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Creativity and intellectual property in advertising industry. A case study from Turkey.

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The Intellectual Property Rights (IPR) elements of the DIME Network currently focus on research in the area of patents, copyrights and related rights. DIME's IPR research is at the forefront as it addresses and debates current political and controversial IPR issues that affect businesses, nations and societies today. These issues challenge state of the art thinking and the existing analytical frameworks that dominate theoretical IPR literature in the fields of economics, management, politics, law and regulation- theory.

**CREATIVITY AND INTELLECTUAL
PROPERTY IN ADVERTISING INDUSTRY
- A CASE STUDY FROM TURKEY -**

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Abstract

Evolution of the unique place of innovation and invention is complemented by the recent discussions regarding the significance of creativity. While the industrialization process of nations and the endogenous growth theorists underline the need for the protection and subsidization of the innovation, we find it necessary to include the output of creativity into the process. The increasing role of creative industries both at the economical level and also at the social level, underlines the significance of intangible inputs of the process mainly the creator. Advertising sector, as one of the core sectors of the creative industry class, needs a distinct attention. Throughout the paper, the advertising sector in Turkey will be evaluated. In line with the legislative and institutional environment of Turkey, the protection of the creative ideas and the creators of advertising work will be discussed. While recent developments remark an improvement, we find it necessary to augment the discussion, by proposing more plain definitions in the legislative framework.

Keywords: *creativity, intellectual property rights, advertising industry*

Introduction

With the fundamental changes in the economy and business environment, new sectors have gained importance as a consequence of the technological changes and globalization of ideas and services. The changing role of individual in market and the rising number of creative entrepreneurs have led to a boost in the creative industries. The foundation of this relation is also connected to the economic growth and development phenomenon, with concentration on the endogenous growth models. While discussed models focus on the evolution of research and development industries, the ability of creative industries to foster knowledge accumulation which is available for innovation, gathers an increasing attention on the protection of the creative ideas.

One of the main sectors that creativity gain importance for innovation and growth is the advertising sector. While the employment creating capacity and the value added of the sector is questionable mainly in developing economies, the special place of advertising in the

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business development process and the growing attention of the developed world towards creative industries call for a deeper analysis of the industry. As one of the core actors in the sector; the most essential function of advertising agencies can be summarized as creating and selling ideas. Consequently, in the advertising work, creativity stands in the forefront and the creative works of the agencies are mostly related with intellectual property. Therefore, throughout the advertising work, some problems are possible to arise within the context of intellectual property rights. Some of them may be related with the definition and context of intellectual work in the legislation, and some may be related with the ownership and claim of the work. The features of the artistic work make it complicated to label the components of advertising work and to put them in a specific context in the framework of laws and regulations.

Although, there have been many crucial changes and progress in Turkey to protect intellectual rights in advertising sector, there are still many gaps that should be considered in the industry. The classification of advertising work in the laws is still confusing, and makes the definition of work complicated. Within this framework, we will distinguish advertising industry from the other emerging creative industries of Turkey and will give special attention on the developments of the sector by concentrating on the intellectual property protection.

In the remaining part of the paper, some related issues will be discussed as follows; in the first part of the study, the role of creation in the economic development debate will be revealed with shedding some light on the recent developments regarding the need for protection of the creative works and ideas. After this part, there will be an overview of the, general environment in Turkey. The attitude of Turkey will be summarized towards property protection by decomposing the industrial and intellectual property protection. As a final part, the intellectual property rights and protection in the advertising industry will be concluded. After a brief overview of the industry the section will end with some policy recommendations as to foster creation in the sector.

Creative Ideas; Economic Importance and Protection

New growth theories of 1990s try to identify the basic motivation of economic growth by introducing the protection and subsidization of innovation, thus creation. Technology, which is introduced (but not explained) as the source of economic growth by neo classic growth theorist, is tried to be illustrated by endogenous growth models. Romer (1990), Lucas

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(1988) argued the importance of knowledge (both stock and spillover) and the innovative activities through technology development process. To capture the source of the innovative activities, special emphasis is given to creative ideas and human capital. Moreover property rights are introduced as the sole stimulus for innovation. The underlined significance of protection of inventor is associated with the public good property of knowledge and creative ideas. Non-rival and non-excludable good property discusses that, under perfect competition and absence of protection of property rights, there will not be enough motivation for inventors to create. Actually it is the patent and other kinds of property rights (copyrights, trademarks etc.) that cause the transformation of the non-excludable and non rival good of invention, thus knowledge, into a non rival but partially excludable one.¹

