the first subparagraph of article 2 and in article 3, provided that the latter are handwritten by authors or composers. Persons who trade the work shall disclose such right of the author in auction or sale catalogues or related documents to buyers or acquirers of the work. The owner of the original of a work may dispose of it according to the terms of the contract he has concluded with the author. However, he may not damage or destroy the work or prejudice the rights of the author. If the work exists in a single original

form, the author may request the work for use in retrospective works and exhibitions covering all of his working periods, subject to conditions of protection and to be returned.

If only, works which are original works of its author and handwritten by its athors or composers come within the scope of the said article. As well, this article is geared to article 45 of FSEK headed payment of a share of sale proceeds of works of fine arts. The amendment made on FSEK in 2001, aims to align article 17 with article 45.

The noteworthy point of this article is that the author may demand the owner or possessor of the original to temporarily avail him of the original of above-mentioned works. So, a permanent avail is not possible. In like manner, the author should fulfill the conditions for protection. As stated in the said article, where necessary the author may invoke his right to access to original work. However, the necessary circumstances, dispatching the author to use this right, are not depicted in the article by law makers. The central pillar of this article is that a work comes to the ownership or possession of a third person other than the author does not prejudice author's rights. There is no arrangement that can be qualified as right of access to original work in Berne Convention.

3.6 OTHER RIGHTS

Rights and powers, that are regulated within scope of the law and essentially not identified as economic or moral rights in the doctrine, despite having economic and moral traits, and also neighbouring rights (related rights) are studied here and classified under the title of other rights.

3.6.1 Right of Rescission

It is natural that owner of the work has some economic and moral expectations as he transfer his rights in the work. The one who takes over the economic right may not adhere to the agreement, may choose not to ever exercise the right or power to use, may misuse it, may not use within appropriate time, or use it in a way detrimental to moral rights of the author. For this reason, FSEK has granted right of rescission to owner of the work which draws upon Article 58 of FSEK.

Article 58 of FSEK is as following: If the acquirer of an economic right or a license

exercises his rights and authorities insufficiently within the agreed period or, where no period has been determined, within a reasonable period of time and if thereby the author's interests are significantly violated, the author may rescind the contract. The author desiring to exercise the right of rescission shall be obliged to grant the other party, upon notifying him by a notary public, a period of time adequate to sufficiently exercise the rights in the contract. The grant of such a period shall not be necessary, if it is impossible for the other party to exercise such right or, if he refuses to exercise it or, if the grant of such period would significantly jeopardize the author's interests. The notice issued by the notary public shall give effect to the rescission of the contract, if the expiration date for the granted period exceeds inconclusively or, if it is not necessary to grant such a period. An action for objection against the rescission of the contract shall not be permitted after four weeks from the date of the notice issued by the notary public. If the acquirer was not at fault for failure to exercise the economic rights, or greater fault may be attributed to the author, the acquirer may claim compensation in cases where equity requires. The right of rescission may not be waived in advance and limitations precluding its exercise for more than two years shall be null and void.

As per Article 58 of FSEK, "owner of the work is accorded the right of rescission under certain conditions" (Öztan 2008, p.581). These three conditions are as follows (FSEK, Article 58/I): "One who takes over a economic right or a license from the owner of the work never use it or misuse it. An agreed period of time, or if no period is stipulated, an appropriate period of time elapses. Rights of the owner of the work are fundamentally infringed due to non-use, i.e. he suffers fundamental losses" (Karahan, et al., 2007, p. 81) This period deteriorates the right. Fault of the other party is not necessary. "Use of the right by the party taking over is both a right and a responsibility simultaneously. Therefore, right of rescission is a right given to the owner of the work against non-use by the one taking over" (Gökyayla 2000, p. 304).

"Legal regulations of countries of Continental Europe like France, Germany, Italy and Spain on moral rights state at least two more moral rights in addition to moral rights stipulated in the Berne Convention. These are the rights to publicize the work and right to cease publication of the work" (Ateş 2003, p.128). "There is a silence on whether Article 58 of the FSEK applies to owners of neighboring rights" (Öztan 2008, p.590).

