T.C.
İSTANBUL MEDENİYET UNIVERSITY
INSTITUTE OF GRADUATE STUDIES
PRIVATE LAW PROGRAMME

INDUSTRIAL PROPERTY ASPECT OF FASHION LAW

Master's Degree

ELİF BEYRELİ

İstanbul, 2019

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Thesis Advisor
Asst. Prof. ÖZGÜR ARIKAN

İstanbul, 2019

ONAY

İstanbul Medeniyet Üniversitesi, Lisansüstü Eğitim Enstitüsü'nde Özel Hukuk Ana Bilim Dalı Yüksek Lisans öğrencisi olan Elif BEYRELİ'nin hazırladığı ve jüri önünde savunduğu "Industrial Property Aspect of Fashion Law" başlıklı tez oy birliğiyle başarılı kabul edilmiştir.

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ÖN SÖZ

Moda kavramı ile hukuk ilişkisi genel olarak fikrî mülkiyet kavramı kapsamında ele alınmaktadır. Bununla beraber fikrî mülkiyet hukukunun içerisinde yer alan sınai mülkiyet hukuku da moda hukuku açısından oldukça önemlidir. Moda markaları, markalarını ve tasarımlarını korumak için sınai mülkiyetin kapsamında yer alan marka ve tasarım haklarından yararlanmaktadır.

Moda endüstrisinde marka koruması, markanın ismi ve logosuna yönelik olmakla beraber, moda markasının ikonikleşmiş bir tasarımına yönelik de olabilmektedir. 556 sayılı Marka Korunması Hakkındaki Kanun Hükmünde Kararnamenin kaldırılmasıyla birlikte, moda dünyasının marka alanında yararlanacağı korumanın kapsamı 6769 sayılı Sınai Mülkiyet Kanunu çerçevesinde olacaktır.

Moda dünyasına ilişkin bir diğer koruma türü ise tasarım korumasıdır. 554 sayılı Endüstriyel Tasarımların Korunması Hakkındaki Kanun Hükmünde Kararname kaldırılmış ve tasarım koruması 6769 sayılı Sınai Mülkiyet Kanununun içinde düzenlenmiştir. Sınai Mülkiyet Kanunu, tasarım konusunu düzenlerken tescilsiz tasarımların koruma kapsamına alınacağını belirtmiştir. Bu yenilik, tasarımlarını marka koruması kapsamında koruyamayan veya tasarım tescilini yaptıramamış bağımsız tasarımcılar için açısından önemli bir gelişmedir.

Bu çalışmanın amacı moda hukukuna, sınai mülkiyet açısından yaklaşmak ve sorunları bu bağlamda değerlendirmektir.

Bu tezin konusunun belirlenmesinde ve tezin yazım sürecinde desteklerini esirgemeyen değerli hocam Dr. Öğr. Üyesi Özgür Arıkan'a teşekkürü bir borç bilirim. Bunun yanında bu süreçte benim yanımda olan sevgili annem, babam ve kardeşime teşekkürlerimi sunarım.

PREFACE

Relationship between the fashion and law is generally evaluated within the scope of intellectual property. Accordingly industrial property, which is a part of intellectual property, has a huge importance in terms of fashion law. In order to protect their fashion designs and brand, fashion brands enjoy industrial property rights such as trademark and design protection.

Trademark protection in fashion industry can be available for brand's name and logo, as well as fashion brand's iconic designs. With the abolishment of Decree Law No. 556 on Protection of Trademarks, trademark protection that benefited by fashion industry will be within the scope of the Law No. 6769 on Industrial Property.

Another protection type enjoyed by the fashion industry is design protection. Decree Law No. 554 on Protection of Industrial designs is abolished and design protection is regulated in the Law No. 6769 on Industrial Property. Law No. 6769 stated that unregistered designs will be within the scope of the protection. This novelty is an important development for the independent designers who could not enjoy trademark protection and could not register her/his designs yet.

The aim of this study is to examine fashion law in the perspective of industrial property and accordingly to evaluate problems of fashion law in this context.

I would like to express my gratitude to my dear thesis advisor Asst. Prof. Özgür Arıkan for his contributions. Thanks should also go to my dear mother, father and brother for their supports.

ETİK İLKELERE UYGUNLUK BEYANI

İstanbul Medeniyet Üniversitesi Lisansüstü Eğitim Enstitüsü bünyesinde hazırladığım bu yüksek lisans tezinin bizzat tarafımdan ve kendi sözcüklerimle yazılmış orijinal bir çalışma olduğunu ve bu tezde;

1. Çeşitli yazarların çalışmalarından faydalandığımda bu çalışmaların ilgili bölümlerini doğru ve net biçimde göstererek yazarlara açık biçimde atıfta bulunduğumu,
2. Yazdığım metinlerin tamamı ya da sadece bir kısmı, daha önce herhangi bir yerde yayımlanmışsa bunu da açıkça ifade ederek gösterdiğimi,
3. Alıntılanan başkalarına ait tüm verileri (tablo, grafik, şekil vb. de dâhil olmak üzere) atıflarla belirttiğimi,
4. Başka yazarların kendi kelimeleriyle alıntıladığım metinlerini kaynak göstererek atıfta bulunduğum gibi, yine başka yazarlara ait olup fakat kendi sözcüklerimle ifade ettiğim hususları da istisnasız olarak kaynak göstererek belirttiğimi,

beyan ve bu etik ilkeleri ihlal etmiş olmam hâlinde bütün sonuçlarına katlanacağımı kabul ederim.

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Danışmanlığını yaptığım işbu tezin tamamen öğrencinin çalışması olduğunu, akademik ve etik kuralları gözeterek çalıştığını taahhüt ederim.

Danışman
Dr. Öğr. Üyesi Özgür ARIKAN

LIST OF ABBREVIATIONS

CJEU	: Court of Justice the European Union
FSEK	: (Fikir ve Sanat Eserleri Kanunu) / Law on Intellectual and Artistic Works
KHK No. 556	: (556 Sayılı Markaların Korunması Hakkında Kanun Hükmünde Kararname) / Decree Law No 556 on the Protection of Trademarks
SMK	: (Sınai Mülkiyet Kanunu) / Law on Industrial Property
TMK	: (Türk Medeni Kanunu) / Turkish Civil Code
TP	: (Türk Patent ve Marka Kurumu) / Turkish Patent and Trademark Office
WIPO	: World Intellectual Property Organization

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ÖZET

Bu çalışma "Industrial Property Aspect of Fashion Law/ Moda Hukukunun Sınai Mülkiyet Yönü" konusunda yapılmıştır. Çalışmada moda hukuku SMK bağlamında marka ve tasarım odaklı incelenmiştir. Tez, giriş ve sonuç dışında üç ana bölümden oluşmaktadır.

Giriş bölümünde moda ve moda hukukunun kavramsal çerçevesine yer verilmiştir.

Birinci bölümde moda kavramı disiplinlerarası bir boyutta ele alınmıştır. Buna göre moda kavramını yorumlayan güzel sanatlar ve sosyoloji alanında yapılan çalışmalar, moda hukuku kavramını açıklarken kullanılmıştır. Bu doğrultuda modanın beş basamaklı döngüsü ile bu döngüye dahil olan fikrî mülkiyet hukukuna dikkat çekilmiş; bununla beraber knock-off gibi moda hukukuna ilişkin kavramlar ve bu kavramların fikrî mülkiyet hukuku ile olan ilişkisi analiz edilmiştir. Belirtilenlere ilaveten bu bölümde sınai mülkiyet haklarının yanında fikrî mülkiyet kavramı açıklanmış ve genel olarak fikrî mülkiyet hakları ile moda hukuku ile ilişkisi anlatılmıştır.

Tezin ikinci bölümünde markaya moda hukuku açısından yaklaşılmıştır. Buna göre marka kavramı, markanın fonksiyonları, mutlak ve nispi tescil engelleri, marka tescili ve koruması, marka hakkına tecavüz ile marka hakkının sona ermesi konuları moda bağlamında incelenmiştir. Çalışmada marka SMK açısından değerlendirilmiş olmakla beraber, moda hukukuna ilişkin global sorunlar karşılaştırmalı hukuk bağlamında örnek olarak verilmiştir.

Tezin üçüncü bölümünde ise tasarım konusu moda bağlamında ele alınmıştır. SMK'daki kapsam doğrultusunda tasarımın niteliği, tasarım türleri, tasarım korumasının kapsamı, tasarım hakkının kapsamı, uluslararası tasarım koruması, koruma süresi ve yenileme, hak sahipliği ve hakkın gaspı, tasarımın çalışanların tasarımları, tasarım hakkının sona erişi ve tasarım hakkına tecavüz konuları incelenmiştir. Tasarım hukuku SMK kapsamında ele alınmış olmakla birlikte, moda tasarımına ilişkin uluslararası sorunlara ve davalara da yer verilmiştir.

Sonuç bölümünde tasarım ve marka korumasının moda endüstrisindeki önemi ve etkisi açıklanmıştır. Bu bölümde birinci bölümde de bahsedilen "knock-off" ve "close

copying” (aynısı kadar benzeri) terimlerinin marka hukuku ve tasarım hukuku kapsamında bir hak ihlaline yol açıp açmadığı konusu analiz edilmeye çalışılmıştır. Bu doğrultuda belirtilmelidir ki “close copying”in tasarım ve marka hukuku açısından hak ihlali oluşturduğu açık olmakla beraber; moda hukukunda tartışmalı bir kavram olan knock-off’ların somut olay göz önünde bulundurulmadan “taklit” veya “esinlenme” olarak değerlendirilemeyeceği sonucuna varılmıştır.

Anahtar Kelimeler: Moda Hukuku, Moda, Sınai Mülkiyet, Fikrî Mülkiyet, Marka, Tasarım.

ABSTRACT

The aim of this study is to examine the "industrial property aspect of fashion law". In this thesis trademark and design rights aspect of fashion is studied. Thesis have three main chapters apart from introduction and conclusion.

In the introduction fashion and concept of fashion law are examined.

In the first chapter, fashion is studied with an interdisciplinary approach. Fine art and sociology studies which analyse the notion of fashion is used to explain the concept of fashion law. Accordingly five stages of fashion cycle is explained in which the intellectual property law gets involved is pointed out. Also the terms about fashion such as knock-off and their relation with the intellectual property law is analysed. In addition, industrial property rights, as well as intellectual property rights are studied generally and intellectual property rights' relation with the fashion law is explained.

Second chapter of the thesis studies trademark from the fashion law perspective. Accordingly notion of trademark, functions of trademark, absolute and relative grounds for refusal, registration and protection, trademark infringement and reasons causing termination of trademark are examined. In this thesis, trademark is studied within the scope of the SMK; however it must be stated that international problems as to fashion law are given as examples in the context of comparative law.

In the third chapter of thesis, design right is studied within the scope of fashion. Concept of design, design types, scope and limits of design protection, scope and limits of design right, international protection, protection period and renewal, rights holding and seizure, designs made by the employees, termination of design rights and infringement of design rights are examined within the meaning of SMK. Although design right is studied within the scope of SMK, international fashion design issues and cases are also taken into consideration.

In the conclusion, the importance and impact of trademark protection and design protection in the fashion industry are explained. We tried to analyse whether fashion copying and/or inspiration terms about fashion law such as close copying and knock-off, which are detailed in the first chapter, contribute to infringing act within the meaning of trademark and design rights. It is concluded that although close copying

can be clearly accepted as an infringing act from the trademark law and design law; knock-offs which is a controversial matter of fashion law cannot be evaluated as an “inspiration” or “imitation” without concrete case is considered.

Key Words: Fashion Law, Fashion, Industrial Property, Intellectual Property, Trademark, Design.

INTRODUCTION

First appearing as a physiological need at the beginning of humanity, clothing has taken an artistic and cultural expression with the start of permanent settlements. Based on these expressions, a different clothing style developed in each civilization. In this way garments started to reflect also a hierarchical status.[1] For example in the Egyptian civilization, the garment named *Şenti* with short skirts possibly due to the affect of hot climate was worn but in the Greek civilization, the garment named *Chiton* which was draped over the left shoulder and left the right arm exposed was preferred.[2] In that regard, purple colour was representing high status and power because it was difficult to make and it had a specific chemical structure.[3]

Fashion concept as used currently developed at the same time with Renaissance but it became more effective with the Industrial Revolution.[4] Although fashion started in Italian state-cities, at the end of 17th century, France made fashion virtually a state policy and famous politician of then era, Mr. Jean Baptiste Colbert said "fashion is to France what the gold mines of Peru are to Spain" in order emphasize importance for fashion for France.[5] And after being adopted centuries ago, this approach eventually made Paris the capital of fashion.

With the acceleration of production process thanks to the new machines invented/developed after the industrial revolution, fashion cycles gained speed in a parallel to this development. With on a structure consisting five steps, fashion functions in the following manner: Generally an idea is born; it is embraced by the elite; then it is embraced by a larger group that has connections with the elite; the idea degenerates and changes, penetrating to the lower segments of the society; and finally the idea dies.[6] In other words, faster the idea degenerates, quicker the fashion cycle develops, resulting in much more products released to the market.

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[1] Marnie Fogg, *Modanın Tüm Öyküsü, Fashion the Whole Story*, Emre Gözgü (tran.), İstanbul: Hayalperest Press, 2014, p.8.
[2] Arzu Evecen and Filiz Nurhan Ölmez, 'Antik Çağ Giysi ve Donatılarında Ekinsel Göndermeler', *Süleyman Demirel Üniversitesi Güzel Sanatlar Fakültesi Hakemli Dergisi*, Issue.14, (November, December 2014), p. 372, 373.
[3] Gözde Adıgüzel and Bilge Yılmaz Kolancı, "Antikçağda Statünün Rengi: Mor; Purple : The colour of Statues in Antiquity", *CEDRUS Akdeniz Uygarlıkları Araştırma Dergisi,* Vol. 5, June, 2017), p.262.
[4] Rebecca Arnold, *Fashion: A very Short Introduction*, New York: Oxford Press, 2009, p.6.
[5] Chris Breward, *Fashion*, Oxford University Press, 2003, p.24.
[6] Dominique Waquet and Marion Laporte, *Le Mode*, Ankara: Dost Press, 2011, p.14-15.

Degeneration of the idea at the 4th step of this cycle occurs through the imitators copying the products exactly or taken on a much more reasonable basis, it could be the work of the fast fashion chains. Thus fast fashion chains take the products of a high end brand and after making certain revisions, they sell them to their own consumers. Although larger fashion firms file objections against this copying,[7] no problem occurs as long as fast fashion companies do not go beyond the limits of inspiration in their knock-off products. For example, when Zara produces a bag in an inspiration from the brand Chloe, Chloe did not file any objection to this product.[8]

At this point, we must make it clear that imitation between brands is not only typical for high end and fast fashion companies. In other words, the entity that copies or is inspired from a product may not always be a fast fashion company. Presentation of a Dior designed dress in 1949 in the 2009 creation of high end brand, i.e. Zuhair Murad is a good example.[9] Dior did not take any legal action against this dress but rather it was evaluated as Dior's effect or reinterpretation of Dior. This example shows us the extent to toleration shown to imitation in the fashion sector, but identity of the imitator matters and approach taken to the determination of imitation or inspiration varies each time.

Fashion law is comparably brand-new area and studies made in connection with fashion law are rare in the Turkish law and in the comparative law as compared to other legal disciplines. However a new discussion subject enters into the realm of fashion law almost every day and as a result, fashion law is now not centered only on imitation issues but covers different legal aspects. The problem of underage model employment that exacerbated when 16 year old Kaia Gerber appeared on the cover page of Vogue magazine; sharing of paparazzi photos by Gigi Hadid in her own instagram account without showing the source and legal action taken against her because of this use[10], and using without permission on the cover page of fashion magazine Chaous69 the art piece of independent artist Sarah Shakeel in the shooting made with Kendall Jenner[11] and similar issues started to occupy the agenda of fashion law recently. However this thesis will discuss such part of the fashion law dealing

[7] *Forever 21, Inc. v. Gucci America, Inc.,* United States District Court, Case No. 2:17-cv-04706.
[8] See. Image 1.
[9] See. Image 2.
[10] *Xclusive-Lee, Inc., V. Jelena Noura "Gigi" Hadid,* New York Eastern Court, Case No. 1:19-cv-00520.
[11] See Image 3.

with industrial property and especially problems with trademarks and designs although there are much more aspects to the fashion law.

In line with this preference, now we have to look at some of the terms that might come forward in the fashion law so that we can better understand the impact of trademarks and designs in the fashion law. One of these terms, the knock-off concept, has a very widespread meaning in the fashion sector. Although knock-offs are seen as a copy of the product, the sector generally shows a degree of tolerance to them. In fact existence of knock-offs was made legitimate resulting in the birth of fast fashion companies. Maybe not at all times, but knock-offs that are made legitimate are sometimes seen as inspiration.

Sole area where we see knock-offs is not only the area of design protection. For that reason, limits of inspiration relevant in knock-offs will be discussed within the concept of trademark because of the inherent connections with trademark issues when there is a verbal similarity between two trademarks or issues arising from trademarks with shapes and from protection of iconic designs present in the reputable trademarks. Legislative Decree No 556 on Protection of Trademarks was annulled to give space for the SMK (Industrial Property Law) regulating trademark protection issues in better harmony with the European trademark law. In general, a trademark is defined as a mark used to distinguish the goods and services of an enterprise from the goods and services of another enterprise. Essential components of a trademark are mark, clarity, certainty and distinctiveness. According SMK, marks that can be considered as trademark include words, including names of persons, shapes, letters, numbers, shape of goods and packing, colors and sounds, although this list is not conclusive. The components of clarity and certainty were added to the trademark with SMK. Contrary to the requirement to publish and reproduce the trademark by means of printing arising from the annulled Legislative Decree (KHK), SMK finds it sufficient if relevant trademark is expressed in the trademark registry in an understandable manner. In another component of the trademark, distinctiveness, we see a separation: Concrete and abstract distinctiveness. In abstract distinctiveness, a trademark will not have any distinctive feature for any of the goods or services but in concrete

distinctiveness, a distinctive feature is needed in the goods or services subject to trademark registration.[12]

Another important aspect of a trademark is its functions. Specific functions of a trademark were determined by CJEU in the case of *L'oreal SA v. Bellure NV*. Accordingly, functions of a trademark were listed as showing source, guarantee and communication, advertising and investment.[13] In the function of showing source, the source is divided into two as commercial and physical source. Physical source shows the place of manufacturing and commercial source shows the base of the trading company that manufactured the relevant product. Guarantee function deals with the guarantee that products are manufactured under the supervision of one enterprise only and this enterprise is responsible for the quality of the products.[14] And final function is related to investment, communication and advertising. Purpose of this function is informing the consumers about the product.[15] This function has an especially powerful effect in the fashion sector. Here we see that impact created by the trademark dominates the product itself, with the result that people spend money not for the product but for the image of its brand. If we interpret these functions within the framework of fashion, we will realize that nobody will have any doubt about the superior quality of a Chanel dress and will associate this dress with the *Parisian* trend without caring for its actual physical origin and people will not look for quality when they buy a Chanel dress even if quality of the product was quite bad compared to the amount of money spent for it just because of the brand image created by Chanel. This fact shows that the function of investment, communication and advertising can take precedence over the other functions.