Although the core discussion regarding endogenous growth models relies heavily on protection of research and development hence knowledge, a similar understanding can also be developed for other industries that may be labeled as creative. As in the case of research and development, which produce non rival (public) goods, we have to treat the output of creative industries - creative ideas, slogans - as public goods that can be observed and imitated freely. Once a slogan or a creative idea is declared, it can be used by other parties without incurring significant costs. Therefore, as in the case of research and development based industries, creative industries also have to be protected as to form an incentive mechanism for innovation and creativity.

Harhoff (2006) underlines the declining ability of tangible assets to produce above normal returns and underlines the possible future opportunities of intangible assets. What Harhoff (2006) points out is the importance of qualified and creative workforce which focuses on the production of innovative outputs. While creative industries and possible protection measures will be discussed in the following sections, we have to underline the emerging significance of those industries mainly in the developed world. Within the transition from agricultural production to industrial development, also remarked by Harhoff (2006), the notion of creative industries is not a clear cut. In a recent report, UNCTAD (2008) remarks the potential of the creative industries². The additional benefits of creative industries such as promoting social inclusion, cultural diversity and human development combined with the

¹ Although growth theorists concentrate on patents as the basic tool, recent studies start to identify other intellectual property rights such as trademarks or copyrights. See Centi, Rubio (2005) for a brief discussion.

² UNCTAD's definition for creative industries covers traditional folk art, cultural festivals, books, paintings, music, performing arts, technology intensive industries, design and audiovisual industry (film, television, radio), architecture, advertising, new media products (digital animation and video games)

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traditional expected positive sides of economic growth and job creation, the significance of creative industries and the attitude toward those industries are underlined. According to the calculations of UNCTAD (2008); trade in goods and services in creative industries jump from \$ 234.8 billion in 1996 to \$ 445.2 billion in 2005. Estimated growth rate of the international trade in the stated industries is around 8.7% per annum between the years 2000 and 2005. While the developed economies dominate the creative industries globally, the increasing potential of the developing economies calls for special attention. However, the increasing potential comes with its problems. The problem of subsidization of these industries is directly connected to the protective measures that have to be taken by the policy makers. In line with the stated debate, the Sao Paulo Meeting (2004) defines the importance of fostering, protecting and promoting creativity based industries of the developing economies.

As we discuss throughout the endogenous growth models which is also stated in UNCTAD (2008) report, the output of the creative industry can be an industrial good or intellectual good, which in both cases should be protected under the prepared acts. Originating from the proposed distinction, the difference between industrial property rights and intellectual property rights should be rationalized. Meanwhile, possible effects on economy should be somehow demonstrated. In line with the proposed research, we will concentrate on the developments in the legislative and institutional attitude of a developing economy, namely Turkey. While we find it crucial to review the overall creative industries, due to data limitations and focusing on a core industry, we choose to review the mechanism in advertising sector. The major significance of the chosen sub-sector is the intellectual work property of the industry; therefore it has to be treated differently with respect to the traditional protection tools.

Creative Industries and Advertising Sector in Turkey

According to a definition by Howkins's (2005), creative industries are those which use brain work to produce intellectual property. There are four challenges that cause the expansion of creative industries. One of them is the fundamental changes in economics which are related with the globalization of ideas, such as in media and entertainment industries. The second challenge is the transformation of organizations and management style. With the changing role of individual in market; creative entrepreneurs, producer, networks give a separate importance to the creative industries. Howkins (2005) claims innovation as the third factor that causes a challenge in the market. The last factor, which is considered as the major

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one, is the issue of intellectual property. IP, in this manner, may be defined as the contract between creative people and public (Hartley, 2005).

Advertising is one of the most relevant sectors that creativity and intellectual property rights gain importance. Advertising can be defined as an economic activity under the classification of knowledge-intensive service businesses (Thiel,2005). Creative works are the core products of the agencies and they are valuable for competing and reputation in the market. Besides, creative work requires an ability to create something valuable and different, therefore public and non-public instruments are necessary to protect this creative effort.