3.6.2 Right of Renunciation

"Owner of the work can only waive his economic rights. Explicit surrender of moral rights is not allowed" (Öztan 2008, p. 596). According to Article 60 of FSEK; the author or his heirs may renounce the economic rights granted them by law by an authenticated document and publication in the official gazette, provided that their previous disposals are not prejudiced. As of its date of publication, renunciation shall produce the same legal effects as expiry of the term of protection. As per Article 60 of FSEK, "waiver sets the work free and anyone can benefit from economic rights.Through waiver, the work becomes free in favor of the public" (Öztan 2008, p.599).

3.6.3 Related Rights (Neighbouring Rights)

"Difference between ownership rights and neighboring rights is the absence of creative factor, which is replaced by a special activity with a market value. The characteristics of this special activity is a mixture of personal and economic/technical elements" (Karahan et al., 2007,p. 98). "Neighboring rights is not about creation of a work, but about promotion of a present work and conveying it to third parties. It is this effort and activity that is protected" (Ateş 2003, p. 201).

Tekinalp (1999, p.255) explains this as:

> *In line with the Rome Convention, FSEK felt the need to protect some people who do not bear the title "owner of a work". Said protection is characteristically like the protection of owner of a work. People in the said groups are called owners of neighboring rights due to their closeness to owners of works, and their rights are called neighboring rights due to close connection to rights of work owners***.**

These rights are given several names in the doctrine such as related rights, neighbouring rights, and ancillary rights. "Economic and moral rights the owner holds on the work are essential rights that he qualifies with the creation of the work. But these rights are secondary rights on the work that are subsequently earned" (Ateş 2003, p.124).

Tekinalp (1999, p.255) expresses this as:

> *Owners of neighboring rights are discussed in the Rome Convention of 1961 ratified by Turkey too. Also, Article 14 of TRIPS is dedicated to protection of neighboring rights. Rome Convention and TRIPS provisions overlap in terms of persons to be protected. These rights are reformulated in Articles 80, 81 and 82 of the FSEK with Law no. 4110 in order to comply with Rome Convention and TRIPS provisions.*

"In Turkish jurisdiction, protection of related rights was introduced for the first time with the amendments in FSEK with Law no. 4110 of 1995. Later on, neighboring rights were regulated by the Regulation on Rights Neighboring to Rights of Work Owners" (Ateş 2003, p. 211).

"By amendments in the FSEK with Law no. 4630, regulations on neighboring rights were completely modified. The latest modification on this subject aims at compliance with the Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright In the Field of Intellectual Property" (Ateş, 2003, p. 213)

These rights were granted to artists who perform a musical work, producers of phonograms and films, and to radio and television organizations. Neighboring rights and their owners need to be studied in more detail.

3.6.3.1 Rights of Performers

"As per Article 80/I of FSEK and Articles 2-4 of Regulation on Neighboring Rights, performer is someone who renders, promotes, tells, describes, and plays a work or a folklore in an original manner, or renders, promotes, tells, describes, and plays in several forms and performs in several forms" (Karahan et al., 2007, p. 99). "Performances of performers are protected only when they are original. The originality here differentiates the performance and elevates it to an artistic level"(Tekinalp 1999, p.256).

Ateş (2003, pp. 216-217) undertakes this issue as:

> *In our jurisdiction, performers have the right to request their names to be indicated on the works in relation to their performances as fixated in recording environments and to prevent distortion of their performances in a way detrimental to their reputation. The owners of neighboring rights are granted these rights "under the condition that the rights of the owner of the work are not harmed". While Article 6 of the Berne Convention regulates moral rights of the owners of works along with their economic rights, Rome Convention which is the basic text on neighboring rights does not regulate moral rights. This gap was filled with the WIPO Treaty. Article 5 of the Treaty bears the title "Moral Rights of Performers" and states that a performer has the right to request to be identified as the performer of his performances and object to any distortion or modification of his performances.*
>
> *Therefore, while drafting Law no. 4630, Article 7 of the Rome Convention and WIPO Treaty provisions were taken into consideration. It is possible to see the influence of EC Directive 92/100 too in the new arrangement.*