In order for a trademark to enjoy trademark protection, it must be duly registered. However if any of the conditions described in Article 5 of SMK are relevant, TP (Turkish Patent) will *ex-officio* examine these conditions and reject registration application. Absolute grounds for refusal are listed in Article 5 of SMK and will be dealt with in detail in the relevant part of this thesis although we need to emphasize a

[12] Cahit Suluk, Rauf Karasu and Temel Nal, *Fikri Mülkiyet Hukuku,* Ankara: Seçkin Press, 2018, p.161.
[13] *L'Oreal SA v. Bellure NV ald Others,* CJEU, Case No. C-487/07, 18.06.2009, http://curia.europa.eu/juris/document/document.jsf;jsessionid=EDE876977C6EAD8C770041E68B278912?text=&docid=75459&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9051008, (03.04.2019).
[14] Tobias Cohen Jehoram, "The Function Theory in European Trade Mark Law and the Holistic Approach of the CJEU", *The Trademark Reporter*, Vol 102, No.6 (November, December 2012), p.1248.
[15] Uğur Çolak, *Türk Marka Hukuku*, 3rd. Edition,İstanbul:12 Levha Press, 2016, p.14.

novelty made under the SMK. Accordingly, if a registration application is filed in respect to a mark that is identical to another trademark registered or filed for registration before or in respect to a mark that is identical to or identically similar to another trademark used for same goods or services, this application will be evaluated by the Institute according to absolute grounds for refusal and will not be rejected provided that owner of the previous trademark has granted explicit consent to such filing. While TP *ex-officio* examines absolute grounds for refusal when there is a concern on public order, it prefers not to conduct any ex officio examination in cases involving relative grounds for refusal. If relative grounds for refusal listed in Article 6 of SMK are present, an objection may be filed against the registration of the trademark.

Upon registration of the trademark, period of protection granted under SMK is 10 years, subject to extensions of ten years each. In addition to that owner of a registered trademark will be entitled to prevent certain actions listed in SMK and to take legal action for trademark infringement if these actions are relevant. Fashion firms are obtaining registration for their fashion designs once they establish their brand. For example Louis Vuitton obtained trademark registration for its monogram fabric[16] and Louboutin for the red bottom of its shoes[17] which are protected as trademark. Therefore in this case trademark protection should not be interpreted in a narrow manner reaching only to the name of Louis Vuitton.

Cases causing termination of trademark rights are regulated under SMK as cancellation, invalidity and other cases. For a decision of invalidity, absolute or relative grounds for refusal as listed under Articles 5 and 6 of SMK must be present and the court will declare the trademark as null and void. And if the conditions listed in Article 26 of SMK are relevant, the trademark will be cancelled according to a decision to be rendered by TP. Other conditions terminating the trademark rights under Article 28 of SMK are expiration of the protection period, failure to renew the trademark registration on a timely basis and withdrawal of trademark rights by the trademark owner.

[16] See Image 4.
[17] See Image 5.

The design concept which forms the other principal part of this thesis is also regulated under SMK. Contrary to the annulled Legislative Decree on the Protection of Industrial Designs, SMK does not use the concept industrial design while describing design but preferred a more comprehensive view of the design concept. Although the term "industrial" was used in the annulled Legislative Decree on the Protection of Industrial Designs, it was also related to handmade products based on a comprehensive view of the concept. Another novelty brought to design issue in SMK was the protection afforded to unregistered designs.

Design protection refers to the appearance of the product but at the same time, a design has to be new and distinctive in order to enjoy the protection afforded by SMK. In addition, under SMK, the concept of novelty has been related to being made available to the public. Accordingly if a design was not made available to the public in any part of the world, it would be considered new. Finally the concept of distinctiveness is made related to the criterion of being different as separate than the concept of explicit difference used in to the annulled Legislative Decree on the Protection of Industrial Designs.

Scope of the design protection to be afforded is determined according to the extent of freedom enjoyed by the designer. If we attempt to explain this issue by using the example of a bag, a fashion item, we will say that the designer will be subject to the limits arising from the normal use of a bag, and so he will not design a shoe if he intended to design a bag in the beginning and will have to limit himself with the general form of a bag. In this case, details added to the bag by the designer can be protected since the designer is under the impact of limits. For example, in a Celine bag with "wings" will enjoy protection as a detail since they were created in a design-limited environment.[18] However in case of products not giving any freedom to the designer, the situation is different because products shaped by functional needs only will not be protected as design.

When a design is concerned, inspiration is normal and source of inspiration does not need to be another design. Actually sources of inspiration affecting the designers are various, including cultures, past time garments and even television or cinema archives. However fashion law is involved here, supervising that the designer did not

[18] See Image 6.

steal the design of another in this inspiration and his design will not be stolen by the others[19] At this point, Article 59 of SMK comes into play, determining the scope of design protection. Accordingly, designer will have certain rights to prevent third persons. We must also remind that novelty made through SMK to extend protection also to unregistered designs will be applicable since unregistered design will be protected only against an identical design or a design that is identically similar to it. At this point, distinction between the two concepts used in connection with fashion law in the first part of this thesis, i.e. knock-off and close copying is important. The phrase identically similar as used in the text of this Article naturally refers to close copying and no protection is possible against knock-offs. In spite of this fact, since a distinctive feature is required for the protection afforded to a registered design and this feature must be some sort of difference instead of distinctive difference as required by the annulled Legislative Decree on the Protection of Industrial Designs, it will pave the way for the protection of the knock-off of a registered design.

Period of protection afforded to designs with SMK is 5 years and it could be extended for up to maximum 25 years. Although providing only a short term design protection to the designs that will be nonfunctional after short time because of the fast cyclic structure of fashion rather than affording permanent trademark protection that is quite expensive seemed like a reasonable option, limiting the period of protection to 5 years or to maximum 25 years in respect to certain fashion designs that became iconic does not seem to be logical. Big fashion companies prefer protecting their iconic designs with trademark protection such as Burberry. However despite the trademark protection option used by the big fashion companies, design protection or especially unregistered design protection will surely provide a considerable level of protection to the independent fashion designers that could not create their trademark yet.

Design rights terminate when the design is declared as invalid; protection period expires; registration is not renewed or right holder withdraws his design rights. Another important aspect of design protection is design infringement. A design infringement occurs when a design that is identical to a previous design or is identically similar to it in general appearance is created. In such a case, infringement can be prevented irrespective of whether such design has been registered or not. The

[19] Erdem Eren, "Moda Hukuku", *Terazi Hukuk Dergisi*, Vol. 12, No. 128, (April 2017).

terms counterfeit and close copying are used in the text of relevant Article. Other cases of infringement include unauthorized expansion of the rights granted by the other through a license or transfer of that right to a third person and seizing of the design. When design infringement is involved, close copying and counterfeiting are regarded as an infringement.

If we compare the provisions about infringement in design protection and trademark protection, we see that Article 81 of SMK requires the respective design to be same or identically similar or identically similar in general appearance in order to decide about infringement of that design. According SMK, a design infringement will be involved if such conditions exist. In the text of relevant Article, it is further stipulated that protection be afforded against counterfeiting and close copying. However since the ambigus nature knock-offs, protection provided against knock-off should be determined according to the concrete case. If knock-offs are considered as inspiration, then this situation must be considered within the scope of principle of utilization and simulation freedom. However such situation can go beyond the limit of inspiration. Although identically similar in general appearance term associates with close copying; protection will be provided against to a knock-off which goes beyond the limits of inspiration since, identically similar in general appearance term term has no sharp lines.

Concerning infringement of trademark rights, SMK Article 29 gives a list of four acts and considers them as infringement. One of these acts is related to license, while the other two are related to a design being identical or identically similar to another previous design. Obviously these two provisions are pointing out to the concepts of close copying and counterfeiting. Finally another act stipulated in Article 29 is about using the trademark without the consent of the trademark owner in ways set out in Article 7. And when we examine Article 7 of SMK, we see that clauses (b) and (c) of the 2nd paragraph and clause (d) of 7/3 use the word “similar”. Accordingly what is not meant here is not identically similar and in this manner in the trademark protection, the road is paved to the protection for knock-offs that go beyond the limits of inspiration or that could be interpreted in this manner.

In the first part of this thesis, we discussed the concept of fashion and examined it from the perspective of intellectual property law. After explaining cyclic nature of

fashion, we reviewed intellectual property law. As aforesaid, intellectual property law is a broad concept containing intellectual rights and industrial rights. We discussed fashion from the perspective of industrial property and although we essentially focused on trademarks and designs, we also mentioned another industrial right which is patent and discussed the relationship between fashion and patents. With the recent developments in technology, inventions started to influence fashion, and these inventions reflected to fashion are protected by a patent. If we examine fashion from the perspective of intellectual rights, we see that fashion designs are protected in FSEK. In spite of the copyright protection afforded by FSEK to the fashion designs considered as works of fine arts, no prejudice occurs to the protection afforded under SMK and pursuant to cumulative protection principle, relevant design will be entitled to enjoy the protection both under SMK and also FSEK .

Second part of the thesis deals with trademark protection. This subject was discussed from the perspective of SMK and emphasized in terms of the fashion law. Staying loyal to the sequence made in accordance with the systematic of the Law, first a general definition was given for the trademark concept and after examining functions of the trademark, barriers to the registration and registration and protection of trademarks, infringement of trademarks were discussed. Finally, reasons of termination of trademark rights were examined.

And last part of the thesis, third part, deals with the design concept. In this part, in addition to a general definition of design, concepts such as novelty, distinctiveness, making available to the public and design types were discussed from the aspect of fashion designs. Then scope of the protection afforded to designs was examined and completed with an explanation of design right and design limits. Finally after discussing right holder’s status in designs and seizure of designs, infringement and termination of design right were explained.

CHAPTER 1

1.1. Concept Of Fashion

There are many assumptions about the etymological source of the word "fashion". Some of them are as follows: The word "fashion" was adopted in English from the French word "façon".[20] Source of the word "façon" is the Latin word "facere" or "facio".[21] This word means giving a general shape to something and it evolved in time to the word "façon" and finally gained widespread use with the word "fashion" in English.[22]

The word "moda" used in Turkish comes from the Latin word "modus". The word modes can be defined as "non-formed border".[23] The word mode derived from the word modus together with the word modern can be also defined as "not belonging to past.[24] Apart from that, TDK Turkish Dictionary defines fashion as "temporary innovation brought to the social life because of need of change or wish for adornment";[25] and Oxford Dictionary defines it as "popular style observed in clothing, hair, decoration or behaviors".[26]

Fashion is sociologically defined as "being first with the latest".[27] Another definition of fashion is given as "the most admired style in clothes and bodily adornments".[28] As one can see in these definitions, there is no general definition for fashion in the doctrine but basic elements of fashion are known as human, time, acceptance and locality.[29]

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[20] Waquet and Laporte, p.7.
[21] Ann-Marie Sellerberg and Patrik Aspers; "Fashion, Sociology of" *International Encyclopedia of the Social and Behavioral Sciences*, Oxford: Elsevier, 2015, p.1**;** Nevin Uçak, "1980'lerden Günümüze Moda ve Türkiye'de Moda Fotoğrafçılığı, İstanbul Arel Üniversitesi SBE, *Unpublished M.S.,* İstanbul 2016, p.4.
[22]Uçak, p.4.
[23]Mine Eker Türkmen, "Dönemin Moda Dergilerindeki Görsellerden Yola Çıkılarak Türkiye'de 1980'li Yıllar Modasındaki Kitsch Etkisi", Gazi Üniversitesi EBE, *Unpublished M.S.,* Ankara 2015, p.33.
[24]Sema Akabay, "Moda Tasarımcısı, Moda Fotoğrafçısı ve Moda Editörü Üçgeninde Tasarım", T.C. Mimar Sinan Güzel Sanatlar Üniversitesi SBE, *Unpublished M.S.,* İstanbul 2010, p.1.
[25]*Türk Dil Kurumu*, "Moda",
http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5b437de3de8179.05779986 (25.01.2018)
[26] *Oxford Dictionaries*, "Fashion",
https://en.oxforddictionaries.com/definition/fashion (25.01.2018)
[27] Sellerberg and Aspers, p.1.
[28] Venkatesh and Others, "The Aesthetics of Luxury Fashion, Body and Identify formation", *Journal of Consumer Psychology*, Vol.20, Issue.4, (October 2010), p.460.
[29] Dima Basma, "The Nature, Scope, and Limits of Modern Trademark", The University of Manchester, *Unpublished PHD,* Manchester 2016, p.49.

1.1.1. History of Fashion

In a general sense, fashion has always existed in human life but beginning of modern fashion dates back to the time of Italian city-states in the Renaissance Period.[30] According to another view, beginning of fashion goes back to the industrialization movement in mid 19th century.[31] Fashion was influenced by and developed with the backup of various events including architecture, disease and accident. For example, pointed hats worn by women in the 15th century were inspired by gothic architecture that reined in medieval Europe. Similarly, ruffs used by royal family were designed to hide goiter disease of the Spanish princess and Chanel style short hair of Coco Chanel came to existence when gas furnace of Coco Chanel exploded and Coco Chanel had to cut the burned hair. [32] Caspian princess Çiçek ("Flower") making "kağan hatun dress" fashionable in Byzantine palace when she was admitted to the palace as bride[33] with the result that this dress accepted as ceremonial dress of the empire[34] clearly shows how fashion could be interpreted differently by various societies since in this case, a woman dress became man fashion in the Byzantine palace.

If we examine history of fashion, we will find out that fashion was not always a global industry. In the past, fashion industry was addressing to elite through Paris centered haute couture houses. Ready to wear products accounted for a very small part of the market and the market was dominated by haute couture. After invention of sewing machine in mid 19th century, industrialization started in clothing. And as a consequence, USA achieved to the global leader in ready to wear products in the 20th century. However France continued to dominate luxurious clothing sector and with the recovery of economy after 1950, American and Italian firms replaced France in high end and ready to wear products. Towards the end of 1900s high end products were globally purchased. And after 1980, Italy became the new haunt for fashion with the dramatic ascension of fashion firms such as Gucci, Prada, Armani and Versace. And after the economic boom in 1990, a customer segment willing to spend money

[30]Berna Ersoy, "Moda Pazarlamasının Önemi ve Moda Sanayiinden Bir Örnek: Vakko", Dokuz Eylül Üniversitesi SBE, *Unpbublished M.S.,* İzmir 2002, p.24.
[31] Fogg, p.9.
[32] Feyza Erol, "Trend Öngörüsü ve Moda Dinamikleri", Mimar Sinan Güzel Sanatlar Üniversitesi SBE, *Unpublished M.S.,* İstanbul 2011, p.94
[33] İbrahim Sarı, *Büyük Türk Tarihi*, 1. Edition., 2017, NoktaE-Book Publishing p.102.
[34] Hayrettin İhsan Erkoç, "1453'ten Önce İstanbul'da Türk Varlığı", *Hacettepe Üniversitesitesi, Türk Kültürünü Araştırma Enstitüsü*, 2009, p.59.

for luxurious ready to wear products emanated. In this period, haute couture had to make sacrifice sales of its products. In the modern fashion concept, small workshops were replaced by larger firms.[35] One of the reasons behind giving up of haute couture was entrance of baby boomer generation of women into business life. Becoming efficient in business life, women were driven to a more masculine style that could make them more dominant at work instead of fancy style of haute couture.[36] As aforesaid there are various opinions about the beginning of modern fashion but obviously, it existed in human life since the beginning. However we must also say that fashion most intensely influenced into the daily living in the 21st century.[37]

1.1.2. Theories Regarding Fashion

Fashion affects traditional styles of people from different cultures and supersedes their traditional inclinations and in this manner, creates a proper foundation for a more global environment.[38] On the other side, if we assume a deeper approach to fashion, we can see that fashion has an inherent paradox as it accommodates for two separate poles: first one is opposing and individualism and second one is harmony and participating into the general style in the society. When a fashion object first appears, it is accepted by people just because it is different and when it is seen that it is owned by everyone else, it will be abandoned since it ceased to be different. And on the other pole, a person adopts a popular object only to accommodate himself to the society and get in touch with the current style. That means that fashion is followed with two different poles of attitude: individuality and adaptation to the society.[39] As a matter of fact, Simmel determined preliminary conditions of fashion as the need to be separate and the need to be united.[40]

It is alleged that fashion consisted of various steps and terminated on the final step. There are various theories trying to explain why fashion changed in cycles. According to a popular theory, fashion is based on the struggle between social statutes.

[35] Karl Raustiala and Cristopher Sprigman, *The Knock-off Economy:How Imitation Sparks Innovation*, USA: Oxford University Press, 2012, p.22-25.
[36] Bengü Sevil, "Moda Sektöründe Küresel Marka Yaratılması: Markalaşma Çalışmaları Üzerine Bir Uygulama", Dokuz Eylül Üniversitesi SBE, *Unpublished M.S.,* İzmir 2006, p.3.
[37] Fogg, p.14.
[38] Cüneyt Üstüner, "21. yy'da Moda ve Sosyal Medyanın Moda Üzerindeki Etkisi", Beykent Üniversitesi SBE, *Unpublished M.S.,* İstanbul 2014, p.7.
[39] C. Scott Hemphill and Jeannie Suk, "The Law, Culture, and Economics of Fashion", *Stanford Law Review*, Vol.61, Issue.5 (March 2010), p.105.
[40] Georg Simmel, "Fashion", *The American Journal of Sociology,* Vol.62, Number.6 (May 1957), p.543.

Accordingly, fashion is adopted by the social elite only to differentiate themselves from the lower classes. Lower classes will feel admiration toward upper class and try to imitate the fashion adopted by the latter, in which case upper class will adopt a new fashion in order to re-differentiate itself from the lower class and start a new cycle that will continue endlessly. [41] Fashion can find no place for itself in primitive tribes and societies without class because fashion has the sociological function of separating different classes from each other in the society.[42]

Generally fashion is dominated by a wealthy group. According to the needs theory of Maslow, layers creating the foundation of pyramid can be completed only by wealthy people. Aesthetical need is positioned at the top of the pyramid as some sort of luxurious fancy and can be accessed only by the wealthy group and at this point, this group will have a say in this layer. [43] In Maslow's theory, human needs are separated into five groups and it resembles a pyramid. Each need corresponds to a specific layer of the pyramid that has five layers. At lowest layer, we find physiological needs as most fundamental need (eating, drinking, accommodation etc.). At the next layer, we find the need for security and this layer is not so vital like the first layer. At the middle layer of the pyramid, we find the need for belonging and love. And at the final two layers, we find the need for respect and self-realization. At the upper layers of the pyramid, realization rates drop down because a human being cannot climb to the upper layers unless he satisfies his needs at the lower layers.[44]

However we cannot say that "clothing need" at the second layer in Maslow's theory is akin to the "clothing style" imposed by different fashion trends because fashion is a concept that is more related to the need for respect from society and self-realization. At this point, we must remind that fashion is a concept that goes beyond need for security because of its specific structure. Therefore it is natural that fashion will be dominated by a wealthy group managed to climb to the upper layers of the pyramid.

Apart from that theory, there is another theory of subculture leadership claiming that fashion can also emanate from subcultures. In the theory of subculture leadership, it is

[41] Hemphill and Suk, p.109-110.
[42] Simmel, p.541.
[43] Henrik Vejlgaard, *Anatomy of a Trend*, McGraw-Hill Compaines E-Book, p.43.
[44] Yıldırım Yıldırım, "Tüketici Davranişlari Bağlaminda Maslow'un İhtiyaçlar Hiyerarşisinin Yeniden İncelenmesi ve Gösterişçi Tüketim", *The Journal of Academic Social Science Studies*, Number.40, (Winter 2015), p.404-405.

defended that fashion was developed from different subcultures and in time, it was affected and shaped by the popular culture.[45] According to another example supporting subculture theory, starting with 1990s, fashion was not fed by Paris haute couture anymore but instead, it penetrated into daily life from subcultures represented in pop music, street culture and marginal groups.[46] Another supporting example is Palestinian scarves. A wealthy group was not influential in spreading of this fashion, but it developed from a subculture. At this point, we must emphasize the fact that source of a fashion object is not always an innovative idea but can be an asset preserved by a culture.