Advertising work comprehends many tasks which are related with different organizations and sectors. The most essential function of advertising agencies can be summarized as creating and selling ideas. In the following figure, there is an illustration which is created by Thiel (2005). This figure depicts the fundamental inputs and outputs in both development and production process of advertising campaigns. The role advertisers as creative employees may be summarized as bridging creative ideas, on the one hand, and demands of market, on the other hand. Creative content in the agencies covers visual and written materials such as slogans, sounds, photographs, art, music, videos and graphics.

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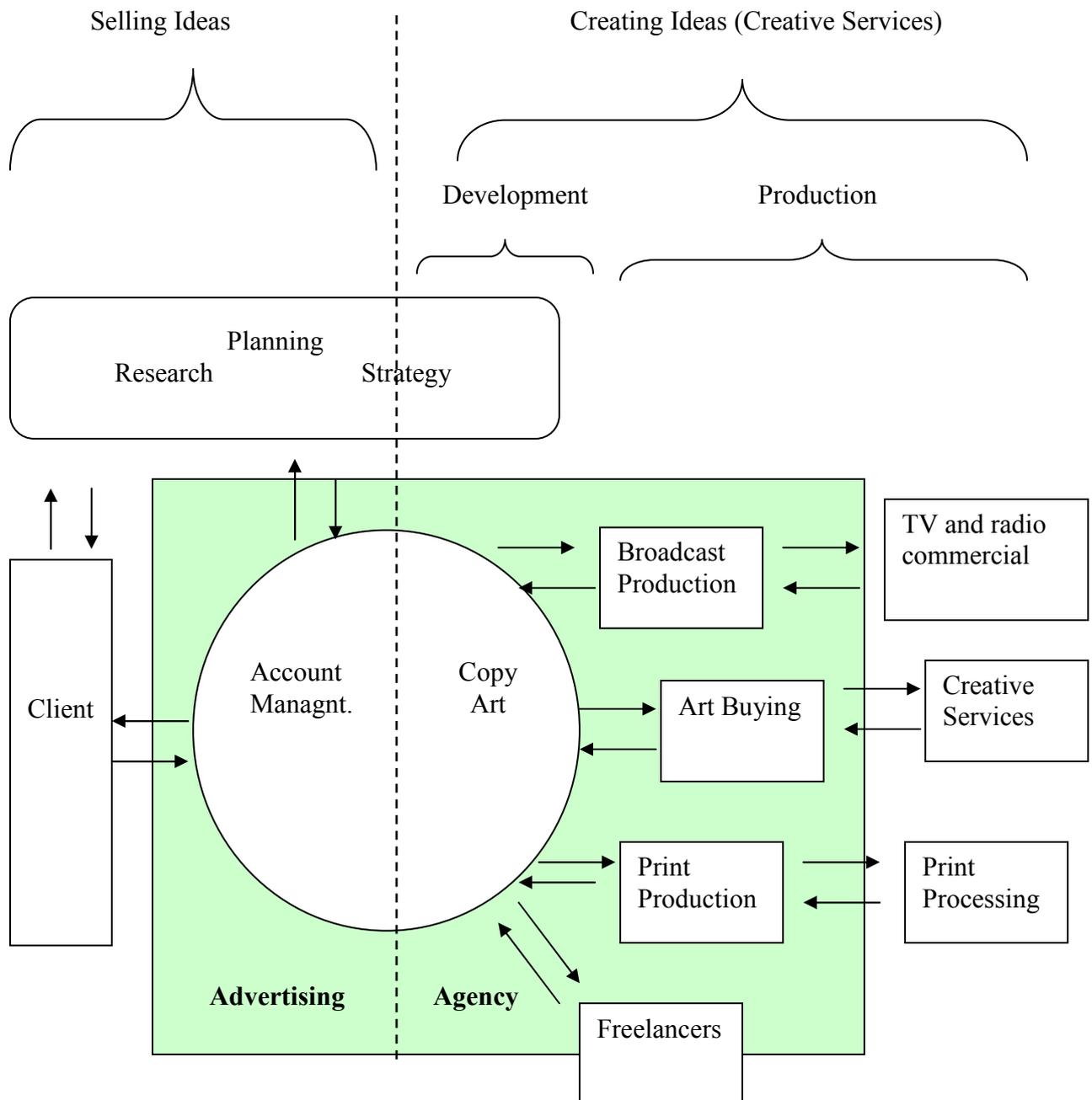


Figure 1. Creating and Selling Ideas in and around an Advertising Agency

Source: Thiel, 2005, pg. 50

In this manner, many tasks in the advertising agencies are closely related with the protection of property rights. According to the kind of advertising work; copyrights, trademarks and other kind of protection tools may come on the scene. These protection tools are listed in Table 1.