3.6.3.2 Rights of Phonogram Producers

Article 1/B of FSEK defines phonogram as the physical medium that carries sounds in which sounds of a performance or other sounds or representations of sounds are fixed, excluding fixation of sounds that are comprised in audiovisual works such as cinematographic works. This concept is defined as ".... fixation of sounds of a performance or of other sounds" in Article 3 (b) of Rome Convention. New Article added to FSEK and titled "Definitions" is in parallel to the concept of fixation in Article 2 (b) of WIPO Performances and Phonograms Treaty.

Ateş (2003, p. 223) expresses this as:

> *FSEK does not define the term producer. As per Article 80, Clause B of the FSEK, definition of producers of phonograms in Article 3 (c) of the Rome Convention and the WIPO Performances and Phonograms Treaty, producer of phonogram may be defined as a real or legal person who fixes the sounds of a performance or other sounds for the first time and undertakes the responsibility of this activity*

As per Clause (e) of Article 1/b of the FSEK, the concept of fixation mentioned here is defined as the act of recording sounds or representation of sounds or sounds and images in an apprehensible, reproducible and transmittable manner. "The one who benefits from the protection of related rights is the producer who conducts the first fixation, those conducting subsequent fixations cannot benefit from protection. First fixation is the first recording of sounds in a way that will allow repetition" (Karahan, et al., 2007, p. 101).

"Even if they do not qualify to be a work or a performance, or no qualification is sought in selection of materials, phonograms, on which all kinds of sounds of any origin can be fixated, are legally protected" (Ateş 2003, p. 224). That is because phonogram makers spend intense efforts, time and money for fixation of a work. "The element of originality needed for protection of works and performances is not a prerequisite for protection of the rights of phonogram producers" (Ateş 2003, p.225) According to Article 80/B of FSEK, phonogram producers that make the first fixation of sounds which are the result of a performance or other sounds shall have the following rights after acquiring authority to exercise economic rights from the author and the performer. They have the following rights with the permission of owners of the works or performers:

The right of authorizing or prohibiting the direct or indirect reproduction, distribution, sale, rental and lending to the public of the fixation which was made with the permission of the author and performer shall belong exclusively to the phonogram producer. Producers shall have the exclusive right of authorizing the communication of their fixations to the public by devices permitting the transmission of signs, sounds and/or images and re-transmission of such fixations.

A phonogram producer shall have the right of authorizing and prohibiting the distribution by sale or any other way, of the original or the reproduced copies of his fixations which have not yet been put up for sale or distributed in any other way in the domestic market.

A phonogram producer shall have the right of authorizing or prohibiting the sale of the fixations of the performances by wire or wireless means or the distribution or other supply and communication of such fixations to the public by providing access to them at a time and place chosen by natural persons. Distribution and supply of fixations by means of communication to the public shall not prejudice producer's right of distribution.

According to Ateş (2003, p. 226) :

> *Producers are not granted moral rights on phonograms, contrary to authors and performers. However, Article 11-12 of Rome Convention states that phonograms sold on the market should bear the name and trade mark of the producer or other appropriate designations that makes it possible to identify his identity.A similar arrangement exists in Article 7 of the Regulation on Marking of Intellectual and Artistic Works.*

3.6.3.3 Rights of Radio and Television Broadcasting Organizations

Articles 80-82 of the FSEK include provisions on ownership of neighboring rights by radio and television broadcasting organizations. "Rights of radio and television organizations in their broadcasts received protection earlier than other neighboring rights. European Agreement on the Protection of Television Broadcast was signed in 1960"(Ateş 2003,p. 228)

"Broadcaster is the real or legal person who publishes, invests and undertakes the legal responsibility. Employees who take part in the broadcasting are not broadcasters. The broadcasting organization that will benefit from protection is the organization which makes the broadcast" (Karahan et al., 2007, p. 102).