In another theory called "Trickle Down", leader of fashion is upper class. According to this theory, upper class embraces a fashion style to emphasize its differences from the lower class and general public starts to imitate them in admiration to the upper class. Then imitated upper class looks for another fashion style to start a new cycle. In the mass market theory, it is claimed that fashion will reach to and adopted by different segments of the society with the help of mass media and in the collective election theory, fashion is seen as a socialization attempt and determines the social standards.[47]

In order to mention the phases applicable in the functioning fashion, we can speak of five main steps in fashion. In the first step, we see arousal of an innovative idea, resulting in a new identity for the fashion object. In the second step, this innovative idea is adopted by a small elite group. In the third step, fashion is adopted by a larger group that has connections with this elite group. In this step, innovative idea is not transformed and the product is manufactured as it is, without any change in the elements of this idea. In the fourth step, we see the process of disintegration and transformation. In this process, innovative idea, i.e. the product is imitated and changed so that it can be available to various income groups. Fast fashion companies like HM and Zara become involved in the process at this step. Final step is generalization. At this step, diluted and degenerated product is made accessible to

[45] Ka Ming Law, Zhi-Ming Zhang and Chung-Sun Leung, "Fashion change and fashion consumption: the chaotic perspective", *Journal of Fashion Marketing and Management: An International Journal,* Vol. 8 Issue: 4, (2004), p.363.
[46] Sevil, p.3.
[47] Law, Zhang and Leung, p.363.

much larger groups. With this step, innovative idea expires and dies.[48] In other words, sector puts forward another new idea in order to outmode the aesthetic created before by it.[49] In this manner, the cycle continues to repeat itself.

There is another sequence functioning in five phases in the same line as follows: At the first phase, an object suddenly becomes widespread. At the second phase, it continues to spread but in addition, element of pleasure comes out. In other words, object becomes widespread totally arbitrarily without any basic need tied to it. At the third phase, object continues to spread in a short time and without any definite reason. Mostly, fashion of that object will expire as fast as it had spread before. At the fourth phase, we see a different course of development which could be correlated totally to the fashion concept because at this phase certain additions are made to the object only to change it without any special need, i.e. the object is attempted to be changed. And at the final phase, fashion becomes a fast and short-term concept with no aims other than its own inherent aim. In other words, a need to rejuvenate will arise although the object has not become obsolete yet only because it is outmoded now.[50] Actually at the final phase, object has not demoded yet but innovative idea put forward in the beginning has grown old, bringing a need for change.

We can say that in these two functioning models that are similar with small differences, the phase to be considered from the aspect of industrial property law is the fourth phase because in the fourth phase, fashion law will be involved together with the fast fashion concept. There is an important difference between inspiration and imitation in the process involving idea development and product changing and it represents one of the principal dynamics of fashion law.

We should not confine fashion only to woman wear or in general clothing sector because fashion is influential in a widespread area including shoes, catering, beauty, internal design, jewelry, entertainment sector or even automobile engineering and phone design.[51] As aforesaid, although fashion has penetrated into all areas of daily life, in this thesis fashion concept will be examined only with respect to clothing, accessories and cosmetics. However we should mention that women and men fashion

[48] Waquet and Laporte, p.14-15.
[49] Fogg, p.14
[50] Cem Hakko, *Moda Olgusu*, Vakko Yayınları, p.17-18.
[51] Joanna Buchalska, "Fashion Law: A New Approach?", *Queen Mary Law Journal Special Conference Issue,* (Autumn 2016), p.14.

moves with different speeds in cyclic terms. Concerning this matter, it has been said that women fashion changes on daily basis, while it takes a couple of centuries for men fashion to change. Indeed men's suit became fashionable in the 19th century and changed so little until the 21st century but women fashion changes very quickly.[52] Therefore subject of this thesis will be centered on woman fashion rather than men fashion.

1.1.3. Fashion Law and Notions Regarding Fashion Law

As a pioneering authority in fashion law, Fordham Law School defines fashion law as follows: "The legal substance of style, including all the issues that may arise throughout the life of a garment, starting with the designer's original idea and continuing all the way to consumer's closet."[53] As it can be understood with this definition, fashion law deals not only with one area but takes into account whole process starting from the development of design until completion of sale and possession of the design by the buyer. Fordham Law School claims that there are four pillars serving as carrier in the fashion law. These are: *Intellectual property, business and finance including areas such as investment, labor law and real estate, international trade and government regulations, including sustainability, privacy and easy to wear technology issues, consumer culture and civil rights*.[54] Our thesis will focus on fashion law in terms of industrial property as one these three pillars.

From an academic perspective, fashion is considered as an interdisciplinary branch covering psychology, sociology, arts, anthropology, economy and semiotics.[55] It is also possible to say that very much like fashion, fashion law contains variable disciplines of law. Although fashion law is usually seen as a branch of law focused on developing solutions for the problems encountered by fashion designers and fashion houses, it actually covers a very wide area including real estate, advertising, companies law, contracts, intellectual property law, international law and labor law and it has an interdisciplinary collective structure. Fashion industry consists of the

[52] Alfredo Cabrera and Matthew Frederick, *101 Things I Learned in Fashion School*, İstanbul: Optimist Press, 2015, p.35.
[53] Mark K. Brewer, "Fashion Law: More Than Wigs, Clothes and Intellectual Property", *San Diego Law Review,* Vol.54, (2017), p.743.
[54] Diana Flavia Barbur, "Fashion Law. Concept and Beginnings in European Union and Romania", *Juridicial Tribune*, Volume 8, Special Issue, (October 2018), p.7.
[55] Marianne Dahlen, "Copy or Copyright Fashion? Swedish Design Protection Law in Historical and Comparative Perspective", *Business History,* Vol. 54, No. 1, (February 2012), p.90.

rings of multiple chains because a fashion company is operated on the basis of a comprehensive cooperation supported by the fashion designer, raw material supplier, textile producer, garment manufacturer, specialized plants, sellers and marketing experts.[56] One of the most important reasons behind this interdisciplinary structure is the need for the existence of a widespread chain of operations and with each ring of the chain, different disciplines of law will be involved once the product is designed and then offered to the customer.

In spite of this large chain and interdisciplinary structure, if we want to make a direct correlation between fashion and a branch of law, we can say that intellectual property law will have the greatest share in this because with the initial appearance of fashion object, first of all intellectual property law will come into play. Therefore this study will explain the relationship between fashion and intellectual property law. However the main concern of this thesis will be industrial property.

Generally speaking, fashion industry has considerable economic importance since consumers in the fashion industry include everybody wearing a garment which means that these consumers represent much higher number than total consumers spending money on arts, music, books etc.[57] The figures that will be given now will surely give a clear picture of size of garment sector: in 2018, revenues in clothing sector earned in Turkey amounted to USD 12,033 million and the sector is expected grow with an annual rate of 12.1% in the period 2018-2021.[58] In global terms, revenues in garment market amount to USD 1,540,136 and the sector is expected grow with an annual rate of 4.4% in the period 2018-2021. These statistical data does not include work clothes, bags, watches and jewelry, snow clothing and umbrellas.[59]

Although fashion law is quite a new branch of law, we see that protection under fashion law in Europe started simultaneously with the rise of textile sector. As a matter of fact, as yet in the 15th century, French king granted privileged rights to the persons engaged in textile business and again in France, in 1711 it was decided that penalty be imposed to the persons copying the designs on the handkerchiefs. And later in 1787, a design protection was afforded to the textile manufacturers in England

[56] Guillermo C. Jimenez and Barbara Kolsun, *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys,* Bloomsbury Publishing Inc, 2014, p.2.
[57] Hemphill and Suk, p.105.
[58] https://www.statista.com/outlook/90000000/113/apparel/turkey# (18.02.2018)
[59] https://www.statista.com/outlook/90000000/100/apparel/worldwide (18.02.2018).

and Scotland. Then in 1876, a copyright law was made to meet the needs of textile industry in Germany.[60] If we examine comparative law, we see that in the European Union, better protection is afforded to the designs, while such level of protection is not available in the USA.[61] WIPO declared that 3 dimensional designs will not be protected by copyrights in the USA, but designs and shapes on the fabric, belt buckles and items of clothing that represent different concepts[62] and garments with no use or functions like the meat garment of Lady Gaga[63] will be entitled to enjoy this copyright protection. Besides that, while EU provides copyright protection to fashion designs through unregistered community design right, in certain EU countries, designs protected by copyrights will also benefit from registered and unregistered protection pursuant to cumulative protection principle.[64]

However the fact remains that no consensus is yet achieved about the necessity of an expanded intellectual property protection and even, in a theory called privacy paradox, it is defended that underdeveloped protection in fashion law will enhance creativity and rapid spreading of knock-offs not affected by any counter measure will contribute to the fashion cycle, accelerating the transition to a new fashion trend.[65]

In this part of the thesis, we will explain knock-off concept, along with some other concepts found in the fashion law.

1.1.3.1. Knock-off

To say that a product is in fashion actually means that similar products will be found in the market. This product will be similar to the products produced by competitors and all of them will serve to the fashion of that period. At this stage, knock-offs come into play. The term knock-off that is widely used in fashion law deals with the

[60] Barbur, p.14,15.
[61] Brewer, p.750-755**;** John Zarocostas, "The Role of IP Rights in the Fashion Business: A US Perspective", *WIPO Magazine,* Issue:4, (August 2018), p.36., Tiffany Mahmood, "Design Law in United States as Compared to the European Community Design System: What Do We Need to Fix?", *Fordham Intellectual Property, Media and Entertainment Law Journal,* Vol.24, (2014), p.558.
[62] Wipo stated that Halloween costume's elements which are capable being separable are protected by copyright, https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf, (06.03.2019).
[63] See Image 7.
[64] https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf, (06.03.2019).
[65] Brewer, p.758.

similarity in the style or in the product. However a sensitive point arises in the distinction between the knock-off and infringement. [66]

Generally knock-offs in the luxurious product sector represent only four percent of general knock-offs. Besides that, it is claimed that knock-offs correspond to ten percent of economy. Some authors evaluate knock-off concept within the concept of counterfeit which comes forth when the buyer knows that the product he/she is buying is counterfeit.[67] However in fashion industry, knock-off concept has a different meaning. Here knock-offs show an inspiration rather than a counterfeit product and are considered as essential in supporting generalization and spreading of the product to all segments of the society which are found at the fourth phase of five phased fashion cycle mentioned before.

As aforesaid, knock-offs are very important in the fashion industry. Since fashion industry is typified with a fast cycle of change, an unsuccessful product will have to be sold with much discount while successful products will be consumed quickly. Thus the need arises to put on products similar to these quickly consumed products onto the shelves and this is much desired by the seller and relevant firms. In this manner, competing firms start to imitate successful products of each other. At this phase, fast fashion companies come onto the stage along with the principal competitors.[68]

1.1.3.2. Fast Fashion

Generally speaking, fast fashion means cheap garment collections imitating the products of luxurious brands.[69] Fast fashion first developed in America during 1980s and spread to the world in 1990s.[70] Fast fashion companies serve to affordable fashion but they frequently renew the products on their shelves as one can understand from the name of this fashion. While luxurious brands release spring-summer and autumn-winter collections, fast fashion companies do not limit themselves with only these two collections and carry out their production activities with a continuously changing

[66] Jimenez and Kolsun, p.9.
[67] Tim Philips, *Knock-off The deadly Treat in Counterfeit Goods*, Kogan Page London and Sterling VA, 2005, p.2-3 and p.10.
[68] Jimenez and Kolsun, p.10.
[69] Joy and Others, "Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands", *Fashion Theory*, Volume 16, Issue 3, (2012), p.273.
[70] Ahu Fatma Mangır, "Sürdürülebilir Kalkınma İçin Yavaş ve Hızlı Moda Fast and Slow Fashion For Sustainable Development", *Selçuk Üniversitesi Sosyal Bilimler Meslek Yüksekokulu Dergisi 41. Yıl Özel Sayısı* ,Vol:19,(2016), p.149.

cycle. With the help of this strategy adopted by the fast fashion companies, a perception is created for customer that if he/she does not buy that product immediately, he/she will not be able to find it in the next visit.[71] Actually, while the upper class of fashion industry uses a two seasonal calendar comprising of spring-summer and autumn-winter, lower class uses a separate calendar for each season, i.e. prepares a different collection for all seasons with the result that new products arrive at the shop every month guaranteeing a fast circulation.[72]

The definition "competing to convert manufactured products into cash smartly and quickly" can be used to explain fast fashion concept. Besides that, three important factors come forth in the concept of fashion: market timing, cost and buying cycle.[73]

The risk of being unsuccessful is much lower in the products of fast fashion companies because they imitate successful products of other firms. In this manner, they can generate high levels of profit. Although legal protection is afforded for fashion designs in the European Union, it is only available for original products. However as clothing products are similar to each other (shirts, buttons, pants etc.), it is not very easy that the criterion of originality can be met in these products. For that reason, no legal protection can be afforded to knock-offs and knock-offs dominate the fashion market in all over the world.[74] With the arrival of smart phones and other technology able to take photos, the products exhibited during fashion shows (in Milan, Tokio, Paris, New York, London, Rome) are meeting with the buyers in local garment stores with much affordable prices as compared to the price of the original product.[75] Actually, concept of copying has been regarded as a necessity of the fashion world rather that its fact. With her statement: "If nobody is imitating you, you are not successful", Elsa Schiparelli revealed how imitation was perceived so differently in the fashion world.[76] The answer given by Ralph Lauren to a question about how he could produce again and again seems to affirm that this perception

[71] Fast Fashion, http://www.vogue.it/en/news/encyclo//fashion/f/fast-fashion?refresh_ce= (16.08.2018).
[72] Cabrera and Frederick, p.89.
[73] Mangır, p.149.
[74] Jimenez and Kolsun, p.11
[75] Dahlen, p.89.
[76] Dahlen, p.90.

again: “You are copying. I am at this point now as a result of copies made for 45 years”.[77]

1.1.3.3. Slow Fashion

The concept that is the opposite of fast fashion concept is the slow fashion concept. An exact definition for this concept that was developed by Fletcher against excessive increase in consumptions has not been made since yet in the academic world but it could be said that it is based on sustainability, local production, traditional values, protection of ecosystem, variability of resources, ethical values of the customers and socially responsible approach. Generally, slow fashion provides the consumer with timeless products that could be worn/used for a very long time. In this way, slow fashion enables the consumer to express himself in an individualized manner instead of choosing a popular product that is forced on the mind of the consumers as part of fast fashion that we attempted to explain above.[78] Slow fashion concept has been shaped with the effect of slow food trend as opposed to the fast food concept that was associated with fast fashion.[79] Relationship between slow fashion and law must be based on a state of monopoly in the market provided that relevant slow fashion firm obtains registration for its brand which will serve to the purpose of the slow fashion.

1.1.3.4. Close Copying

We must be careful about the distinction between “close copying” and adaptation to current trends. Products trying to adapt to the same trend do not need to be the close copying of each other.[80] One person may be consciously or unconsciously influenced by the style of another person and as a result, wear the same style of garment. But copying is different in that it directly attempts to replicate the original product. In spite of this fact, a designer may create his product by referring to the product of another designer without being involved in close copying. In this case, it will be realized that original product was a source of inspiration rather than close copying.

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[77] Eric Wilson, “O and RL: Monograms Meet”, *NY Times,* 25.10.2011, https://www.nytimes.com/2011/10/27/fashion/oprah-winfrey-interviews-ralph-lauren.html (14.04.2019).; Raustiala and Sprigman, p.19.

[78] Róbert Štefko and Vladimira Steffek, “Key Issues in Slow Fashion: Current Challenges and Future Perspectives”, *Sustainability*, vol.10, Issue.7 (July, 2018), p.2-5.

[79] Kate Fletcher, “Slow Fashion: An invatiton for Systems Change”, *Fashion Practice*, Vol.2, Issue.2, (2010), p.261.

[80] Hemphill and Suk, p. 106-107.

This will obviously help to the reinterpretation of the original product.[81] Making covers for a popular song by other musicians is an example of copying. In this case, respect must be shown to the original artwork or product.

As may be understood, concept of close copying is different than the aforesaid knock-off concept because close copying carries the act of imitation to a higher level while knock-offs can be seen in the category of inspiration. Cambridge Dictionary gives the definition of knock-off as "cheap copy of a popular and expensive product".[82] In the light of this definition shows that knock-offs are not identically similar to the copying involved in close copying and element of distinction may be still relevant**.**

Fordham University, Fashion Law Institute founder Susan Scafidi defines counterfeits as close copying of distinctive features such as label and logo without any authorization and gives as example 'Prado' and 'Vuiton'. Scafidi also says that they can't be legal. However Scafidi evaluated knock-offs as replicas rather than an inspiration and complained that it was very difficult to fight with them without sufficient legal framework.[83] At this point, knock-off concept seems to be an inevitable subject of a strong debate. As a matter of fact, outside of fashion, knock-off concept can be seen as a direct copy rather than an inspiration. However, when fashion products are concerned, any inspiration from a popular product launched to the market for consumption will help to turn this wheel further and so knock-offs have been considered as almost necessary and distinguished from close copying.

Inspiration involved in knock-offs can be perceived as a respect to the original product but in close copying, value of the original product is diluted.[84] As aforesaid, at the fourth step of the five stepped system of fashion, we find fast fashion companies. At this point, we want to give examples in order to make the following distinctions. Generally speaking, Mango and Zara avoids close copying. They rather interpret the products of luxurious brands together with their own designers.[85] However products of Forever 21 brand are close to copying rather than to the inspiration. The brand Gucci is in dispute with the brand Forever 21 due to the reason

[81] Hemphill and Suk, p.113, 114.
[82] *Cambridge Dictionary*, "Knock off", https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/knock-off (03.08.2018).
[83] Emily Gyben, "Knock-offs and Counterfeits : What's the Difference?", *Fashionetc,* 04.04.2011, http://fashionetc.com/news/fashion/1346-knock-offs-counterfeits-difference (03.08.2018).
[84] Hemphill and Suk, p. 114.
[85] Hemphill and Suk, p.126; See Image 8 and See Image 9.

that latter copied the blue red blue and green red green lines used by Gucci on its products since more than 50 years. Although the court justified the position of Forever 21 concluding that these lines do not automatically bring to mind the brand Gucci, design of Forever 21 is close copying rather than interpretation as can be seen on the attachment.[86]

Attempts to protect the fashion designs from close copying are directed to the benefit of small-scale designers rather than focusing on a threat against the luxurious brands because luxurious brands are already protected by many elements such as trademarks and trademark investments. Here the group under threat is independent small sized enterprises that could not obtain protection with such elements. Such type of design protection could motivate new creative designers to join the sector with the protection afforded against copying.[87] Besides that fact, it is much more difficult to imitate the products of luxurious brands as they use very expensive and distinctive materials in their products. Since they cannot be copied with the help of a cheap workforce, again small sized independent designers will be the losing party here because materials used by these designers will not be able to compete with the expensive materials of luxurious brands. As a result, they will the most disadvantageous party.[88]

This thesis will approach the fashion law from the perspective of industrial property rights. Since industrial property rights are within the scope of intellectual property; we will now attempt to clarify intellectual property rights and other rights applicable with the fashion law.