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Table 1. IP in Advertising

	Advertising Elements	Protected by;
Creative content	Written material, photographs, art, graphics, music and videos	Copyright
Slogans and sounds	Slogans and sounds in the advertising	Copyright and/or by trademark law
Signs	Business names, logos, product names, domain names	Trademarks
Geographical indications	Sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin	Laws against unfair competition, consumer protection laws, laws for the protection of certification marks
Graphic symbols, screen displays, graphic user interfaces, webpage	Computer-generated products	Industrial design law, website by copyrights
Software	Digital advertisements	Copyright and/or patents
Databases	Consumer profiles	Copyright
Packaging	Distinctive packaging of a product	Trademark, industrial design
Identity	Name, photograph, image, voice or signature	Publicity or privacy rights
Unfair advertising methods	False advertising claims, false endorsement of products, deceptive packaging, dishonest promotions or marketing	Unfair competition laws

Source: WIPO

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Advertising sector covers the advertisers, the advertising agencies, the media agencies, the advertising mediums and the producers that take part in the production of advertisements. Today, in Turkey, there are approximately 100 advertising agencies in the organized manner with customer relations, creative and media departments. The number of total employees in the advertising agencies is projected approximately 3000. Real size of the sector was estimated to be around 2,534 million USD and 3,675 million New Turkish Liras for 2006. The general investment toward advertising industry is graphed as to capture the sensitivity of the sector to the general economic environment of Turkey. Starting from the investment figures (see figure 2), the sharp declines in 1994 and 2001 are vital in the sense that, years represent the two important crises for Turkey. The sharp declines can be associated with the general attitude towards advertising expenditures in business environment.

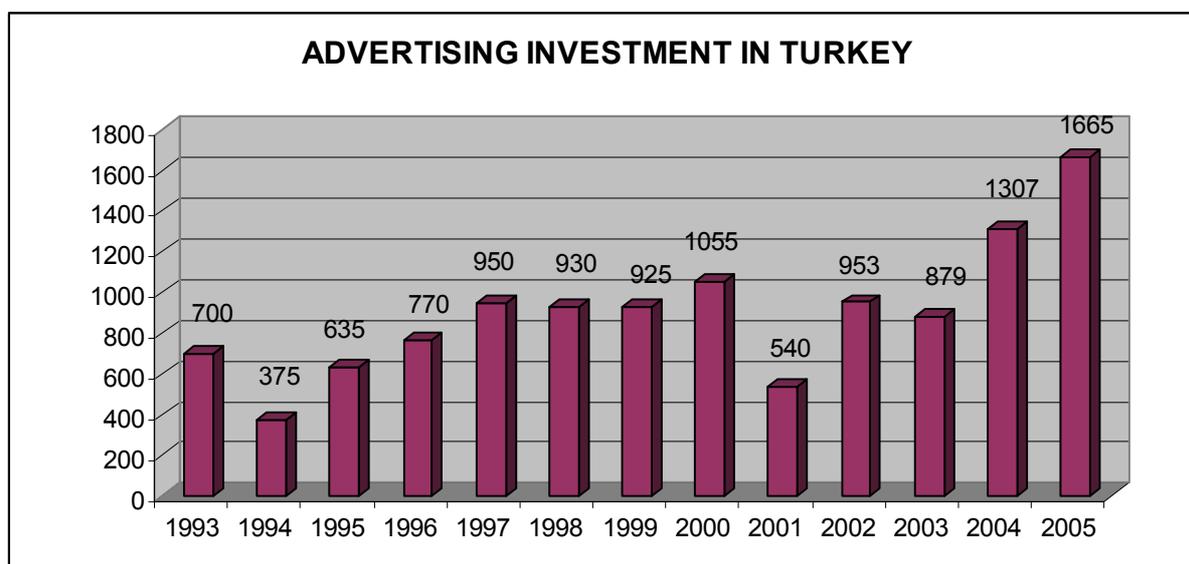


Figure 2. Advertising Investment in Turkey in millions USD (1993-2005)