"Subject of rights of radio and television organizations protected in FSEK are the radio and TV programs, i.e. broadcasts" (Ateş 2003,p. 229). Since radio and television broadcasts require high cost, intensive efforts, infrastructure, technical equipment and investment, Lawmaker felt the need to protect the broadcasts.

Ateş (2003, p. 229) explains this as:

> *Items that can be a subject of neighboring rights of broadcasting organizations are either a work, or performance of a work or fixation of a work or a performance by a producer. Whatever qualities the work possesses, all of the neighboring rights of broadcasting organizations are called "broadcast". However, the concept of broadcast is not defined in the FSEK.*

There are definitions to this effect in Article 3(f) of Rome Convention and Article 2 of WIPO Performances and Phonograms Treaty. Radio-television organizations shall fulfill the obligations prescribed by Article 80/C of FSEK.

Radio-television organizations shall have the following exclusive rights on the broadcasts they produce: Authorizing or prohibiting the fixation of their broadcasts, their simultaneous transmission by other broadcasting organizations, their delayed transmission, their re-transmission, and their distribution via satellite or cable; authorizing or prohibiting the direct or indirect reproduction and distribution by any technique or method of their broadcasts except for private use; authorizing or prohibiting the transmission of their broadcasts at public premises; authorizing the communication of their fixed broadcasts to the public by providing access to them at a time and place chosen by natural persons.

Authorizing or prohibiting the communication of their broadcast signals on communication satellites or signals directed at them to the public by another broadcasting organization or cable operator or other third parties as well as the decrypting of their encrypted broadcasts.

"Rental and lending rights are not included in the publication rights broadcasting organizations hold. This arrangement is in line with Article 2/1 of Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property" (Ateş 2003, p. 101).

3.6.3.4 Rights of Film Producers

"Directive 92/100/EEC whose main purpose is to establish a homogenous system by minimizing the differences among countries, does not explicitly list the owners of related rights" (Ateş 2003, p. 233). Pursuant to provisions of the Directive EC/92/100, Law no. 4620 regulates the rights of filmmakers within scope of related rights. The term film producer is not defined in either the FSEK or the Directive 92/100.

"Film producer is the one who fixates the film for the first time" (Karahan, et al., 2007, p.102). "Film producer can also be defined as the real or legal person who for the first time records images in a medium, with or without sounds, in a way that can be understood, reproduced and transferred" (Ateş 2003, p. 233). Rights of film producers have many parallels to rights of phonogram makers. It is a rule that the filmmaker gets consent of the owner of the work or the performer.

According to Article 80/2 of FSEK, film producers that make the first fixation of films shall have the following rights after acquiring authority to exercise economic rights from the author and the performer:

A film producer shall have the exclusive right of authorizing or prohibiting the direct or indirect reproduction, distribution, sale, rental and lending to the public of the fixation, which was made with the permission of the author and the performer. Producers shall have the exclusive right of authorizing the communication of their fixations to the public by devices permitting the transmission of signs, sounds and/or images and their re-transmission.

A film producer shall have the right of authorizing or prohibiting the distribution by sale or any other way, of the original or the reproduced copies of film fixations which have not yet been put up for sale or distributed in any other way in the domestic market.

A film producer shall have the right of authorizing or prohibiting the sale of film fixations by wire or wireless means, or the distribution or other supply and communication of such fixations to the public by providing access to them at a time and place chosen by natural persons. Distribution and supply of fixations by means of communication to the public shall not prejudice producer's right of distribution.

In case performances fixed on phonograms and films are communicated to the public in any manner, persons using them shall be obliged to pay an equitable remuneration to the authors as well as the performers and producers or the collecting societies of the related field.

A natural or legal person whose name appears in the usual manner on a cinematographic work shall, in the absence of proof to the contrary, be presumed as the producer that has made the first fixation of the film.