1.2. Intellectual Property

Intellectual property in English means both intellectual property and intellectual and industrial property as used in the Turkish law.[89] The doctrine recognizes no distinction between intellectual rights, intellectual property, intellectual and industrial property and intellectual, industrial and commercial property.[90]

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[86] *Forever 21, Inc. v. Gucci America, Inc., et al,* http://www.thefashionlaw.com/home/forever-21-wins-this-round-in-gucci-stripe-battle; See Image 10; See Image 11 and Image 12 for more Forever 21 designs.
[87] Hemphill and Jeannie Suk, p.107.
[88] Hemphill and Suk, p. 131-132.
[89] Engin Erdil, *Fikri Mülkiyet Hukuku*, İstanbul:Vedat Press, 2016, p.1.
[90] Savaş Bozbel, *Fikri Mülkiyet Hukuku*, İstanbul:12 Levha Press, 2015, p.3.; Ünal Tekinalp, *Fikri Mülkiyet Hukuku, Temel Bilgiler, Uluslararası Sözleşmeler, Fikir ve Sanat Eserleri, Markalar ve Patentler,* İstanbul:Beta, 1999, p.1.

In addition to that, these terms are not always gathered under the same roof in the comparative law. Germany, Switzerland and Austria distinguished law of intellectual and artistic works from the law of patents, trademarks, design, geographical indication and trade names. In some way, these laws were removed from under the comprehensive roof of protection afforded by the intellectual property law in order to create space for intellectual and artistic works as a branch of intellectual property. However French and Belgian law gives a broad meaning to the concept of intellectual property without making any distinction. According to Tekinalp, broad meaning is given to intellectual property in Turkey but intellectual law has a rather limited meaning as compared to intellectual property in general and covers law of intellectual and artistic works, patents and designs.[91]

Oğuzman and Barlas defined intellectual rights as intellectual property, furthermore they classified literature and artistic works as literature and artistic property; and the rights on patent, model, trademark and trade name are classified as industrial property.[92] In addition to that intellectual law is considered as artistic works and invention by Dural and Sarı.[93]

Intellectual property rights usually correspond to the products of human mind. Relevant idea is actually abstract but it is materialized on a substance. In this matter Bozbel, Sarı and Dural stated that intellectual property rights as unlimited and absolute domination on an intangible item.[94] As part of private law, intellectual property rights are as a rule considered as absolute right. In spite of this absolute status, intellectual property rights afford to the right holder limited period of protection.[95]

In our law, intellectual rights are regulated by FSEK No. 5846 (Law on Intellectual and Artistic Works) and industrial rights are regulated by SMK No. 6769 (Industrial

[91] Tekinalp, (1999), p.2-4.
[92] M. Kemal Oğuzman and Nami Barlas, *Medeni Hukuk, Giriş, Kaynaklar*, *Temel Kavramlar*, 15. Edition, İstanbul: Vedat Press, 2008, p.137.
[93] Mustafa Dural and Suat Sarı, *Türk Özel Hukuku, Cilt.1, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri,* 4.Edition, İstanbul: Filiz Press, 2009, p.15.
[94] Dural and Sarı, p.132.; In this matter, Hirsch stated that the theory, also supported by Sarı, Dural and Bozbel, is a weak one since in said theory the moral rights on work of owner are excluded from patent and copyright law and these rights are equivalent as personal rights. According to Hirsch, patent right and copyrights are not the combination of separately rights, but come up as a consequence of an original inttellectual creation. Hirsch also stated that patent right and copyrights are legally acquired and they are capable of giving moral and material authority to its owner. Ernst E. Hirsch, "Eser Sahipliği: Fikri ve Sınai Hakların Mahiyeti Hakkında Yeni Bir Görüş", *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* Vol.1, (1944), p.335, 338.
[95] Bozbel, p.4-6.

Property Law). In this thesis, we will examine intellectual property rights as a superior concept containing both intellectual rights and industrial rights.

1.2.1. Intellectual Rights

Although the concept of intellectual and artistic works is quite old, legal framework was built only after the French Revolution. At that time, protection was mostly afforded by the authors' law and around the concept of copyright. Two years after the revolution, property rights of the work owner over the work created were recognized and intellectual property concept became dominant in law. And in 1709 before the revolution, Act Anne was enacted in England to protect the rights of work owner and encourage science. With this law, rights over the intellectual or artistic work created have been transferred from the publishers to the work owner himself.[96] Most important agreement concluded to protect intellectual and artistic works was Bern Convention, of 1886. After this agreement that built Bern association, WIPO was founded on 1967 as a result of a revision made to handle the affairs of the association.[97]

One reason behind the failure to afford protection to the intellectual and industrial works for a long time may be that various categories of works that are considered as intellectual and artistic work were at that time excluded in Medieval Europe. Medieval Europe grouped liberal arts into 7 different categories (rhetoric, grammar, logic, geometry, mathematics, music and astronomy)[98] and chosen not to take into account other type of works as art. Naturally, these branches of art were not able to enjoy any protection as they were not seen as art.

In Turkish law, the first important document that protected the rights of the authors and granted copyrights to them was Encümen-i Daniş Nizannamesi dated 1850. This was followed by Hakk-ı Telif Nizannamesi in 1857.[99] Our first law, named Hakk-ı Telif Kanunu, on intellectual and artistic works was inspired by Bern Convention and passed as Copyright Law in 1910.[100] With this law, a definition was developed for

[96] Tekinalp, (1999), p.89-95; Bozbel, p.19.
[97] Fırat Öztan, *Fikir ve Sanat Eserleri Hukuku*, Ankara: Turhan Kitabevi, (2008), p.38-39.
[98] https://www.britannica.com/topic/liberal-arts, Date of Access: 15.05.2019
[99] Tekinalp, (1999), p.94-95.
[100] Akın Beşiroğlu, *Fikir Hukuku Dersleri, İlkeler ve Kurallar, Haklar Üzerinde Tasarruflar, Sözleşmeler, Uyuşmazlıklar, Hukuk Yollarına Başvuru, Yaptırımlar,* 4. Edition, Arıkan, 2006, p.1.

copyright for the first time in our country.[101] After this law, the Law No. 5846 on Intellectual and Artistic Works, 1952 was enacted and this law is still in force in Turkey.

When intellectual property rights are concerned, what is afforded is an abstract right rather than a material domination. The subject of such rights cannot be material.[102] If we take the general meaning of the concept, we can use the metaphor *human mind's product* for intellectual property rights. Intellectual product has a legal or economic value separate than the material developed with the intellectual product. Countrywide protection is available for intellectual rights and this right should be registered in the country in which it is planned to be exercised.[103]

As distinct from industrial rights, the work created based on intellectual rights has no industrial or commercial purpose of use. In other words, specific purpose of use for the work doesn't matter. Thus intellectual rights are seen *neutral investments* in terms of purpose. In case of intellectual rights, relevant owner enjoys a right over the work or intellectual property. In general, intellectual rights are examined in two groups: rights applicable on intellectual works and rights applicable on artistic works.[104]

Intellectual rights are regulated under the Law No. 5846 on Intellectual and Artistic Works ("FSEK"). In this law, the term work is defined as follows: "All kinds of intellectual or artistic products carrying special characteristics of the owner and considered as work of science, literature, music, fine arts or cinema". Qualifications required in a work so that it is validly considered as work under FSEK are: work carries along special characteristics of the creator and was shaped to reflect these characteristics and should be in one of the categories of work listed in FSEK and created as a result of intellectual effort.[105] Another approach to these qualifications required in a work takes into account two elements: subjective element relating to the special characteristics of the work owner and objective element relating to the perception of the work. Besides that, the work must be in one of the categories of work listed in the Law, fulfilling the formal conditions.[106] In Bern Convention, there

[101] Bozbel, p.25.
[102] Öztan, p.9.
[103] Bozbel, p.18.
[104] Ahmet M. Kılıçoğlu, *Sınai Haklarla Karşılaştırmalı Fikri Haklar*, Ankara: Turhan, 2006, p.13.
[105] Tekinalp, (1999), p.110; Savaş Bozbel, p.27.
[106] Erdil, p.7.

is no specific definition for the work but based on the provisions in the relevant part thereof, it can be seen that work is required to be original (authentic) and must be a product of creative thinking.[107] Here meanings for the work concept, i.e. a work as recognized by the Law on Intellectual and Artistic Works and for the material product shaped by this work are not same. Objects serving to the materialization of the work (e.g. books, drawings etc.) are subject to the property law.[108]

Intellectual and artistic works recognized under Law No. 5846 are works of science and literature, musical works, works of fine arts and cinema works.

1.2.1.1. Works of Science and Literature

Scope of works of science and literature is recognized by Law No 5846 includes *works expressed by a language or inscription in any manner and computer programs developed in any format and preliminary designs thereof provided that they turn into program at the next phase, all kinds of guides, written choreography works, pantomimes and similar nonverbal stage works, all kinds of technical and scientific photography works without aesthetical features, all kinds of maps, plans, projects, sketches, paintings, mockup and similar works used in geography and topography, all kinds of architectural and urban design and projects, architectural mockups, industrial, environmental and on-stage design and projects*. Besides that, the Law states that *any ideas or principles serving as a basis for an element of a computer program* should not be considered as work. As may be seen, no definition was made for the works of science and literature but only its specific types were given.

1.2.1.2. Musical Works

The Law defines musical works as *all kinds of musical compositions with or without lyrics*. However there is no definition of music in the Bern Convention.[109] Three basic components of a musical work are melody, harmony and rhythm. Bu all of them need not be present in a musical work. A musical product will be accepted as a musical work only if it has special synchronization of the sounds creating the music and

[107] Beşiroğlu, p.55**;** Bern Convention for The Protection of Literary and Artistic Works, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 (30.05.2019).
[108] Öztan, p.8-9.
[109] Beşiroğlu, p.103; Bern Convention for The Protection of Literary and Artistic Works, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 (30.05.2019)

special rhythm.[110] In musical works, original work is not the performance of music but the music itself. Source of the sound may be a human being, a musical instrument or electronic devices. However music produced by a program with any intellectual effort of a human being is not considered as musical work.[111]

1.2.1.3. Cinema Works

The Law defines cinema works as *series of interrelated moving images with or without sound, which could be played by electronic, mechanical or similar devices irrespective of the material on which they are recorded, such as films and cinema films having aesthetic, scientific, educative or technical characteristics or showing daily events*.

However we should mention that currently the term video-audio work is used rather than cinema work.[112]

1.2.1.4. Adaptations and Compilations

In addition to above mentioned types of work, adaptations and compilations are also considered as intellectual and artistic works. According to the Law, intellectual and artistic works that are created with the use of a work and that cannot be thought apart from that work shall be accepted as adaptation. The Law further gives examples of adaptation but as the list given is not comprehensive, it cannot be taken as *numerus clausus*. Besides that, adaptations created without giving any damage to the rights of the original work owner, exhibiting the special characteristics of the person making that adaptations are also considered as an artistic work according to FSEK.

1.2.1.5. Fine Art Works

Since intellectual rights available in fashion law, as the subject of this thesis are mostly related to textile and fashion designs that are considered as fine art works, we will examine the concept of fine arts works in detail. However first of all, the concept of aesthetics will be examined.

[110] Erdil, p.13.
[111] Tekinalp, (1999), p.126.
[112] Bozbel, p.46.

FSEK, first emphasizes that fine arts works have to contain an aesthetic value and then gives a list of these works as follows: *oil and watercolour paintings, all kinds of pictures, designs, pastels, engravings, calligraphy and illuminations, works that are drawn or recorded on mine, stone, wood or other substances by means of scraping, carving, inlaying or similar methods, calligraphy, serigraphy, sculptures, embossments and carvings, architectural works, handwork, small arts of works, miniature and ornament products, textile and fashion designs, photographic works and slides, graphical works, caricature works and all kinds of typecasting.* However this list given for the arts of works in the FSEK is not *numerus clausus*.[113]

Following an amendment made to FSEK in 1995, the phrase aesthetical quality has been used instead of the aesthetic value. TDK gives the definition of aesthetics as *conforming to the criteria for beauty, appealing to the eye and heart, admired and aesthetic*.[114] Based on this definition, one can say that this amendment did not result in a real change. However the doctrine says that the concept of aesthetics is much deeper than it seems to be and if esthetic value is interpreted only as beautiful, rare, pleasant etc., a work that is admired by a minority group but not admired by the greater part of the society will face the risk of not enjoying any protection since it will not be considered as beautiful.[115] The word aesthetics comes from the Greek word *aisthesis* and in addition to its meaning of perceptible by senses, it has been defined as "science of sensory information" by Baumgarten who used aesthetics as a philosophical discipline.[116] Based on these premises, one can say that any object that arouses senses in a human being shall have aesthetic quality even if it is not beautiful. Similarly Temel, Nal and Suluk gave the example of German law and said that a person viewing a work of art will give an aesthetic reaction to it irrespective of whether he admired or revolted at it.[117] This reaction need not to be a good reaction based on general interpretation and use of the word aesthetic. As one can realized from the Greek source of the word, here reaction means any kind of impression left on the person by the work of art.

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[113] Erdil, p.14.
[114] *Türk Dil Kurumu*, "Estetik", http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5c4f2726f34c47.73455847 (25.02.2019)
[115] Cahit Suluk, Rauf Karasu, Temel Nal, *Fikri Mülkiyet Hukuku*, 2. Edition, Ankara: Seçkin, 2018, Ankara, p. 67.
[116] Nesrin Ertürk, "A.G. Baumgarten'da Duyusal Bilginin Bilimi Olarak Estetik", *Ulakbilge*, 2015, Vol. 4, Issue. 7, (2015), p.119.
[117] Suluk, Karasu, Nal, p. 68.

If there is no aesthetic quality in the work, this work will not be accepted as a work of art but will still remain in the category of work.[118] At this point, we should remind that textile and fashion designs are considered as fine arts works. This means that they are entitled to the honor of artwork and will enjoy the protection afforded under FSEK. There is no definition for fashion design in the Law No 5846. However Öztan said that fashion models, specific cutting methods and drafts cannot be protected as artwork because they are produced according to the current fashion trends. He also added that beautiful products serving a material purpose should never be seen as artwork. For that reason he thinks that protection afforded to fashion designs by the Law is open to debate. According to Öztan, the law actually aims to protect only "real works of fashion". However Öztan did not give any definition for this "real work of fashion.[119] In our opinion, the concept used as real work of fashion by Öztan should refer the original authentic work that started a fashion cycle and due to this fact, that is imitated later since it initiated an innovative idea.

Before assessing a fashion design as fine artwork, we have to examine whether it is actually a work. Certain conditions are set forth in FSEK to qualify as a work. In theory, these conditions are: carrying the special characteristics of the work owner; being in one of the categories of work listed by FSEK and being perceptible to third persons with means of disposal.[120] Besides that a clothing item manufactured by serial production will neither be considered as artwork since it will not carry the special characteristics of its designer. However a garment customized to the buyer like in haute couture can be taken as artwork since this garment will reflect the special characteristics of its designer. As a result, relevant work will enjoy the protected afforded by FSEK since it has met this condition, also will be entitled to a cumulative protection under SMK once it is taken as a design.

Here we will examine the term wearable art in order to better explain artistic connections of a garment. Wearable art is created when the artist reflects his feelings, culture and thoughts to the three-dimensional world with the use of fabric and various materials. A garment will be wearable art if it is not serial production and if it is unique, reflecting the specific emotional world of the artist and his know-how of

[118] Tekinalp, (1999), p.129.
[119] Öztan, p.140.
[120] Suluk, Karasu, Nal, p. 42.

relevant techniques, fabrics, form and materials. Works of Issey Miyeke reflecting Japanese culture can be seen as example to wearable art.[121]

Upon a review of comparative law, one can see that in the USA, a clothing item is not considered as intellectual property because it is seen just a useful object but copyright will be granted to any part of that item that differentiates as product.[122] An exemplary decision was taken by the US Supreme Court in 2017 in the case Star Athletica LLC v. Varsity Brands Inc., ordering that two dimensional lines on the cheerleader dresses should be protected with copyright.[123]

1.2.2. Industrial Rights

As another branch of intellectual property, industrial rights are regulated under Industrial Property Law numbered 6769 which will be referred as SMK. Generally speaking, Industrial Property Law provides for the rights applicable to trademarks, patents, geographical indication, designs, useful models and traditional products. The first book of the SMK deals with trademarks that will be also treated in this thesis comprehensively and the second book deals of geographical indication and traditional product rights. Third book deals with the concept of design which we will attempt to discuss in detail in the following sections. Finally the fourth book deals with patents and useful models. In general, the law contains stipulations about the filing, registration and post-registration processes in connection with these rights and regulates the legal and criminal sanctions to be imposed in the event of infringement of industrial rights.

Although design and trademark among industrial rights are most relevant for the subject of this thesis, relationship between patents and fashion law will be stated under this section.

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[121] Sanem Odabaşı, "A Design Method on Wearable Art", *International Textiles and Costume Congress*, İstanbul, 2015, p.1,2.

[122] Francesca Montalvo Witzburg, "Protecting Fashion: A Comparative Analysis of Fashion Design Protection in The United States and The European Union", *The Trademark Reporter, The Law Journal of the International Trademark Association,* Vol 107, p.1132-1149.

[123] John W. Mashni, "Copyright is in Fashion Following Supreme Court's Decision Upholding Protection for Cherleading Uniform Design", 01.06.2017, https://www.michiganitlaw.com/copyright-fashion-protecting-design, (30.01.2019); *Star Athletica, L.L.C. V. Varsity Brands, Inc., Et Al., Supreme Court of United States, 15-866, 2017.*

1.2.2.1. Trademark

There is no clear definition regarding of trademark's itself in the SMK, however specific signs to be accepted as trademark are listed as follows:

A trademark may consist of any word, shape, color, letter, number, sound and shape of goods and packages including names of persons provided that it enables one to distinguish the products and services of an enterprise from the products and services of other undertakings and it could be shown on the trademark register so that subject of protection afforded to the relevant trademark owner is distinct and definite.

Trademark right is an absolute right entitling the trademark owner to prevent utilization of its trademark without its prior consent.[124] Trademark concept will be examined in detail in the second part of this thesis due its relationship with the fashion law.

1.2.2.2. Geographical Indication and Traditional Product Name

SMK defines geographical indication as *any indication showing a product that is associated with a locality, area, region or country of its origin due its distinctive features, fame or other characteristics*.

Geographical indication is divided into two: name of origin and protected geographical indication. If a product emanates only from a certain geographical region and all or essential components of that product emanate from the nature or community of that geography and if its production and processing is made only in that geography, relevant geographical indication will be called as origin. In case of protected geographical indication, it is not required that all or essential components of the product belong to one geographical region but reference is made to that geographical region due to certain features of the product.[125]

According to the SMK, names not classified as name of origin or protected geographical indication but used in the relevant market in order to describe a product proven to be in use for minimum thirty years as a tradition will be defined as traditional product name if they had been produced via traditional production and

[124] Tekinalp, (1999), p.24.
[125] Tekinalp, (1999), p.26.

processing methods or have traditional composition or made of traditional raw materials or materials.

Before enactment of the Law No. 6769, geographical indications were protected by the Legislative Decree No. 555 on the Protection of Geographical Indications, which did not mention the traditional product concept.

1.2.2.3. Design

SMK defines design as *appearance of the whole product or part thereof or any ornament thereon which is characterized by some lines, shapes, colors, form, materials or surface texture*.

Upon annulment of the Legislative Decree No. 555 on the Protection of Geographical Indications by the Law No. 6769, the phrase industrial design was abandoned and only the word design was started to be used. SMK also requires existence of a new and distinctive feature on a design before affording any legal protection.

Design concept will be discussed in the 4th part of this thesis due to its relationship with the fashion law.

1.2.2.4. Patent and Useful Model

SMK does not given any definition for patent and useful model but stipulates that patent be granted *to the inventions in all areas of technology on the condition that they are new, contain inventive step and capable of being applied to industry*. If an invention is new, capable being applied to industry and contains inventive step, it could be patented. Here novelty means not being included into state of art.