Source: Turkish Association of Advertising Agencies

Finally, to demonstrate the recent developments in the sector, overall establishment number in the advertising services, average annual employee in the advertising services are illustrated. When we observe table 2, we realize the overall job market structure of the advertising services industry.³ Sector-specific data is collected from the Service Sector Annual Bulletin of TURKSTAT. Due to lack of data availability, we fail to demonstrate the environment for the post 2001 period. What the figures below indicate us, is the stable structure of establishment number through out the period. However, the increase in the wage earner employment after 1997 signals us the increasing capacity of the sector in the job

³ Advertising Services is classified by ISIC Rev. 3 No:7340, 734

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creation process in Turkey. Note that, inclusion of the data for the post 2001 crisis period, may affect our comments.

Table 2. Major Advertising Industry Indicators in Turkey

	1993	1994	1995	1996	1997	1998	1999	2000	2001
Establishments*	1,714	1,766	1,916	2,034	2,209	2,317	2,265	2,293	2,206
Employees**	4,492	5,204	5,036	6,577	7,594	10,834	12,196	11,535	11,131

Source: TURSTAT

*Net number of Establishments

** Average Number of Wage Earners

In recent years, there has been an increasing pressure for audit by state institutions. Two main public audit institutions are: Advertising Board of the Ministry of Industry and Trade, and Radio and Television Supreme Committee. As a non-public institution, The Advertising Self-Regulatory Board (RÖK) was established in 1994 by the advertising agencies with a mission of maintaining ethics in the advertising works in the line with International Code of Advertising Practice.⁴

Developments in Property Protection in Turkey

Before entering the discussion regarding the protection of the intellectual property rights in the advertising industry, it seems to be a necessity to describe the general environment in Turkey. As previously clarified, there exists an apparent distinction between the protection of industrial property and intellectual property.

Underlining the specified distinction, we first aim to figure out the general representation of the major tools used to protect the industrial property in Turkey. Historical developments have its roots up to 1870s⁵. First known legislations of 1871 Law (Eşya-i Ticariyeye Mahsus Alamet-i Farikalara Dair Nizamname) and 1879 Patent Rights Law (İhtira Beratı Kanunu) stand as the roots of trademark and patent protection debate in Turkey. After the republican period, Turkey continues its protective attitude toward industrial rights by engaging into Paris Treaty (1925). Following the critical developments, we have to remark two milestones; Trade Law of Turkey (Act No: 551) and the entrance to WIPO (1965). In 1994, Turkish Patent Institute, as representing the first significant institutional development,

⁴ Turkish Association of Advertising Agencies, <http://www.rd.org.tr/>

⁵ Turkish Patent Institute, www.tpe.gov.tr

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was founded in Turkey. Later in 2003, Act No.2000 regarding the foundation and objectives of Turkish Patent Institute goes into effect. In line with the legislations, four major tools are introduced as to protect different kinds of properties;

- ✓ First group is the **patents**; under which international classifications list the following industries: Human Needs, Transportation, Chemistry, Textile and Paper works, Construction, Various engineering works, Physics, electricity
- ✓ Second Group consists of the **trademarks**, which is classified into 45 sub groups⁶
- ✓ Third Group is the **industrial design** which has a wider classification.
- ✓ Fourth Group is the **geographical instruments** which does not have a general expected classification, rather a classification based on the geography and property of regions.

In the Table 3, the composition of the major industrial property protection instruments are demonstrated for Turkey. Note that, the fourth group is not included in the table as the background mechanism of this instrument is different with respect to the others. Figure for the post 1995 period underlines the dominance of trademarks as the major tool in the industrial property protection process.

Table 3. Composition of Major Industrial Protection Tools in Turkey

	Patents	Trademarks	Designs
1995	8.24%	91.76%	0.00%
1996	4.49%	80.55%	14.96%
1997	2.29%	78.06%	19.66%
1998	4.76%	60.97%	34.27%
1999	4.73%	77.93%	17.34%
2000	5.50%	79.26%	15.24%
2001	7.14%	49.30%	43.56%
2002	4.71%	51.87%	43.41%
2003	2.89%	54.62%	42.49%
2004	3.52%	50.75%	45.74%
2005	4.91%	53.72%	41.37%
2006	5.66%	54.66%	39.69%
2007	5.33%	61.24%	33.43%