After transferring their economic rights to the producer making the first fixation of films, joint authors of cinematographic works may not object to the dubbing or subtitling of the film, provided that nothing to the contrary or no special provision is stipulated in the contract.

The author of a musical work shall maintain the right to broadcast and perform his work, provided that the provisions of the contract concluded between him and the producer making the first fixation of films are reserved. The permissions granted by neighbouring rights holders and the producers that make the first fixation of films must be in writing.

3.7 PROBLEMS OF IMPLEMENTATION OF COPYRIGHT LAW IN TURKEY

Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. "A country's development depends to a very great extent on the creativity of its people, and encouragement of individual creativity and its dissemination is a sine qua non for progress" (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004, p.41).

According to general thought; there are two main purposes for copyright protection. One of them is to reward authors who enrich the cultural heritage of mankind. Another one is the thought that without the incentive of financial gain certain types of work would not be created at all or would not be made available to the general public.

> *Copyright and related rights are essential to human creativity, by giving creators incentives in the form of recognition and fair economic rewards. Under this system of rights, creators are assured that their works can be disseminated without fear of unauthorized copying or piracy. This in turn helps increase access to and enhances the enjoyment of culture, knowledge, and entertainment all over the world (http://www.wipo.int 2009).*

> *The first step is adoption of the law. The practical value of the law depends on its effective and efficient application. Copyright, if effectively implemented, serves as an incentive to authors and their assignees (the publishers) to create and disseminate knowledge. It is something that society must necessarily accept if it wishes to encourage intellectual creativity, to ensure the progress of the sciences, the arts and of knowledge in general, to promote the industry using authors'works and to render it possible to distribute such works in an organized manner among the widest possible circle of interested persons (WIPO Intellectual Property Hand Book: Policy, Law and Use 2004, p.42).*

"Important economic, social, political and technological developments over the past few years have had a fundamental impact on how intellectual property is created, exploited and used" (Current and Emerging Intellectual Property Issues for Business 2008, p.1). Furthermore, it is a known fact there is a positive and close correlation between the intellectual right protection system and countries' economic growth.

> *The protection of copyright and related rights within the ever-changing digital infrastructure and applications is taking place within a framework of complex legal, economic and social issues. On the other hand; the globalization of the economy; the development of new technologies; the spread of internet connectivity and broadband penetration; the growth in economic importance of non-technological business innovations and resources not protected by existing intellectual property regimes; the politicization of intellectual property issues; changes in the ways businesses operate are some of the main forces changing the intellectual property landscape today (Current and Emerging Intellectual Property Issues for Business 2008, p.91).*

On the ground that intellectual capital is the most valuable asset of many companies and economies today and will be the driving force behind future economic growth, the new trend of intellectual property right protection systems is to maintain a balance between provision of adequate rewards to creators of works and ensuring that such rewards are in harmony with the public interest and the needs of modern society.

The significance laid on the protection of intellectual property rights in the international economy has had an impact on the economic policies of Turkey, a country which has made considerable progress in integrating with the global economy. In Turkey, improvements have been made in the legislation governing intellectual property rights, particularly after the Customs Union Agreement, which came into force in 1996. As it is well known,the Association Agreement between Turkey and the then EEC was signed in 1963 and entered in force in December 1964. Turkey and the EU formed a customs union in 1995. Turkey got the status of candidate country in the Helsinki European Council of December 1999. Accession negotiations with Turkey were opened in October 2005.

As per Turkey 2008 Progress Report expressed by European Commission; accession negotiations between EU and Turkey continues and up to this point negotiations have been opened on eight chapters and one of these chapters is intellectual property law. However, a number of Turkey's commitments on intellectual property rights remain unfulfilled.