When an invention is used in commerce, it will not lose its abstract quality. The right to demand a patent is given to the inventor or to his successors. Patent protection is afforded on countrywide basis.[126] However useful model is known as a technical solution called “small invention” or “small model”. Owner of the useful model certificate will be afforded the same protection like the patent owner. It is possible to transform an application for a useful model into a patent application but an invention cannot enjoy the protection of both patent and useful model.[127] Period of protection

[126] Tekinalp, (1999), p.14,15,16.
[127] Tekinalp, (1999), p.16,17.

afforded to a patent is 20 years in SMK but this period is only 10 years in case of useful model which is not possible to extend further.

Before enactment of the Law No 6769, patents and useful models were protected under the Legislative Decree No 551 on the Protection of Patent Rights, 1995.

Since an invention needs to be present in order to obtain a patent, one may not be able to establish the relation between patent and fashion at the first glance. As a matter of fact, patent protection is considerable a new trend in law. Fashion world attempts to obtain patent protection for its products due to inadequacy of the legal protection afforded by the trademarks and copyrights in the USA in the area of fashion. However certain disadvantages arising from the design patents are impacting the fashion sector that has a fast cycle, since application process lasts too long with considerable costs.[128] According to New York Law Journal, Christian Dior obtained patent for its Couture sunglasses and Louis Vuitton Malletier obtained patent for its unique packing.[129] Cosmetic sector is a more appropriate area for obtaining patents. We saw too many developments after the classical lipsticks patented to Kairalla Elenanor in 1944.[130] Lipsticks of Elizabeth Arden that remains on the lip for longer term without losing as gloss effect can be given as an example.[131]

If one examines Turkish law to see how patents are dealt with in the area of fashion, we see that Law No. 6769 does not provide any patent to the products having aesthetic quality. As long as a clothing item, cosmetic product or jewelry has an aesthetic value, it will not enjoy any patent protection under Turkish law.

As aforementioned, intellectual property law is examined in two main titles; intellectual rights and industrial property rights. Fashion design that is regarded as work of fine art is also granted protection as design under industrial property rights. Many times in fashion, the trademark may supersede the product, and therefore protection of trademark is as important as protection of design. Therefore in the

[128] *Currently Trending in Fashion: Design Patents,* (2016), http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents, (30.01.2019)
[129] Patricia Werschulz and Sandra Holtzman, "The Latest Fashion in Fashion Patents", *New York Law Journal*, 05.09.2018, https://www.law.com/newyorklawjournal/2018/09/05/the-latest-fashion-in-fashion-patents/, (30.01.2019)
[130] "Lipstick", https://patents.google.com/patent/US2344883A/en, (05.02.2019)
[131] "Long Wearing Lipstick", https://patents.google.com/patent/US5667770, (05.02.2019)

following chapter, trademark protection will be detailed in accordance with the fashion law.

CHAPTER 2

2.1. Trademark Aspect of Fashion Law

Although trademark concept has multiple definitions, most general definition of trademark says it is a mark that is used to distinguish the goods or services of an enterprise from the goods or services of another enterprise.[132] At this point, we must remind that undertaking is a much broader concept than enterprise and because associations with no legal entity can operate as undertaking.[133] SMK uses the term undertaking instead of the term enterprise; and for that reason, to make the trademark definition as a mark that is used to distinguish the goods or services of an undertaking from the goods or services of another undertaking will be more appropriate from the point of SMK.

Another definition of trademark mentions symbols and signs used for certain purposes;[134] while it is also defined as "*traditional form of expression and valuable conveyors of information that enable people to convey a message to the customers about the origin of product that they own or want to trade in or other kind of messages*".[135]

Although there is no clear definition of trademark in SMK, Article 4 gives an indirect definition, listing the marks that could be accepted as trademark. According to Article 4 of SMK, words including names of persons, shapes, colors, letters, numbers, sounds and shape of the goods or packing are seen as marks and it is also stipulated that such mark shall be used to distinguish the goods or services of an undertaking from the goods or services of another undertaking and is shown in the trademark registry so that it could be comprehended clearly.

As an evidence for the historic source of trademark, one can show the symbols made on the vases in old ages. However it remains unclear whether the symbols seen on personal belongings was a symbol of the person making it or showed the specific

[132] Çolak, p.8.
[133] Özlem Karaman Coşgun, "6102 Sayılı Türk Ticaret Kanunu'nda Teşebbüs Kavramı ve Tacir Sayılmasının Sonuçları", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, Vol.21, Issue.1, p.107.
[134] A. Caner Yenidünya and Zafer İçer, *Marka Hakkına Tecavüz Suçları (556 Sayılı KHK m.61/A),* 2. Edition, İstanbul:Digesta, 2004, p.21.
[135] Özgür Arıkan, *Trade Mark Rights and Parallel Importation in the European Union,* 1. Edition, İstanbul: On iki Levha, 2016, p.24.

family owing it during the middle ages. Besides that, guilds in certain countries like Italy, Germany, Switzerland and France played a very important role in the creation of trademark in commercial terms. At these times, members of the same guild marked their goods with the same symbols. In this manner, it became possible to distinguish the goods and services of one guild from the goods and service of another guild and the trademark gained a commercial identity. After some time, public benefits took prevalence over the competition among the guilds and use of trademarks was made compulsory so that public may know which trademark was used by a specific guild. After revoking the privileges granted to the guilds following the French Revolution, the requirement to use a trademark was cancelled but it is important to see that even in middle ages, an obligation to use trademarks had been imposed in order to avoid misleading of the buyers. In this example, we see the distinctiveness function and the function of source showing at the very beginning of trademark concept.[136] In 1858, Charles Worth sewed his own logo on its garments and became the first person introducing trademark concept to the world of fashion.[137]

In Turkish law, first arrangement made about the trademarks appears in the statute dated 1872. This statute was followed by Alameti Farika Nizannamesi dated 1888 on identification marks. An ordinance was issued in 1928 so that Alameti Farika Nizannamesi can be also applied in the Republic of Turkey. In 1965, Trademarks Law numbered 551 was adopted but was then annulled with the enactment of Legislative Decree No. 556 in 1995. Currently, SMK numbered 6769 that came into force in 2017 regulates the trademark issues.[138]

As one can understand from the definitions given for trademark and from the information given about the source of trademarks, essential purpose of a trademark is distinctiveness and showing a source. These two characteristic shaped the functions of the trademark and also formed its components. However functions of the trademark changed in time, although its components did not change much. According to the SMK, components of a trademark are mark, clarity, certainty and distinctiveness. Following part will deal with the components of a trademark.

[136] Tekinalp, (1999), p.326-327.
[137] "Charles Frederick Worth", https://www.encyclopedia.com/people/literature-and-arts/fashion-biographies/charles-frederick-worth, (01.12.2018).
[138] Çolak, p.2.

2.1.1. Components of Trademark

Although trademark definition made in the period of the Legislative Decree No 556 listed components of a trademark as sign and distinctiveness[139]; definition given under Article 4 of SMK further includes the components of clarity and certainty. In this part, these components will be discussed.

2.1.1.1. Sign

TDK gives the definition of a mark as "Anything to which meaning is given, meaningful indication, sign[140]; and in Oxford Dictionary it is defined as "an object, quality, or event whose presence or occurrence indicates the probable presence or occurrence of something else".[141] In trademark law, it is said that a mark functions as a symbol associating an undertaking and connecting the target audience to that undertaking. According to this, it is sufficient for mark to be perceived one of sense organs.[142] These definitions indicate that it is not necessary for a mark to address to sense of vision only and for that reason it is not required that these marks are published by means of printing or reproduced. Because if a mark is only published and reproduced by means of print, it will solely address to the sense of vision and its scope will be narrowed. Accurately enough, SMK adds colors and sounds to the words, including names of persons, shapes, letters, numbers and shape of goods and packing and in this manner, expands the scope of the definition. Accordingly it was found sufficient when a trademark is expressed in the trademark registry in any understandable manner.

Although SMK does not accept smell as one of the marks that could be registered, the list of marks given in SMK as trademark is not conclusive. That means that a smell can be registered as a trademark if relevant conditions are satisfied. The application made to OHIM by Vennootschap onder Firma Senta Aromatic Marketing in order to obtain registration for tennis balls smelling like freshly cut grass was accepted and the firm made the following explanation for this smell: **"***The smell of freshly cut grass is*

[139] İlhami Güneş, *Uygulamada Fikri Mülkiyet Hakları ve Haksız Rekabet Davaları,* 2. Edition, Ankara: Seçkin, 2013, p.79.
[140] *Türk Dil Kurumu,* "İşaret", http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5c8fe2d08fec66.18382282, (10.03.2019).
[141] *Oxford Dictionaries*, "Sign", https://en.oxforddictionaries.com/definition/sign, (10.03.2019).
[142] Suluk, Karasu and Nal, p. 160.

a distinct smell which everyone immediately recognizes from experience". In this manner, this trademark became the first smell trademark registered by OHIM.[143] In parallel to that logic, in the decision of CJEU Sieckmann, it was stated that when registration of smell trademarks was concerned, it would not be different from the registration of any other trademark and smells could be registered as trademark if they can be shown by graphics and have a distinctive character. The court concluded that non-visual marks could be possibly registered if they are shown by a graphic in an understandable and objective manner. Accordingly, a third person viewing the trademark registry should be able to clearly comprehend these marks. According to the court, indication of the smell with a formula or its verbal definition or presentation of a smell sample cannot be considered as graphic presentation because a person viewing the formula will not be able clearly determine that smell or after a verbal expression, he will not reach a definitive conclusion and the smell sample given will transform and eventually disappear in time.[144] Although English Intellectual Property Office provided registration for "sharp beer smell" and "flower smell resembling roses", OHIM[145] did not accept these registration filings.[146] However OHIM provided registration for raspberry smell in connection with a motor fuel.[147] This shows the difference practices in regard to the registration of smells as trademarks.

The matter concerning whether colors could be registered as a trademark or not was a subject of debate before the enactment of SMK. An idea in the doctrine defends that according to the previous directive, color was not regarded among the registered signs but it could be possibly registered as a trademark since it will be seen as a mark that could be expressed by drawing or in a similar manner and that could be published and reproduced by means of printing. However registration of separate color is not seen possible while any combination of them can be registered as trademark.[148] Actually, under Article 15 the Trade Related Aspects of Intellectual Property Rights Agreement

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143 *Vennootschap onder Firma Senta Aromatic Marketing,* OHIM, Decision of the Second Board of Appeal of 11 February 1999, Case R 156/1998-2, http://www.copat.de/download/R0156_1998-2.pdf, (31.03.2019); Mutlu Yıldırım Köse, Canan Tınaz and Tuğçe Atlı, "Geleneksel Olmayan Markalar", *FMR Fikri Mülkiyet ve Rekabet Hukuku Dergisi,* 2014/2, p.92.

144 Köse, Tınaz and Atlı, p.92,93; *Ralf Sieckmann,* CJEU, Judgement of the Court 12 December 2002, C-273/00, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0273&from=EN, (31.03.2019).

145 Its current name is EUPIO.

146 Köse, Tınaz and Atlı, p.93

147 Eleni Mezulanik, "The Status of Scents as Trademarks: An International Perspective", *INTA BULLETIN*, Vol 67, No 1, (January 2012)., *Myles Ltd's Application/'The Scent of Raspberries', OHIM, R 711/1999-3, E.T.M.R. 56 (2003).,* Stavroula Karapapa, "Registering Scents As Community Trademarks", The Trademark Reporter, 2010,100,6. p.6.

148 Yenidünya and İçer, p.43,44,45.

to which Turkey is a party, combination of colors can be registered as trademark.[149] Tekinalp said that colors are regarded as marks "that could be expressed by drawing or in a similar manner and that could be published and reproduced by means of printing".[150] From these words, we can deduce that Tekinalp defended registration of colors as trademark. However as the SMK eliminated the condition of printing and put the requirement of being clearly and definitely understandable, satisfaction of this condition for registration of colors is not necessary anymore.

Another idea in the doctrine defends that a color naturally existing cannot be given to the monopoly of one person. The brand Aygaz took legal action against another firm using silver aluminum color in the gas tubes, stating that it had obtained registration for the silver color but 11th Civil Chamber of the Supreme Court (Yargıtay) dismissed this case.[151] It stated as follows in its relevant decision "…colors cannot be used independently as trademarks (…) there are 7 main colors in a rainbow, if a right of monopoly is conferred on the colors, a strange result will ensue that some firms are not able to carry out any activity since all colors are already registered…" and due to that reason, colors cannot be registered as trademark.[152] At this point, it must be stated that main colors are not seven in number as stated by the Supreme Court but there are only three colors: red, blue and yellow. And the colors we perceive by our eyes are not consisting of only those seven colors appearing on a rainbow. Another important issue here is that black and white are not really color and so although it is possible to prevent registration of red color, registration of black or white cannot be prevented on the basis of the color argument.

In this respect, two ideas in the doctrine can be summarised as following. One of them says that besides color combinations, colors can be registered as trademark if it is associated with a certain goods or service. Other idea says that main colors in nature are limited in number and a single colour cannot be registered as a trademark unless it becomes distinctive and permanently presented to the registration authorities.[153]

[149] *Agreement on Trade-Related Aspects Of Intellectual Property Rights (Trips),* https://www.wto.org/english/docs_e/legal_e/27-trips.pdf, (01.06.2019).
[150] Tekinalp, (1999), p.336.
[151] Tekinalp, (1999), p.336, 337.
[152] Arslan Kaya, *Marka Hukuku*, İstanbul :Arıkan, 2006, p.30, 31. Yargıtay, 7.7.1997, 1997/3559 E., 1997/5453 K.
[153] Çolak, p.72.

According to the Supreme Court, colors cannot be registered by themselves but if they create a combination with a figure or with other colors, they can be accepted as a trademark.[154] As a matter of fact, 11th Civil Chamber of Supreme Court did not accept silver color as trademark in its decision in the case of Aygaz-Petgaz.[155] However CJEU concluded that abstract color marks can be registered in certain conditions. In its relevant LIBERTEL decision dated 2003, it stated that a Pantone[156] code number could be given to the colors with a color encoding system and if a publicly perceived bond exists between that color and the enterprise, it could be possibly registered as trademark .[157]

Another disputed registration made for a color is related to the red bottom shoes of Louboutin. In 2008, Christian Louboutin obtained registration for its red bottom shoes. However YSL launched to the market its monochrome red shoes[158] and as a result, Louboutin took legal action against YSL in 2011. The court did not support the position of Louboutin, stating that a red bottom can be protected only if upper part of the shoe makes a contrast to that color.[159] As explained above, Louboutin obtained registration for its red bottom shoes and was entitled to protection for it. But as it may be realized from the result of that case, Louboutin did not obtain registration for red color but for the red bottom of the shoes. However in the shoes of YSL, we see a totally red shoe instead of different parts comprising of red edges, red upper part and red shoe bottom. In parallel to this view, the Court defended that red bottom can be protected only if it is used together with a color other than red.

2.1.1.2. Distinctiveness

In commerce, the customers use trademarks in order to indicate the quality of a product and use that trademark information to describe the product.[160] This refers to the distinctive character of a trademark because without that distinctive character, it

[154] Kaya, p.31.
[155] Yargıtay 11. HD. 25.6.1998, E.1997/8873, K.1998/4815.
[156] Pantone is an authority for colour and known for its Pantone Matching System., https://www.pantone.com/ (01.06.2019).
[157] Çolak, p.73,74
[158] See Image 13.
[159] Reanna l. Kuitse, "Christian Louboutin's "Red Sole Mark" Saved to Remain Louboutin's Footmark in High Fashion, For Now . . . ", *Indiana Law Review*, Vol.46, (2013), p.242,243**;** *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.* District Court, S.D. New York, Case Number:1:11-cv-02381, https://casetext.com/case/christian-louboutin-sa-v-yves-saint-laurent-am-inc; (31.03.2019).
[160] Minde Glenn Browning, "International Trademark Law: A Pathfinder and Selected Bibliography", *INT'L & COMP. L. REV*. Vol. 4, (1994), p.339.

will not be possible to define a certain trademark in the market or to add a certain identity to that trademark.

Distinctiveness is examined in two parts: abstract and concrete distinctiveness. In abstract distinctiveness, the sign does not have any distinctive feature in respect to any good or service. In abstract distinctiveness, there must be integrity and limits of that sign must be definite. In accordance with that what is meant by distinctiveness in Article 4 of SMK is the abstract distinctiveness. Besides that, in case of concrete distinctiveness, it is examined whether the goods or services sought to be registered have any distinctive function. In other words, it is important whether the sign is appropriate for registration in connection with the relevant goods or services pursuant to Article 5/1(b) of SMK in case of concrete distinctiveness.[161] At this point, it must be stated that while abstract distinctiveness is a preliminary condition for a trademark, concrete distinctiveness is a preliminary condition for registration.[162] In the phrase "a sign having no distinctive character" as will be used in the absolute grounds for refusal section of this thesis, what is meant by distinctiveness is concrete distinctiveness. Accordingly, although the word Mango experiences no problem of concrete distinctiveness in its registration as a clothing brand, registration of that word mango for a fruit shop will not be possible since criterion of concrete distinctiveness will not be satisfied here.

2.1.1.3. Clarity and Certainty

The component of clarity and certainty were made trademark component after adoption of SMK. In the period when KHK No. 556 was in effect, the condition to publish and reproduce the mark by means of printing and the condition to express the mark in a graphical manner was required but this condition was replaced in SMK with the condition to provide the protection to the relevant trademark owner a clear and certain protection. In this manner, harmony was achieved with the EU trademark legislation numbered 2015/2424[163] and EU Trademark Directive of 2015/2436[164] in the desired way.[165]

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[161] Suluk, Karasu and Nal, p. 161.
[162] Dilek İmirlioğlu, "Marka Hukukunda Ayırt Edicilik ve Kişi Adı Markalarında Ayırt Edicilik Tespiti", *Başkent Üniversitesi Hukuk Fakültesi Dergisi,* Vol. 3, Issue. 2, (July 2017).
[163] *Regulation (Eu) 2015/2424 Of The European Parliament And Of The Council Of 16 December 2015*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2424&from=EN, (31.03.2019).

Apart from the components, a trademark has certain functions, indicating the specific purposes it would serve. Functions of the trademark evolved in time with the historical process and took their current form. Following section deals with the functions of a trademark.

2.1.2. Functions of Trademark

3000 years ago, Indian craftsmen engraved their sign on the artwork before they send them to Iran.[166] As one of the first examples of a trademark in history, the purpose of the exporting Indians in engraving their signs to the artwork was obviously to show a source. However with the developing world and especially after the Industrial Revolution, functions of the trademark were not limited only to showing source but included others.

In the case of *L'oreal SA v. Bellure NV*, CJEU expanded the scope of protected functions of a trademark by adding the function of communication, advertising and investment to the already known essential origin function and guarantee function.[167] And there may be more functions of a trademark in the future in an ever developing and changing world. An example of this can be given in the function of good faith. Although this function was never clearly specified by CJEU, it has practical use since a trademark should be protected against unfair benefits and any matter that would impair the reputation or distinctive character of the trademark which served to that function.[168] While we discuss the functions of a trademark in this thesis, we will take as a basis those functions specified in the aforesaid CJEU decision and attempt to explain the functions of origin, advertising, communication, investment and guarantee.

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164 *Directive (Eu) 2015/2436 Of The European Parliament And Of The Council Of 16 December 2015 To Approximate The Laws Of The Member States Relating To Trade Marks,* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2436&rid=5, (31.03.2019).