Source: TPI

⁶ See Turkish Patent Institute for the detailed classification www.tpe.gov.tr

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Rules and norms about intellectual property rights are mostly arranged and controlled by the Ministry of Culture. Legal framework of intellectual property was derived from Law no. 5846 on Intellectual and Artistic Works which was approved in December 5, 1951. This law was modified by Law No.4630 in 2001 and Law No.5101 in 2004. With these improvements, standards and norms about copyright policy become closer to international standards and requirements of WIPO⁷. Turkey acceded to the below mentioned agreements within this framework⁸:

- ✓ Paris Text of the Bern Convention on the Protection of Literary and Artistic Works (Law No 4417);
- ✓ Rome Convention on the Protection of Performing Artists, Phonogram Producers and Broadcasting Enterprises (Law No 4116);
- ✓ Stockholm Text of Paris Convention on the Protection of Industrial Property (Cabinet Decree No 94/5903);
- ✓ Convention Establishing WIPO;
- ✓ Bern Convention for the Protection of Literary and Artistic Works;
- ✓ Nice Agreement on the International Classification of the Goods and Services for the Purposes of Establishing Registration of Marks (Cabinet Decree No 95/7094);
- ✓ The Approval of Turkey's Accession to the Patent Cooperation Treaty (Law No 4115);
- ✓ Vienna Agreement on the International Classification of the Figurative Elements of Trademarks (Cabinet Decree No 95/7094);
- ✓ Strasbourg Agreement on the International Patent Classification (Cabinet Decree No 95/7094);
- ✓ Protocol Relating to the Madrid Agreement concerning International Registration of Marks (Cabinet Decree No 97/9731);
- ✓ Locarno Agreement on Establishing International Classification of Industrial Designs (Cabinet Decree No 97/9731);

⁷ Republic of Turkey Ministry of Culture and Tourism, www.kultur.gov.tr

⁸ Republic of Turkey Prime Ministry Undersecretariat fo Customs, www.gumruk.gov.tr

PriceWaterhouseCoopers "Acquisition of Intellectual and Industrial Property Rights in Turkey", 2003

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- ✓ Budapest Agreement on International Recognition of the Deposit of Micro-organisms for The Purposes of Patent Procedure (Cabinet Decree No 97/9731);
- ✓ European Patent Convention and Annexes Thereof on Issuance of European Patents (Law No 4504).

In addition to above stated international agreements, there has been an improvement in the specialized IPR courts; such as two additional courts function effectively in different cities with providing further training to judges and prosecutors⁹.

Ministry of Justice contributes to the implementation and development of IPR with a project which is named as “Effective Enforcement of Intellectual Property Rights”. This project is also supported by EU resources for the establishment of specialized courts related with intellectual property rights. Beside the specialized courts, there has been an improvement in the administrative capacity of copyrights and laws.

However, there are still many gaps and problems in the protection of IPR. One of the reasons that lie down behind the problem is the implementation of legislation by non-specialized courts. Administrative capacity still remains inadequate beside the enhancements in the capacity.

Implementation of IPR in Advertising Sector, Evidence from Turkey

After observing the general structure of advertising sector and defining the possible measures considered for creation and protection, we aim to concentrate on the attitude towards intellectual property protection in advertising sector. 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.

The creative works of advertising agencies enter the realm of intellectual property in many different ways. In the content of national legislation, copyrights of the products in the advertising agencies are protected within the framework of legal associations, laws and non-public institutions. However, the main problem is how effective these institutions and laws are utilized in the advertising sector.

⁹ European Commission Turkey Progress Report, 2005

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The creative work of advertising sector is subject to the Law no. 5846 on Intellectual and Artistic Works. The core area of the law is the protection of artistic works that relied on creativity. While we are analyzing the related acts, we have to remark the major obstacles of the Law with respect to advertising sector. Meanwhile, it seems to be a necessity to decompose the general structure as follows; (i) Main components of advertising work, (ii) Contributors of advertising work, (iii) Problem of claim on the produced creative work. Such decomposition may help us to concentrate on the different obstacles of the advertising industry.