According to Turkey 2008 Progress Report; the overall legislative framework for intellectual and industrial property rights is largely aligned with the acquis, however Turkey is still one of the countries where intellectual property rights protection and enforcement are most problematic. On the other hand, improvement of coordination and cooperation between various stakeholders in the area of copyright and related rights issues, increasing of the number of collecting societies from 22 to 24, agreement of four collecting societies in the music sector agreed on a common approach to setting tariffs, licensing and other issues, and signing of an agreement on the licensing of musical works used in hotels, publishment of the laws for ratification of the WIPO Copyright and Phonograms Treaties in the Official Gazete, establishment of a high-level Intellectual and Industrial Property Coordination Board, co-chaired by the Ministry of Industry and Trade and the Ministry of Culture, establishment and going into operation of new specialised intellectual property right courts, have been highlighted as positive developments in the area of copyright and neighbouring rights in Turkey.

Although Turkey has achieved considerable progress in intellectual property rights protection, Turkey's enforcement capacity is still lagging behind. In Turkey 2008 Progress Report, it has been expressed clearly that Turkey has made very important progresses, however not reached the desired level. The problems concerning counterfeit, piracy of books and other media, such as CDs and DVDs, difficulties in obtaining preliminary injunctions or search and seizure warrants, longstanding judgement and appeal stages still continue and such handicaps pose many obstacles to intellectual property right protection in Turkey.

4. CONCLUSION

While the property protection in Turkey has some missing parts mainly in intellectual property, we have to underline the developments for the post 1990 period during the acceleration of the institutional restructuring in Turkey. However, the main problem is how effective these institutions and laws are utilized in the related fields. It is undeniable that Turkey has strived for harmonization of acquis communitaria with his legislation and has covered a great distance on this way.

In Article 27 of Universal Declaration of Human Rights, it is provided that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".It is stated that legal protection for intellectual and artistic works has gone beyond the national borders and acquired a universal quality, thus it would be correct for our country to participate in Berne Convention, besides these issues have been taken into consideration while making the law. In this way, intellectual property rights are considered to be human rights on the international platform.

The right to the protection of the moral and material interests granted to the author under Berne Convention is provided not by the acts of author's state but by the provisions of universal contract. A set of arrangement in tune with contractual provisions has been made in national laws so that those displaying activity in the field of intellectual and artistic works and create works are protected, powers of member states in this regard have been restricted more or less. Therefore, certain arrangements have been made in our country based upon the recent studies and documents of WIPO.

Turkey has not fall outside of international agrements and international agreements. Notwithstanding all these legislations, unfortunately Turkey does not have a good record in protection of intellectual property rights. Because, overly intellectual property rights infrigements of are not prevented which affect Turkish economy in a negative way, for instance discourages potential direct foreign investments.

The main critique, during all these harmonization process, is Turkey's restlessness in adoptation of EU law without taking the consequences in the direction of implementation. and

becoming party to an international agreement without creating basic facilities sufficiently. There are gaps and problems in the protection of intellectual property rights in Turkey. Turkey has reached a considerable level of legislative alignment with the acquis in the area of intellectual property right. However, administrative capacity is yet insufficient to ensure an effective enforcement of intellectual property law.

Turkey has not submitted plans detailing how it intends to complete alignment with the acquis and develop the administrative capacity. Development of administrative capacity and enforcement involve substantial investments, including in the judiciary, and needs to in After the establishment of new specialized courts to deal with cases concerning the legal relations governed by this Act in Turkey, there has been an improvement in the administrative capacity of copyrights and law. However, the number of courts, judges and prosecutors specialized on intellectual property right are, still, deficient. Furthermore, these courts deal with a too high number of cases compared to their actual capacity. Administrative capacity still remains inadequate beside the enhancement in the capacity. The too frequent recourse to experts' opinion in IPR cases has also reduced the effectiveness of judicial proceedings. Training of judges, as well as reinforcing IPR specialised courts are necessary and activities in this sense are ongoing.

Notwithstanding the difficulties, recent efforts of Turkey to align existing laws as well as to comply with relevant EC directives and international instruments are appreciable steps that carries Turkey to go a step further. Turkey has achieved a lot in a short time. He should continue on this way without cushioning. All these developments in Turkey are hopeful.

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