165 Suluk, Karasu and Nal, p. 161,162.

166 *Wipo National Colloquium On The Judiciary And The Intellectual Property System,* https://www.wipo.int/mdocsarchives/WIPO_IP_JU_CM_96/WIPO_IP_JU_CM_96_1_E.pdf (31.03.2019).

167 Irina Pak, "The Expansion of Trademark Rights in Europe", *IP Theory,* Volume 3, Issue 2, (Spring 2013), p.163, 164.

168 Jehoram, p.1247.

2.1.2.1. Origin Function

Origin function is an essential function of a trademark.[169] As the definition of a trademark explain, the trademark points out to the specific relationship between a product and relevant enterprise. If the same trademark is used by multiple enterprises, the bond between relevant product and that enterprise would be weakened.[170]

Although the origin function is an essential function of a trademark as mentioned above, this function somehow weakened in time because it is not possible anymore for people to establish the connection between the source of a trademark and trademark itself. In that regard, licenses and franchises made considerable negative impacts on the function of showing source.[171] At this point, it must be emphasized that this source is divided into two: physical source and commercial source.[172] For example, commercial source of Zara is Spain but since it produces its products in Bangladesh, its physical source is Bangladesh. Currently origin function refers to commercial source rather than physical source and this condition obviously resulted in a weakening in this function.

The doctrine speaks of weakening of the function of showing source in time since the customers do not look at the exact country of manufacturing but take into account the country where the trademark has originated.[173] In spite of this fact, commercial source might not be perceived as the dominant source by the customers at all times. A good example of this is the Chinese products.

Most of the production relating to clothing sector is carried out in China due to cheap work force. However the emblem "Made in China" makes a bad impression on people irrespective of the country to which the trademark belongs and Chinese products are perceived as products with poor quality.[174] For example when US brand GAP puts the emblem "Made in China"" on its product, consumers correlate that product with

[169] Çolak, p.13.
[170] Hamdi Yasaman and Others, *Marka Hukuku 556 Sayılı KHK Şerhi,* 1. Edition, İstanbul: Vedat, 2004, p.18.
[171] Obhrai Raveen, "Traditional and Contemporary Functions of Trademarks, Trademark Law at Millennium's Turn: Part One: Philosophical and Doctrinal Foundations", *Journal of Contemporary Legal Issues,* Vol.12, (2001,2002), p.17.
[172] Arıkan, p.41
[173] Çolak, p.13.
[174] Paul Midler, "Why Made in China is a Mark of Shame?", *Telegraph,* 10.01.2010, https://www.telegraph.co.uk/finance/comment/6962703/Why-Made-in-China-is-a-mark-of-shame.html, (20.03.2019).

China rather than USA and take into account physical source rather than commercial source.

2.1.2.2. Quality Guarantee Function

A trademark becomes the symbol of quality for the product bearing that trademark and determines the expectations of the consumers from that product. Although trademark owner is not legally obliged not to disrupt the quality of a trademark, in the normal course of trade, people will tend to prefer branded products because of the trust they feel for the quality of that brand. For that reason assurance of quality for a product by the trademark is very important.[175]

Quality guarantee function developed with the weakening of the origin function due to development of multiple trading environments provided by the licenses and franchises. Now what matters is not the origin but quality assurance of a product.[176]

Quality guarantee function denotes that products are produced by a single enterprise which is responsible for the quality of these products.[177] What is important here is not manufacturing of the products or provision of the services by a certain enterprise but execution of these activities under the supervision of that enterprise. In other words, physical source is eliminated by guarantee function, leaving the customer face to face with the commercial source.

A trademark helps the consumer to save the efforts and costs of inquiry when preparing to buy a product. When the consumer buys the brand with which he/she has connections, believing its quality, he/she will not think whether this quality is impaired in time or not and will not carry out an inquiry about it. Thus a brand's quality guarantee function serves to the transparency of the market and protects social benefits.[178]

[175] Yasaman and Others, p.19.
[176] Raveen, p.17.
[177] Jehoram, p.1248.
[178] Hanife Dirikkan, *Tanınmış Markanın Korunması*, 1. Edition, Ankara: Seçkin, 2003, p.16.

2.1.2.3. Function of Advertising, Communication and Investment

The function of advertising, communication and investment refers to informing the consumers about the product.[179] Proper introduction of a product bearing the trademark is important so that it meets the consumers. The customer will start to buy properly introduced branded product as a reflex and even presence of that brand on the product will serve as an advertisement.[180] And the investment to be made by that trademark to this type of advertising is related to the investment function. Finally, communication function strives to create a brand image and establish communication between the buyers and supplier of the goods or services.[181] Certain social media applications such as instagram help the brand to become friends with its customers and direct communication with the customer can be possible through the posts. With the posts made in instagram by the brand, the brand eventually takes the form of a human being in the minds of the consumers. In this manner, it observes the life of the customers based on their posts in instagram and finds the chance to better know them, resulting in further attraction of the consumer to that brand and strong brand loyalty.[182]

Importance of the image created by a trademark is seen very clearly in the fashion sector. Classical monogram bag of Louis Vuitton shows the mark on all over the bag's surface and in this example trademark takes precedence over the product. The exaggerated size of the emblems appearing on Chanel and Gucci bags serves to the same purpose. Victoria's Secret brand organizes a fashion show every year in order build a reputable image in the society and this show costs approximately 12 million dollars, which is much more than the cost of normal fashion show, i.e. 1 million dollars.[183]

In addition to these use, we see that names of certain fashion brands are used in the recent films and songs. With the help of the adaptation movie "Devil wears Prada", Prada brand was advertised throughout the world without any extra cost and only name of the brand was enough to advertise itself. In the recent songs originating from

[179] Çolak, p.14.
[180] Yasaman and Others, p.20.
[181] Çolak, p.15.
[182] Gözde Öymen Kale, "Sosyal Ağlarda Eğlence Faktörü Kullanımın Marka Kişiliğine Etkisi: Starbucks Türkiye Örneği", *TRT Akademi Eğlence Endüstrisi Sayısı,* Vol.1, Issue.1, (January 2016), p.158, 159, 160
[183] *Victoria's Secret Fashion Show 2018: Everything you need to know, (2018),* https://www.harpersbazaar.com/uk/fashion/fashion-news/a42911/victorias-secret-fashion-show/ (01.12.2018).

the subcultures, fashion brands are used as an object of status, indicating that relevant individual climbed the social ladder. For example in the song named "Bodak Yellow", the singer Cardi B mentions 'red bottom shoes' to refer Louboutin shoes and Beyonce speaks of 'Givenchy' dress in her song "Formation". In both of these songs, the singers advertise a branded product that they could not afford before but could buy later, making them feel more powerful.

Recently trademarks tend to build the brand itself rather than specific goods or services bearing that brand. Like the importance of the trademark's source function becoming obvious when Indian artisans exported their products to Iran 3000 years ago[184], the function of advertising, investment and communication now serves an important purpose in the 21st century**.** Following comment made about the people lining up in front of the Supreme store almost confirm our idea: "It became a huge event, where Supreme fans from around the world would line up in front of Supreme stores to get a hold of the latest product ... It's not only about standing in line to buy a new product. It's just as much about being there with a community that you're a part of."[185]

However it is not always easy to be a part of such community. In order to buy a Hermes Kelly or Hermes Birkin bag, money would't be sufficient. According to an unwritten rule, people have to have non Birkin/Kelly purchase history, and have to wait long waiting list just for to have one of these iconic bags. It is obvious that Hermes' priority is not to sell its products, but to create an unreachable brand image.[186]

If the brand is already famous, advertising function of the trademark can be fulfilled by the customers almost as much as by the brand itself. If the brand has a good status in the eyes of the society, people voluntarily advertise that brand, using its power.

[184] *Wipo National Colloquium On The Judiciary And The Intellectual Property System,* https://www.wipo.int/mdocsarchives/WIPO_IP_JU_CM_96/WIPO_IP_JU_CM_96_1_E.pdf, (19.03.2019)

[185] Jacopo Prisco, "Battle of Supremes: How "Legal Fakes" are Challenging a $1B Brand?", *CNN International*, 18.03.2019, https://edition.cnn.com/style/Article/supreme-italia-legal-fake/index.html, (21.03.2019).

[186] *The reality of Purchasing a Hermes Birkin,* https://baghunter.com/blogs/insights/how-to-get-birkin-bag-from-hermes (01.06.2019)
Zou Brennan, "What happens when we sent ordinary women to ask for a Hermes handbag?", *Dailymail UK*, 25.04.2016, https://www.dailymail.co.uk/femail/Article-3556882/The-bag-not-allowed-buy-covetable-snooty-stores-sell-list-happened-sent-ordinary-women-ask-Hermes-handbag.html (01.06.2019)
The 6 Best, Simplest Tips to Help You Get Your Hermes Dream Bag at One of the Brand's Boutiques, 19.06.2017, https://www.purseblog.com/hermes/how-to-buy-hermes-bags/ (01.06.2019)

With the popularity of social media, the concept of "fashion blogger" came into existence and even considered as a profession.[187] In the current conditions, advertising a brand actually helps advertising of the person wearing it and in this manner, people almost become live billboards for the brands. This is typically seen in clothing sector and accessories. Although same situation is seen is automotive and electronic appliances sector, the fact remains that circulation in the fashion sector is much faster as compared to the automotive and electronics sector.

Another function mentioned in the doctrine is the function relating to allurement of the buyer/reputation. After the brand is introduced to the customers by means of advertising function, allurement function helps to attract buyer group.[188] Actually this function serves to the function of communication, investment and advertising and two functions operate in the same direction. For that reason, the function of allurement of buyers/reputation is discussed in this thesis as part of the function of communication, advertising and investment.

As it may be understood from above examples, a trademark's functions evolve and develop over time. Establishment of these functions helps for their proper protection as the functions of a trademark. With the transformation and expansion of benefits over time, functions enjoying trademark protection transform and develop, as well.

A trademark registration application may be rejected if the relative and absolute grounds for refusal are relevant. Following section will deal with the absolute and relative grounds for refusal.

2.1.3. Absolute Grounds For Refusal

In Turkey, competent trademark registration authority is the Turkish Patents Institute and Institute is entitled to carry out an *ex-officio* examination if there is an absolute ground for refusal in respect to the trademark registration. These absolute grounds for refusal stipulated in Article 5 will be discussed in this section.

TP makes an *ex-officio* examination of absolute grounds for refusal because of concerns over the public benefits. In the decision numbered of the 11th Civil Chamber

[187] For the "Example of Chiara Ferragni" regarding this issue: https://www.telegraph.co.uk/fashion/people/chiara-ferragni-interview/, (20.03.2019)
[188] Yasaman and Others, p.20.

of the Supreme Court, purposes of absolute grounds for refusal are given as public order and public benefits.[189]

With the enactment of SMK, a change occurred in the absolute grounds for refusal. After giving a definition for the marks that could be considered as trademark in Article 4, SMK gives among absolute grounds for refusal the signs not complying with Article 4 and makes an addition about the signs that have no distinctive character as contrast to annulled KHK No. 556 (Legislative Decree). Further SMK introduces another novelty. Accordingly, if a registration application is filed in respect to a mark that is identical to another trademark registered or filed for registration before or in respect to a mark that is identical to or identically similar to another trademark used for same or same type of goods or services, this application will be evaluated by the Institute according to absolute grounds for refusal and will not be rejected provided that owner of the previous trademark has granted explicit consent to such filing as confirmed by a certificate to be attested by a notary public.

Absolute grounds for refusal are listed in Article 5 of SMK. Pursuant to Article 5 of SMK, signs that cannot be considered as trademark as per Article 4, signs with no distinctive character, signs containing exclusively or essentially any sign or denomination indicating type, class, qualification, quality, quantity, purpose, value or geographical source in the course of commerce or showing the time when the goods were produced or services were provided or indicating other features of the goods or services; signs that are identical to or identically similar to another trademark registered or filed for registration before for the same or same type of goods or services; signs containing exclusively or essentially any sign or denomination used by everyone in commerce or to distinguish a specific group of professionals, artists or traders; signs that are used compulsorily to achieve the shape or other feature of the goods arising from its nature or to obtain a technical result or signs exclusively containing the form or other feature that gives the intrinsic value to the goods; signs that could mislead the public about the nature, quality or geographical source of the goods or services; signs that could be denied registration pursuant to 2nd repeated Article 6 of the Paris Convention; signs that are not within the scope of 2nd repeated

[189] Kaya, p.78, Yargıtay 11. HD. 26.11.1999, E.1999/5790, K.1999/9590.

Article 6 of the Paris Convention but which are related to the public and became public in terms of historical and cultural assets; signs containing arms, badges and denominations for which registration is denied by the competent authorities; signs containing religious assets and symbols; signs that are against public order and general morality; and signs comprising of or containing a registered geographical sign will not be registered. Such a sign will be seen as an absolute ground for refusal and will be *ex-officio* examined by TP as it relates to the public order. In this section absolute grounds for refusal will be detailed.

2.1.3.1. Signs that cannot be registered as trademark pursuant to Article 4

Pursuant to Article 5/1 of SMK, signs that are not within the scope of Article 4 will not be registered. As mentioned before, signs listed in Article 4 of SMK include words, including names of persons, shapes, letters, numbers, shape of goods and packing, colors and sounds. Besides that, these signs should be distinctive and clearly and definitely show the object of protection granted to the trademark owner.

If a sign is not within the scope of Article 4 of SMK, in other words, if a sign has no abstract distinctiveness in the meaning given by Article 4, this sign will not be registered as a trademark. However certain signs gain distinctive character after regular use in the future, but a sign having no abstract distinctiveness will not be entitled to registration just because of regular use.[190]

As mentioned before, SMK mentioned the colors and sounds as registrable signs beside the other traditional forms of signs under Article 4. Apart from that, KHK No. 556 required that the sign is expressed by means of drawing or similar method and capable of being published and reproduced through print. However according to SMK, it is sufficient if the sign is expressed in an understandable manner.

2.1.3.2. Signs having no distinctive character under Article 5/1(b)

Pursuant to this Article, a sign must have a distinctive character. Karasu said that legislator referred to concrete distinctive character while stipulating this Article and added that text of the Article is far from being clear.[191] Tekinalp defined

[190] Suluk, Karasu and Nal, p.174.
[191] Suluk, Karasu and Nal, p,174.

distinctiveness as follows: ”Characteristics and elements making a sign different than the signs in any manner howsoever”.[192] Distinctiveness makes one sign formally different than the others and adds features to that sign so that it cannot be confused with the other signs. The distinctive character can be gained when a sign is different than others at the beginning or through regular use, a standard sign that was not distinctive before can become distinctive. However a distinctive sign does not need to be authentic or is not required to reflect the essential characteristics of a product or service. Distinctiveness can be noticed when the sign causes one to perceive a connection to the relevant product or service, making that connection concrete.[193] For example, when we see MK, logo of Michael Kors only as letters MK, there will be no distinctiveness but when the letters MK are put inside a circle and written next to each other, they will gain a distinctive character.

If the sign is close to the name or definition of a concept, it’s distinctiveness wouldn’t be sufficient enough.[194] Founders of Mango, Andic Emay brothers said that name of their brand came from the fruit mango. [195] Here we see that a clothing brand that has no relation to the concept of fruit will be distinctive. But if Mango brand would have chosen a phrase relating to the concept of Mango fruit products, this sign would not be distinctive enough. As an example of this, Tekinalp gives the Apple brand and says that the word had a meaning although it was a foreign concept for the specific product and this brand was distinctive since its initial creation.[196] This example is very similar to the example of Mango.

2.1.3.3. Complementary signs under Article 5/1(c)

Pursuant to Article 5/1(c), if a sign indicates type, class, qualification, quality, quantity, purpose, value or geographical source in the course of commerce or shows the time when the goods were produced or services were provided or indicates other features of the goods or services, it will be evaluated according to absolute grounds for refusal irrespective of whether it shows them as an essential or exclusive component or not.

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[192] Tekinalp, (1999), p.337.
[193] Kaya, p.80, 81.
[194] Tekinalp, (1999), p.338.
[195] Demet Cengiz Bilgin, “Mango’nun Tepesinde Türkçe Konuşuyoruz”, *Hürriyet,* 03.03.2006, http://www.hurriyet.com.tr/ekonomi/mango-nun-tepesinde-turkce-konusuyoruz-4015717, (17.12.2018).
[196] Tekinalp, (1999), p.339.

As an example, brand Limon Company can be given. Registration of the words Limon Company will be denied due to absolute grounds for refusal if it is sought to be registered for a lemonade producer or lemon selling company but there will be no barrier preventing this clothing company from registering the words Limon Company since that registration will be made in the area of clothing products.

2.1.3.4. Double Identity

This clause contains stipulations about the same signs or identically similar signs. Accordingly, if signs that are identical or identically similar to another trademark registered or filed for registration before for the same or same type of goods[197] or services are used, it will be taken as an absolute grounds for refusal.

Novelty introduced to this Article with the SMK is indicated in Article 5/3. Accordingly the TP will not be entitled to *ex-officio* reject the registration if there is a notary public attested certificate confirming explicit consent of the previous trademark owner to the registration.

At this point, we should focus on the concept "identically similar", since concept of being same does not give rise to misunderstanding. Even if a trademark is identically similar, there will be in any case some difference between the trademark for which registration application was filed and the previous trademark. In this case, components of the trademark must be examined. Decision of 11th Civil Chamber of the Supreme Court brings some clarification to this issue. Accordingly, if a trademark has multiple components, 'essential component of that trademark can be found in its general appearance and its image emphasizing its distinctive character'. Therefore if the essential components are same in the trademark for which registration application was filed and the previous trademark and this addition does not bring a distinctive quality, these trademarks will be considered as identically similar.[198]

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[197] It must be stated that if both signs and goods/services are identical or identically similar; this situtation is constitued as a *double identity*., *Guidelines for Examination of European Union Trade Marks European Union Intellectual Property Office (Euipo) Part C Opposition Section 2 Double Identity And Likelihood Of Confusion Chapter 1 General Principles,*
https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/trade_marks_practice_manual/WP_1_2017/Part-C/02-part_c_opposition_section_2/part_c_opposition_section_2_chapter_1_general_principles/TC/part_c_opposition_section_2_chapter_1_general_principles_tc_en.pdf, (11.04.2019).

[198] Kaya, p.86-88, Yargıtay 11. HD, 12.05.2003, E.2002/12399, K.2003/4710.

If a trademark consists of one component and if the second registration application has made very little change in the essential component, it will be concluded that such trademark is identically similar. For example, the Supreme Court decided that the trademarks "Champion" and "Cebi champion" were identically similar.[199] Similarly Chanel and Şanel are identically that Şanel constitues an imitation of Chanel, along with that Supreme Court ruled accordingly.[200]

2.1.3.5. Signs used by everyone in commerce or signs to distinguish of professionals, artists or traders under Article 5/1(d)

Under this clause, if there are signs containing exclusively or essentially any sign or denomination used by everyone in commerce or to distinguish a specific group of professionals, artists or traders, it will be considered as an absolute ground for refusal. In this manner, a sign that became public knowledge is not allocated only to one person.

For example, the word 'cosmetics' cannot be registered as it used in the course of commerce but it will be possible to register 'Mac Cosmetics' since with the word 'Mac' the mark gains distinctive character. In this example, the word cosmetic has a secondary role. In connection with such uses, Karasu said that descriptive signs cannot be registered as an essential element or by themselves alone but if they are used together with a distinctive phrase, they will take a secondary position in the trademark and can be possibly registered.[201]

2.1.3.6. Signs that consist the shape of goods under Article 5/1(e)

If there are signs that are used compulsorily to achieve the shape or other feature of the goods arising from its nature or to obtain a technical result or signs exclusively containing the form or other feature that gives the intrinsic value to the goods, it will be considered as an absolute ground for refusal.