Throughout the law, the work of advertising sector is not specified clearly. Although the output of advertising industry is defined as an artistic work in the Law no. 5846, main query in here is the specified definition of the advertising work. According to Turkish Association of Advertising Agencies, the advertisement is identified as an artistic work satisfying the following prerequisites;

- ✓ Reflects the characteristics of the creator
- ✓ Original in representing a creative intellectual work
- ✓ Incarnate and carrying economic value

Meanwhile, to be protected through legislation, intellectual work should be labeled as literary works, music works, fine arts or cinema works based on Law no. 5846 on Intellectual and Artistic Works. While the visual advertisings may be labeled as cinema and TV movies, other kinds of advertisement such as newspaper, magazine or billboard advertisements may be categorized as graphical artistic works. Moreover, the text of the advertisement is also discussed to be a literature work which should be protected as a movie or printed work. As Law no. 5846 protects this classification of artistic works, the law does not define the work of advertisement directly. Actually, this fact stands as one of the core obstacles for creators to question and demand their rights on the creative output.

Another problem of the IPR in advertising sector derives from the identification of the creator and owner. Owner of the creation or the artistic work is defined and discussed under Act No.8 and Act No. 18 in the law. The core area of discussion is based on the definition of material and immaterial claims on the advertising work. The general attitude of the act towards the ownership of the work states that; “creator of the work has the sole claim on the work”. However, the distinction between the real person and the legal entity causes special

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interpretation. Act No.18 and the modifications in 2001 underline that, if the work is produced by more than one individual, then there stands binding rule that, the organization or the body, the legal entity, that put these individuals together has the sole claim on the work. In our case, advertising agency plays the role defined in the law. As Baygın (2002) underlines, the creator can not claim an ownership right when working for an advertising agency. The contract between the agency and the creator causes a transfer of ownership, while protecting other rights determined by the legislation, such as social benefits. The major explanation is the responsibility of the creator in the agency. Actually, the law also underlines that; the core prerequisite of such a transfer from the real person to the legal entity is the need for coherence in the foundation and operation objective of the body. The law clearly defines that when the ideas or works directly enter to the agenda of the body, the legal entity can demand the sole ownership, without leaving any right to the creator. Kaya (2002) proposes the need for such a distinction in the act; since a possible dispute may arise between the contributors of the creative work in the absence of such a harmonization.

When we move towards the advertising agencies and their major concerns, we underline that, the central anxiety is not only the ownership issue, but also protection of the output, advertisement work. The defined acts of the Law no. 5846 underline the internal property protection scheme. Another dimension of this relation that represents an external mechanism is also be emphasized in the legislation. External mechanism covers the relation between the advertisement agency and the client. As also discussed by laws, there stands a legal contract between the client and the agency, to protect the rights of the agency. Kaya (2002) underlines the significance of such an arrangement. The core prerequisite of a sound protection of the idea and the output of the individual or the advertising agency, is the existence of a legal statement clarifying the following points; (i) Upon the expiration of the contract, the creator should demand its sole rights, (ii) Client has the right to use and copy the created work subject to the clauses of the agreement, (iii) Any change in the advertisement is also subject to the approval of the creator, (iv) The intellectual property should be used in line with the predetermined objectives.

Conclusion and Recommendations

To sum up, this work may be considered as a snapshot that reflects the current position of IPR in the advertising sector of Turkey. There are not so many available publications about implementations of IPR in the advertising sector for the case of Turkey. Therefore, we

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constructed this paper by collecting information from different resources such as industrial data and legislation about intellectual property. We also conducted some interviews with the specialist in the advertising agencies and lawyers who are related with the implementation of IPR in the sector.

Originating from the developments in the industry and the legislative framework, we find it crucial to underline some issues. One major source of confusion comes from the complex structure of advertisement work. The legislation directly eliminates the problem by giving the sole right to the advertising agency. While it seems to be a necessity to develop such a structure, we have to remark the possible negative effects on the real owners of the work. In line with the creation, innovation and its subsidization debate, we have to point out that such a possible conflict can be solved by different implementations of the advertising agencies. A second source of puzzlement is the classification of different kinds of advertising output within the categorization of artistic works, which is protected by Law no. 5846 on Intellectual and Artistic Works. In our view, although it will not be a clear and direct cut, a more plain understanding should be developed as to place different advertising tools. While each component of advertising output is an artistic work, the production structure and consumption of the service is slightly different with respect to the considered artistic works. Hence, while behaving advertising within the framework of Law no. 5846 on Intellectual and Artistic Works is an improvement, it seems to be a necessity to take new steps toward the identification of advertising output in the legislation.

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