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[199] Kaya, p.88. Yargıtay 11. HD, 13.12.1999, E.8495, K.10179.
[200] Sevgican Aydın, "556 Sayılı Khk'ya Göre Marka Hakkına Tecavüz Ve Hakkın Korunması" T.C. İstanbul Üniversitesi SBE, *Unpublished M.S.*, İstanbul, 2011, p.53., Yargıtay Temyiz Ticaret Dairesi, 16.10.1953. E. 1697, K. 527., Erman Vatansever, Marka Tescilinden Doğan Hakların Kapsamı, T.C. Türk Patent Enstitüsü Markalar Dairesi Başkanlığı, *Unpublished Expertise Thesis,* Ankara, 2010, p.45.
[201] Suluk, Karasu and Nal, p.178.

At this point, one must check whether the three dimensional shape is the unique natural shape of the goods or not. In connection with the registration application filed by Gucci for its three dimensional shape, the 11th Civil Chamber of the Supreme Court concluded that this shape did not arise from the original structure of the product or as a result of a technical necessity or did not give the product its intrinsic value in terms of the products for which registration is sought. You may find the visual of 3 dimensional shape of Gucci attached to this thesis.[202]

2.1.3.7. Signs that could mislead the public under Article 5/1(f)

According to Article 5/1(f), signs that could mislead the public about the nature, quality or geographical source of the goods of services will be rejected pursuant to absolute grounds for refusal. Misleading quality of a sign for the public is determined by taking as a basis average consumer. However if the goods or service has been developed for a specific customer segment, then this group will be taken as a basis. Competent trademark authority will not look for an intention to mislead in the applying person while determining publicly misleading quality of a sign.[203] If the sign sought to be registered is such that it can mislead average consumer, or in other words, if the sign gives an impression that it has been tested and proved to be superior to the other trademarks for the relevant product or service, it will be considered as an absolute ground for refusal. Accordingly as an example, rejection decision of the Supreme Court for the word "Besttest" can be given.[204] However the trademark "Supreme" is an exception. In terms of its structure, the word "Supreme" is a descriptive word and must be considered as an absolute ground for refusal under this clause. As a matter of fact, Supreme brand had to wait 20 years for becoming entitled to registration as a trademark and with the help of this secondary meaning[205] it could be registered only a short time ago.[206] This is because; trademarks which acquire

[202] Türkay Alıca, *Trademark Disputes in Turkish Jurisprudence*, Munih, 2014, p.10; Çolak, p.162,163; Yargıtay 11. HD. 31.05.2010, E.2009/179, K.2010/6085., See Image 14.
[203] Kaya, p.105.
[204] Suluk, Karasu and Nal, p.180.
[205] Secondary meaning exists when customer is capable of make a bond between product and brand as he/she sees the brand in US Trademark Law. (The secondary meaning in US Law correspondes the acquirement of distinctiveness on the minds of consumers through use in Turkish/European Law System): Nicholas Economides, "Trademarks Forthcoming in the New Palgrave Dictionary of Economics and the Law", September 1997, p.2.
[206] Jeremy Chen, "Registiring Descriptive Trademarks: Supreme as a Case Study", http://jeremychenlaw.com/supreme-trademark-trouble-with-registering-descriptive-trademarks/, (21.03.2019); Jacopo Prisco, "Battle of Supremes: How "Legal Fakes" are Challenging a $1B Brand?", *CNN International*, 18.03.2019,
https://edition.cnn.com/style/Article/supreme-italia-legal-fake/index.html, (21.03.2019)

distinctiveness though use will not be rejected under this clause. This will be explained in detail under the title of 2.1.4.1.

Misleading signs in terms of geographical sign are also considered as absolute ground for refusal. Registration application filed for the non-US textile products bearing the phrases San Francisco Forty Niners and San Francisco49ers were rejected by the US Federal Court as this phrase could mislead the public about the geographical source.[207] Again certain misleading phrases about the nature of the product are considered as absolute ground for refusal. If a scarf is branded 'İpek' ("Silk") but is made of polyester, it can be a barrier to registration since it would mislead the public about the quality of the product.

2.1.3.8. Signs that could be denied registration pursuant to Paris Convention under Article 5/1(g)

2nd repeated Article 6 of the Paris Convention is about the prohibitions imposed in connection with state emblems, hall marks and emblems of interstate organizations. Accordingly, these emblems cannot be used without the prior consent of the relevant authority.[208] Therefore all unauthorized use will be rejected *ex-officio* by TP.

One can give as an example the logo of the fashion designer Dilara Fındıkoğlu consisting of downward looking black crescent and a star on a red base. Although this logo does not directly signify Turkish flag, it is obviously an imitation of Turkish flag.[209] However we did not find any information regarding whether Dilara Fındıkoğlu managed to obtain registration for this logo, although it seems that this application would face absolute refusal under this clause.

2.1.3.9. Signs that are not within the scope of Paris Convention but which are related to the public assets

Article 5/1(ğ) is related to the signs that concern the public subject however are not within the scope of the second repeated Article six of the Paris Convention. Since these signs have a historical and cultural meaning, they are seen as part of the

[207] Kaya, p.108.
[208] Kaya, p.111.
[209] See Image 15.

common heritage and so they can be used only with prior consent.[210] As indicated in this clause, as there are public benefits arising from common heritage and for that reason these signs are considered as absolute ground for refusal.

2.1.3.10. Signs containing religious assets or symbols under Article 5/1(h)

Religious assets and symbols cannot be registered as trademark. Therefore names of the holy books, prophets or pictures of saints and symbol of cross are not registered.[211] However the crescent as the symbol of Muslims was registered although it had a religious meaning.[212] At this point, we must remind that SMK does not limit religious assets only with the religion of Islam but takes into account any kind of religious asset.[213]

2.1.3.11. Signs that are against public order and general morality under Article 5/1(ı)

As aforesaid, existence of a sign that is against public order or general morality is an absolute ground for refusal. As example of such signs, one can name signs contrary to the sense of morality in the society, signs leading people to harmful habits or signs motivating people to disobey social/official rules. However sense of morality in a society evolves in time and so limits of these signs may also change. For example, nude woman photos were seen unmoral in England but in 1989, a nude male baby was chosen as a trademark and found acceptable by the English people.[214] Besides that, in the grant of a registration for a sign that is contrary to the public order or general morality, original intent of the application holder is not taken into account. In other words, the competent authority will not bother whether the application holder had a goal that goes contrary to the public order or morality but instead existence of a contrariness of the sign to the public order or morality in objective terms is seen sufficient to take it as an absolute ground for refusal.[215]

[210] Tekinalp, (1999), p.378.
[211] Tekinalp, (1999), p.378.
[212] "Crescent Moon", https://trademarks.justia.com/766/77/crescent-76677321.html, (18.12.2018).
[213] Suluk, Karasu and Nal, p. 181.
[214] Tekinalp, (1999), p.381.
[215] Suluk, Karasu and Nal, p.182.

2.1.3.12. Signs comprising of or containing a registered geographical sign under Article 5/1(i)

Although there is no arrangement in KHK No. 556 about such signs, under SMK, existence of a sign comprising of or containing a registered geographical sign is seen as an absolute ground for refusal. Registered geographical sign is different than geographical source because here, a product or service specific for that region is mentioned together with the name of this region. An example of this is the silk of Bursa.[216] Here it does not matter whether this geographical sign exists as an essential or secondary component of the trademark and no registration will be provided to it.

2.1.4. Exceptions of Absolute Grounds for Refusal

According to the SMK, if an unregistered design has gained a distinctive character through using or there is a consent of a previous trademark owner; these registrations cannot be denied under absolute grounds for refusal. These situations will be detailed in the following sections.

2.1.4.1. Gaining distinctive character through using

If an unregistered sign has gained distinctive character as a result of regular use, application for its registration cannot be denied pursuant to clauses (b), (c) and (d). In other words, registration cannot be denied due to existence of signs containing exclusively or essentially any sign or denomination indicating type, class, qualification, quality, quantity, purpose, value or geographical source in the course of commerce or showing the time when the goods were produced or services were provided or indicating other features of the goods or services; signs that are identical to or identically similar to another trademark registered or filed for registration before for the same or same type of goods or services; signs containing exclusively or essentially any sign or denomination used by everyone in commerce or to distinguish a specific group of professionals, artists or traders.

According to an opinion about gaining distinctive character by regular use, distinctive character gained by regular use means that the risk of confusing the two trademarks

[216] T.C. Türk Patent ve Marka Kurumu, *Resmi Coğrafi İşaret ve Geleneksel Ürün Adı Bülteni*, Issue.35, 2018, p.10.

that are similar or identical to each other has ceased; that the society is aware that these two trademarks originate from different enterprises in connection with the relevant product and service; and that signs indicating the type or quality of the product or signs specific to a certain group of profession, art or trade has lost this character and are now mentioned together with a certain enterprise. Another opinion interprets gaining distinctive character by regular use as the protection of the image created as a result of an investment. Here unregistered sign is introduced with great costs and in this manner, becomes a natural part of the enterprise. [217] An example of gaining distinctive character by regular use is "Ayakkabı Dünyası" ("Shoe World"). Operating in the area of shoe sales with a descriptive name, this brand became distinctive as a result of regular use and intense introduction activities. However we should also remind that it has been in use since 1923.[218]

2.1.4.2. Consent of previous trademark owner

Article 5/3 is a novelty introduced by SMK. It aimed to prevent absolute ground of refusal arising from Article 5/1(ç). Pursuant to Article 5/1(ç), if a registration application is filed in respect to a mark that is identical to another trademark registered or filed for registration before or in respect to a mark that is identical to or identically similar to another trademark used for same or same type goods or services, TP will not be entitled to *ex-officio* reject the application provided that owner of the previous trademark has granted explicit consent to such filing through a notary public. Here the phrase previous trademark owner is used, meaning a registered trademark. Therefore consent of the registered trademark owner is required but not the consent from the owner of a trademark for which only a registration application was filed.

As detailed above, these absolute grounds for refusal are explained in the law one by one and were made the subject of an *ex-officio* examination by TP since public benefits are concerned. If there are any of the absolute grounds for refusal, a trademark cannot be registered but SMK has also introduced certain exceptions to these absolute grounds for refusal. Accordingly if a secondary meaning has developed through regular use or if the previous trademark owner has granted explicit consent to

[217] Ünal Tekinalp, (1999), p.384.
[218] Erdal Noyan, *Marka Hukuku*, 4th Edition, Ankara: Adalet, 2009, p.232.

the condition described in Article 5/1(ç), trademark registration application cannot be rejected based on the absolute grounds for refusal.

2.1.5. Relative Grounds for Refusal

As distinct from the absolute grounds for refusal, there are no public benefits arising from the relative grounds of refusal and so TP or the competent court is in no position to take these grounds into account *ex-officio*. If relative grounds for refusal exist, it means that a third party right is violated and such third party must file an objection so that these grounds can be examined by the competent authority.[219] SMK Article 6 regulates the relative grounds for refusal. Accordingly, if the trademark for which a registration application is filed is identical or similar to another trademark registered or filed for registration before and relates to the same or similar goods or services and the public can possibly confuse these trademarks including making an association between the trademark and that sign; if the trading agent or representative is attempting to obtain registration in his name for a mark that is identical or identically similar to that trademark; if a right has been acquired for the unregistered trademark or for a sign used in trade before the application date or expiration date; if pursuant to 1st repeated Article 6 of the Paris Convention, a sign that is identical or similar to a known trademark is made subject to a registration application in respect to same or similar goods or services; if a registered trademark or a trademark for which registration application was made before is a well-known trademark in Turkey and an application is made for a trademark that is identical or similar to that trademark in respect to same, similar or different services without a valid reason and if this situation would make a negative impact to the reputation of the well-known trademark; give harm to its distinctive character and bring an unfair benefit; if the trademark for which registration application will be filed contains the name, photograph, trade name, copyright or any intellectual property right of another, it will be considered as relative grounds for refusal. Following section will detail these grounds one by one.

[219] Kaya, p.134.

2.1.5.1. Similarity and likelihood of confusion including likelihood of association

According to Article 6/1, if a registered trademark or a trademark for which a registration application was filed and the trademark for which registration will be filed are identical or similar and relate to the same or similar goods or services or if the trademark for which registration application was filed before and the trademark for which registration application will be filed are associated with each other or confused by the general public, this application can be rejected upon an objection. In this Article, right of objection is granted in two cases. First of them relates to the existence of identical or similar trademarks operating in the area of same or similar products and services. If there are identical or identically similar trademarks operating in the area of same or same type of products and services, an absolute ground for refusal will be evident and will be examined *ex-officio*. Existence of similar trademarks operating in the area of identical or similar products and services rather than existence of identically similar trademarks will bring protection based on relative grounds for refusal. Another basis of objection arises from the likelihood of confusion including likelihood of association by the public[220] between the trademark for which registration application was filed before and the sign for which registration application will be filed.

Generally application for that trademark is made after making small revisions to it without really getting different from the registered trademark or from the trademark for which registration application was filed before. As a matter of fact, when two trademarks are identical, it will be considered as an absolute ground for refusal as mentioned before. Although this is criticized in the doctrine, German law is given as example, stating that this situation is dealt with in connection with relative grounds for refusal in the German trademark law. However Tekinalp says that this gives a chance to intervene if it slips the notice of TP.[221] Furthermore in the European Trademark Directive, this is only considered among relative grounds for refusal.[222]

[220] In here public refers average consumer., Eren Başer, "Marka Tescilinde Benzerlik ve Karıştırılma İhtimali Kavramları ile Bu Kavramların Farklı Ülke Sistemleri ile Karşılaştırmalı Olarak İncelenmesi" , T.C. Türk Patent Enstitüsü Markalar Dairesi Başkanlığı, *Unpublished Expertise Thesis,* Ankara, 2014, p.47.
[221] Ünal Tekinalp, *Fikri Mülkiyet Hukuku*, İstanbul, 2005, p.342, Cited by: Başer, p.25.
[222] Directives Directive (Eu) 2015/2436 Of The European Parliament And Of The Council Of 16 December 2015 To Approximate The Laws Of The Member States Relating To Trade Marks, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2436&from=en, (28.03.2019).

For the possibility of confusion as the other accepted reason for objection to exist, the trademarks should be identical or similar. However since similarity is a relative concept, trademarks should be examined as a whole to see if they are identically similar. An example of this is seen in the decision of the 11th Civil Chamber of Supreme Court.[223] In the relevant case, the trademark CDOSS-CROSS Jeans operating in clothing sector made a demand for deletion of the name BROSS from the trademarks BY BROSS and BROSS operating in the same sector with the reason that similarity between the trademark CDOSS-CROSS Jeans and trademarks BY BROSS and BROSS was confusing the average consumers. The Court decided that the two trademarks were similar in phonetic sense and in visual sense except for the letter B and concluded that this would be misleading for the consumers. The decision was approved by the Supreme Court.[224]

The likelihood of confusion is relevant when the buyer of a certain product or service is inclined towards an enterprise providing identical or similar products or services once that buyer decides to buy that product or service. However even if that buyer is aware that this enterprise towards which he is inclined is an enterprise other than the one he knows for sure, possibility of confusion will be relevant when the buyer is inclined toward the former enterprise only because its trademark is identical or similar. But there are two opinions about the likelihood of confusion including the likelihood of association. In the first opinion, the likelihood of association is interpreted as a sub-concept of confusion concept and in the second opinion, these two concepts are taken separately, stating that likelihood of association may be relevant without any likelihood of confusion. In the decision of European Communities Court rendered in the case *Sabel BV v. Puma AG*, the possibility of association was not seen as an alternative to the likelihood of confusion and it was stated that likelihood of association would only serve to the purpose of likelihood of confusion.[225]

In order to understand how the likelihood of association was dealt with in the fashion law, one have to look at the case of *Gianni Versace, SPA v. Versace 1969*

[223] Yargıtay 11. HD. 2.7.1998, 1998/3336 E, 1998/5067 K.
[224] Kaya, p.137,138.
[225] Sevgi Epçeli, *Marka Hukukunda Karıştırılma İhtimali,* 1. Edition, İstanbul:Legal, 2006, p.1-4. *Sabel BV v. Puma AG,* Judgement of the Court of 11.11.1997, Case No.C-251/95, http://curia.europa.eu/juris/liste.jsf?num=C-251/95 (09.06.2019).

Abbigliamento. In this case, Versace 1969 Abbigliamento Sportivo, or in its abbreviated form, Versace 1969 was a trademark for accessories and clothing founded by Alessandro Versace in Milan. However this trademark had no relations with the Milan based famous Versace trademark or Alessandro Versace had no relative relations with the Gianni and Donatella siblings. Here, Alessandro Versace used his surname to create an accessories and clothing brand. After this development, Versace took legal actions against the trademark Versace 1969 and claimed that there was the risk that customers think there was some sort of connection between these two trademarks, defending that this act constituted infringement of its trademark and trademark misuse and therefore it would cause unfair competition.[226] Similar to the Versace case, Rihanna obtained registration for her surname Fenty but his father Ronald Fenty established the company Fenty Entertainment LLC and Rihanna said that she had no connection to that company and took legal action against his father based on the claims of trademark infringement, false designation of origin[227], and false advertising.[228]

Kylie Jenner filled an application in 2015 to the US Patent and Trademark Office and obtained registration for her name Kylie Jenner in connection with the class of goods including all kinds of bags, umbrellas, accessories, clothing, pajamas, swimwear, jewelry and perfumes on which Kylie Jenner name was used. She also filed another application to obtain registration for the name Kylie but Kylie Minogue filed an objection against this application. Kylie Minogue said that she owned the trademarks "Kylie Minogue Darling", "Lucky-the Kylie Minogue Musical" and "Kylie Minogue" and since 1996, domain name Kylie.com. Actually US Patent Institute rejected the application filed by Kylie Jenner. WIPO claimed that two different Kylie brands

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[226] *Versace Nabs Victory in Case Against Similarly-Named Versace 1969 Brand,* (2018), http://www.thefashionlaw.com/home/versace-nabs-victory-in-case-against-similarly-named-versace-1969-brand (03.01.2019);
Versace 1969 Files Suit Against Versace After Famed Brand Threatened to Sue, (2017), http://www.thefashionlaw.com/home/versace-1969-files-suit-against-versace-after-famed-brand-threatened-to-sue (03.01.2019);
Moda Hukuku Enstitüsü, *Moda Hukuku Gazetesi*, Issue 21, August 2018, p.4, https://issuu.com/modahukukuenstitusu/docs/moda_hukuku_gazetesi_no.21_-_a_usto (09.11.2018).
Gianni Versace, S.P.A., et al., v. Versace 19.69 Abbigliamento Sportivo Srl, et al., 4:16-cv-03617-HSG (N.D.Cal).
[227] Notion of False Designation arises when manufacterer or seller lies regarding the country of origin or maker of the product. This notion is defined in 15 United States Code Article 15.
[228] *Rihanna Files 75 Million Lawsuit Against Her Dad over Their Lastname,* (2019) http://www.thefashionlaw.com/home/rihanna-files-75-million-lawsuit-against-her-dad-over-their-last-name, (28.03.2019), *Fenty et al v. Fenty Entertainment, LLC et al, 2:19-cv-00307 (C.D.Cal).*

would cause confusion in the minds of the consumers and the brands will make each other ineffective.[229]

Although no legal action or objection has been filed yet, the trademarks Fenty Beauty owned by Rihanna and Fendi will sure cause some confusion. The trademark Fenty Beauty operates in the cosmetics sector and the trademark Fendi operates in clothing/textile sector. It is obvious that these two sectors are similar as they are operated under the same roof of fashion. Besides that, Fenty Beauty was not influenced by the trademark Fendi but chose this name since it was the surname of Rihanna. However too many people said online that they confuse these two brands. In addition, Rihanna released to the market an underwear brand Savage x Fenty and started to operate also in clothing sector with the brand Fenty x Puma in cooperation with the Puma brand.

Although Fendi filed no objection against the activities of Fenty brand in this sector, the brand Fenty x Puma arising from cooperation was sued by the brand Freedom United. In the Fenty x Puma collection, abbreviated logo of Fenty University was used as FU and Freedom United claimed that FU was their logo and defended that these two logos are identically similar; said case has not concluded yet.[230]

Similarity that might cause confusion should not be limited to only phonetic similarity. In the decision of 11th Civil Chamber of the Supreme Court, it was stated that although the words miss and mini were not similar in terms of phonetic, writing and meaning, writing of the word mini was calligraphically found similar to the writing of the brand miss, causing confusion.[231]

In determining the likelihood of confusion, average consumers are taken as a basis. Accordingly average consumers should confuse the product or service at the first look or should not fall in such a danger. However if the product is developed for a special customer segment instead of general buyers, perception of that group will be taken

[229] Moda Hukuku Enstitüsü, *Moda Hukuku Gazetesi*, Issue. 6, February 2017, p.1, https://issuu.com/modahukukuenstitusu/docs/moda_hukuku_gazetes___-_no.6_-___ub, (28.03.2019)
[230] *Rihanna, Puma and Fenty Corp. Are Being Sued over "FU" Garments and Accessories, (*2018), http://www.thefashionlaw.com/home/rihanna-puma-amp-fenty-corp-are-being-sued-over-fu-wares (03.01.2019), *Freedom United Beverage INC., d/b/a, Freedom United Clothing, v. Robyn Rihanna Fenty, Fenty Corp., and Puma North America, Inc., 1:18-cv-09504 (SDNY).*
[231] Kaya, p.140. Yargıtay 11. HD. 25.01.2000, E.1999/6765, K. 2000/317.

into account while determining the likelihood of confusion.[232] If this product or service was developed for multiple groups of special buyers, then it would be sufficient even if only one of these groups confuses the product or service.[233] However the SMK emphasizes the likelihood of confusion for general public rather than for a certain specialized group. KHK No. 556 also takes into account perception of general public but in the decision of 11th Civil Chamber of the Supreme Court (Yargıtay)[234] opinion of the specialized persons was taken into account instead of general public. Again in the another decision of 11th Civil Chamber of the Supreme Court (Yargıtay)[235] it was stated that general public will confuse the products and establish a connection between the two products if both trademarks operate in the same sector or service and there is a audio and visual similarity.[236]

As Supreme Court (Yargıtay)[237], CJEU takes into account average consumers in their approach to the concept of public. "T*he average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect, but his level of attention is likely to vary according to the category of goods or services in question"*.[238] However in the concept of average consumer, type of the relevant product or service is very important. While the level of attention shown to a cheap product like chewing gum is expected to be low, in the decision of CJEU taken for the case *Giovanni Cosmetics v OHMI- Vasconcelos & Gonçalves (Giovanni Galli)*[239] level of attention expected was determined to be middle since the price of skin care products, perfumes and similar cosmetic products is an average price and these products are purchased frequently but they are also examined to fit the skin type. Accordingly, if the product to be purchased is expensive or is bought rarely or purchased for emotional reasons[240] and if there is an inherent danger in the product to

[232] Kaya, p.140,141.
[233] Epçeli, p.47.
[234] Yargıtay 11. HD. 13.01.2003, E. 2002/7864, K. 2003/48.
[235] Yargıtay 11. HD, 13.11.2003 dated E.2003/74003, 2003/10839 K.
[236] Alper Tunga Ünal, "Marka Hukukunda Tescil Engelleri", Gazi Üniversitesi SBE, *Unpublished M.S.,* Ankara 2007, p.62, 63.
[237] Yargıtay 11. HD. 28/12/2004 Dated, 2005/4005 E. 2006/6569 K.
[238] *Deoleo SA, formerly Koipe Corporacion SL v Aceites del Sur-Coosur, formerly Aceites del Sur Taxation of costs,* CJEU, 03.09.2009, Case Number: C-498/07 P.,
http://curia.europa.eu/juris/document/document.jsf?docid=73081&doclang=en, (31.03.2019)
[239] *Giovanni Cosmetics v OHMI- Vasconcelos & Gonçalves (Giovanni Galli),* CJEU, 03.06.2015, Case Number: T559/13,
http://curia.europa.eu/juris/document/document.jsf?text=&docid=164707&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=378054, (31.03.2019).
[240] Here this statement refers products, such jewellery, given as a gift.

be purchased[241] such level of attention is expected to be high.[242] If at this point we would go back the example we discussed in the previous parts of this thesis in connection with red bottom Louboutin shoes and monochrome red YSL shoes, since price of a pair of Louboutin shoes is equal to USD 1.195[243] a high level of attention can be expected from the average consumers intending to buy that product. Therefore likelihood of confusion between the red YSL monochrome shoes and Louboutin shoes will be very low for the consumers.

2.1.5.2. Trading agent or representative's actions against Article 6/2

According to Article 6/2, if trading agent or representative attempts to register his/her name for a sign which is identical or identically similar to the previous trademark, without consent of the trademark owner or without any valid reason, this application will be rejected upon the objection of trademark owner.

While right of objection is conferred for the trademark in KHK No. 556, SMK expands the scope and confers a right of objection in respect of both trademark and another trademark that is identically similar to it. SMK further replaces the phrase justification with the phrase valid reason.

If a trademark operating in a foreign country is registered in Turkey in the name of the trading agent or representative without prior consent of the trademark owner, the request made for registration will be rejected upon the objection to be filed by the trademark owner.[244]

The doctrine defends that trading agent or representative must be interpreted with a broad meaning. Thus relations between these persons can be based on other reasons such as a power of attorney. According to the doctrine, what was meant by the word justification used in the KHK was valid reason and therefore the SMK replaced that word with the phrase valid reason. An example of valid reason is relevant when this representative has put considered efforts for a long time to develop that brand and

[241] Here this statement refers prescription drugs that are sold in pharmacy.
[242] Çolak, p.244, 245.
[243] "Follies Strass", http://us.christianlouboutin.com/us_en/shop/women/follies-strass-15.html, (28.03.2019).
[244] Tekinalp, (1999), p.387.

relevant trademark owner is observed to have withdrawn from the Turkish market, resulting in a need for the representative to obtain registration in its own name. [245]

If a trademark operating in a foreign country is registered in Turkey in the name of the trading agent or representative without prior consent of the trademark owner, the request made for registration will be rejected upon the objection to be filed by the trademark owner.

2.1.5.3. Right that is acquired for unregistered trademark or sign

According to Article 6/3, if a right has been acquired on an unregistered trademark or a sign used in commerce and if this right is applicable before the application or expiration date, trademark application will be rejected upon the objection of the owner of that sign.

Under this provision, past time utilization of the trademark by its real owner takes precedence over registration. In case of a right arising from past time use, such use does not need to be absolutely brand-related. If a domain name is used and introduced in commerce, a right can be acquired over that domain name. However if a right has been acquired on a product or service due to utilization, the trademark to be objected must be related to similar products or services. [246]

2.1.5.4. Trademark that is identical or similar to a well-known trademark in a meaning of Paris Convention

According to Article 6/4, if the trademark applications made for trademarks that are identical or similar to a well-known trademark are related to the same or similar products or services, they will be rejected. Here well-known trademark is a well-known trademark in the meaning given by the Paris Convention. However Paris Convention does not contain any clear definition for a well-known trademark. Generally a well-known trademark is a trademark also known by the consumers that have no relation with the relevant product or service; that became independent from the sector of product or services in which it operates because of the level of well-known status and that will be regarded as reliable and reputable by the buyers even if

[245] Kaya, p.150,151.
[246] Çolak, p.313.

this trademark is later used in a different service sector.[247] Tekinalp gives following definition for a well-known trademark: "Not a trademark that became established in one or several regions of a country but a trademark that is known by the relevant customer segment in and out of the country even if not globally and that belongs to a citizen of one of the contracting states of Paris Convention or persons residing in these countries or operating a commercial or industrial enterprise in these countries".[248] According to this definition, if a trademark is known abroad but not known in Turkey, it cannot be accepted as a well-known trademark under the Paris Convention.[249] The theory about well-known trademarks takes into account the nature of the trademark in addition to high level of being known. Accordingly factors to be taken into consideration in that evaluation include authenticity, distinctive character, reputation, uniqueness and superior quality of a trademark as well as its similarity to the trademark that infringed it, if any.[250]

2.1.5.5. Registration of a trademark which is identical or similar to a well-known trademark in Turkey

According to Article 6/5, if the trademark that was registered before or for which a registration application was filed before is a well-known trademark in Turkey and if an unfair benefit is gained and reputation or distinctive character of that previous trademark can be harmed, application made for a trademark that is identical or similar will be rejected even if that application was filed for the same, similar or different sector. Besides that the right to rely on a valid reason has been reserved.

In this version, relevant product or service can be related to the same, similar or different areas. If the trademark and the sign for which registration is sought are identical or similar and if both of them operates in connection with the same or similar products or services, an objection can be filed according to Article 6/1 in order to prevent registration of that sign without considering well-known status, unfair benefits, harm to the reputation of the trademark or impairment of its distinctive character. Besides that, this Article can be easily used by a trademark owner objecting to a sign that is identical or similar to its trademark but that operates in connection

[247] Kaya, p.158.
[248] Nilüfer Kargı, "Tanınmış Marka Kavramı ve Tanınmışlık Kirteri", Marmara Üniversitesi SBE, *Unpublished M.S.,* İstanbul 2006, p.23.; Tekinalp, (1999), p.379.
[249] Kargı, p.23.
[250] Hanife Dirikkan, *Tanınmış Markanın Korunması*, 1. Edition, Ankara:Seçkin, 2003, p.89.

with a different product or service. Another requirement for this objection is well-known status enjoyed by that trademark in Turkey and it is also necessary that such sign gains unfair benefits from this registration or makes harm to the reputation or distinctive character of the former trademark.

An example of this case is the decision rendered by the Supreme Court (Yargıtay) for the brands Gucci and Blucci. In this case, the brand Blucci wanted registration in connection with products and services different than those used by the brand Gucci. However Supreme Court concluded that this registration would impair the distinctive character of the Gucci brand, constituting free riding and unfair enjoyment.[251]

Another exemplary decision is the decision of the Supreme Court rendered for Lacoste and CROCODILE phrase. Although the plaintiff owned the brand Lacoste and Crocodile shape trademark, it filed an objection to the registration application made for the trademark CROCODILE which was rejected by YDIK. Lacoste appealed the case before the Supreme Court but TP stated that registered trademark and defendant's application were not identical or similar. Upon this appeal, the Supreme Court stated that Crocodile Device Trademark was a well-known trademark in the meaning given by the 1st repeated Article 6 of the Paris Convention; that the word CROCODILE meant crocodile in Turkish and the word CROCODILE entered into Turkish as crocodile (crocodile skin). It further explained that two parties were operating in the same sector and accepted the plaintiff's case concluding that defendant will be able to gain unfair benefits and give harm to the reputation of the plaintiff's trademark.[252]

Only well-known status of a trademark is not sufficient for refusal. In addition to that status, factors listed in above paragraph must be relevant. The burden of proof about the well-known status of the trademark on the shoulder of the party claiming such status. Although there are recommendations made by WIPO and TP about well-known status, circumstances of the relevant case should be taken into account.[253]

[251] Güldeniz Doğan Alkan, "Yargı Kararları", *FMR Dergisi*, Issue.1, 2016, p.151.
[252] Noyan, p.196. Yargıtay Hukuk Genel Kurulu, E.2015/3127, K.2016/11.
[253] Kaya, p.160,162

2.1.5.6. Trademark contains the name, photograph, trade name, copyright or any intellectual property right of another

According to Article 6/6, if the trademark for which registration application will be filed contains the name, photograph, trade name, copyright or any intellectual property right of another, registration application will be rejected upon the objection of the relevant right holder. Here what matters is the association of the name chosen as trademark with the personality rights of the relevant person. Acceptance of a name as trademark will not entitle the persons having that name to object to this registration application.[254]

2.1.5.7. Application of an identical or similar trademark which is made within the 3 years after expiration of the common or guarantee trademark

According to Article 6/7, if the common trademark or guarantee trademark was not duly renewed upon expiration of the protection period, the trademark application made within 3 years after the expiration date will be rejected upon the objection of the previous right holder if it relates to a trademark that is identical or similar to the common trademark or guarantee trademark and is made in respect to products or services that are identical or similar to those with the previous trademark.

Guarantee trademark and common trademark are defined in Article 31 of the SMK as follows: "Guarantee trademark is a sign used to guarantee the common characteristics, production methods, geographical origins and quality of multiple enterprises controlled by the trademark owner". "Common trademark is used to distinguish the products or services of the undertakings in the group from the products or services of other enterprises".

2.1.5.8. Application of an identical or similar trademark which is made within the two years after expiration date of a former trademark

Pursuant to KHK No. 556 and SMK Article 6/8, trademark registration application filed in a period of two years after expiration of the protection period applicable for the registered trademark due to failure to renew may be rejected upon the objection of the previous right holder if it relates to a trademark that is identical or similar to the

[254] Kaya, p.168.

former trademark and was filed in connection with the same or similar products or services. However preliminary condition to this objection is physical use of that trademark because Article 9 of SMK requires genuine use of the trademark.

2.1.5.9. Trademark registration application filed with bad faith

According to Article 6/9, trademark registration application filed with bad faith will be rejected upon an objection. In the KHK, the concept of bad faith was not mentioned but under SMK, a right is conferred to file an objection to the applications made with bad faith.

SMK gives a comprehensive list of relative grounds for refusal like the absolute grounds for refusal. As aforesaid relative grounds for refusal are not related to public benefit and so they are not *ex-officio* taken into account by TP, but TP will conduct an examination upon an objection.

2.1.6. Trademark Registration And Protection

Trademark protection means that a third party is not entitled to use that trademark without the consent of the trademark owner or if it used, it will constitute trademark infringement. As a rule, trademark right is gained with registration and registration is considered as a material and formal condition of trademark protection because trademark means the name given to a registered sign.[255]

Trademark right confers to the relevant owner a monopoly and also seen as an absolute right. This absolute right is established with the creation or selection of the sign and with its regular use. This absolute right enables the right holder to make an objection to all persons and distinctive signs and creates a protection for that purpose. Whether registered or not, a trademark functions to distinguish the products or services of an undertaking from the products or services of another enterprise. A sign will be mentioned as a trademark irrespective of whether it is registered or not. However, if the trademark is registered, scope and basis of protection will differ.[256]

[255] Tekinalp, (1999), p.394.
[256] Kaya, p.229, 230.

2.1.6.1. Registered Trademark Protection

Pursuant to Article 23 of SMK, protection period afforded to a registered trademark is ten years and can be renewed for further periods of ten years. Article 7 stipulates that trademark protection will be afforded under the SMK only after registration. However no limit is imposed about renewal. Protection for the registered trademark starts on the date of application provided that registration was granted, but a registration has to be published in order to be valid.[257] If one examines this subject from the perspective of fashion law, one sees that trademark protection is normally preferred by the great fashion brands. However this preference should not be seen to conclude that long term protection would be unnecessary in the fashion world since it has a very fast circulation. Fashion brands can create iconic products and even this iconic product can become the symbol of the brand in the eyes of the society. For example, when the name Burberry is mentioned, people immediately think of striped fabric and when the name Louboutin is mentioned, red bottom in the shoes comes to mind. These designs are not subject to a temporary trend any more so they are entitled to trademark protection instead of design protection that only gives restricted protection.

Rights arising from the registration directly belong to the trademark owner and trademark owner is entitled to prevent all actions involving unauthorized use of its trademark. These actions are listed in Article 7/2 of the SMK. Accordingly if a sign that is identical to a registered trademark is used in respect to same goods or services subject to the registered trademark or if it covers the products or services that are identical or similar to the products or services protected by the registered trademark and for that reason, there is the likelihood of confusion including likelihood of association with the registered trademark or if the same, similar or registered trademark is a well-known trademark in Turkey and if a sign that is identical or similar to that trademark is in use which takes unfair advantage of, or detrimental to its distinctive character or, repute of the trademark due to the reputation; the trademark owner will be entitled to prevent these actions provided that this sign was used without a valid reason and irrespective of whether this sign is used in respect to same, similar or different products or services.

[257] İlhami Güneş, "Marka Tescilinin Rolü", *Terazi Hukuk Dergisi*, Issue. 42, (February 2010)

This Article makes arrangements for three different circumstances and entitles the trademark owner to prevent relevant actions. First of these actions involves using a sign that is identical to a registered trademark in respect to the same products or services protected by that registered trademark, in other words creating a double identity. This use can be prevented upon the request of the trademark owner and it also constitutes absolute grounds for refusal.

Second action involves use of a sign that is identical or similar to a registered trademark in connection with the same or similar products or services. A right to object to this use arises when there is the likelihood of confusion including likelihood of association with the two signs. This situation is regulated with relative grounds for refusal as mentioned before.

Final situation entitling the trademark owner to make an objection is the well-known status of the registered trademark in Turkey. If there is a sign that is identical or similar to a registered trademark, this sign may gain unfair benefits from the well-known status of that registered trademark or give harm to its reputation or impair its distinctive character. However for the right of objection, it is not necessary that all of these actions occur at the same time but only one of them is sufficient. In this case, owner of the registered trademark will be entitled to make an objection to the use of that sign even if it is used in connection with the same, similar or different products or services. However it is also necessary that this sign is used without a valid reason. This is dealt with in the SMK as a relative grounds for refusal, preventing registration.

Article 7 includes additional provisions about absolute and relative grounds for refusal, although Article 7 does not include any stipulation on registration application. In other words, it is not necessary that a registration application is filed for the signs. However these signs can be used in commercial activities without any registration, too and in this case, it is difficult to control these activities by using the barriers to registration. Therefore purpose of Article 7 is to eliminate these activities carried without any final goal of registration. However request of the trademark owner is required for this.

This Article stipulates further that if a sign is used in commercial activities, its use can be prevented/prohibited with the request of the trademark owner pursuant to the

provisions of 2nd paragraph in the event that this sign is put on a product or on its packing, products bearing the sign are released to the market, an offer is made for the delivery of products bearing the sign, products bearing the sign are stored or services are provided or offered under that sign, products bearing the sign are imported or exported, use of the sign in the business documents and advertisements of the undertaking**,** online use of the same or similar sign as domain name, leading code, keyword or similar manner provided that person using the sign has no right for or legitimate connection to the use of that sign, and use of the sign in comparative advertisements contrary to law.

4th clause of Article 7 of SMK provides that these rights will be applicable against the third persons starting from the date of publication of the trademark registration. However 5th clause gives the exceptions to the trademark protection: a real person giving his own name or address; making explanations about the type, quality, quantity, usage purpose, value, geographical source, production or release date or other characteristics of the goods and mentioning the usage purpose of the goods or services especially on the accessories, spare parts and any equivalent parts. However such uses are allowed for third persons only if the sign is used honestly and in the ordinary course of trade.

Decision of the 11th Civil Chamber of the Supreme Court (Yargıtay 11. Hukuk Dairesi)[258] gives scope of this honest use as follows: "We cannot speak of an honest use if it attempts to create confusion or only to benefit from the trademark of another although this use is not compulsory…" Therefore honest use must be examined on case by case basis and any potential for bad faith of the user must be taken into consideration. And even if there is no bad faith, if such use cannot be perceived as normal according to commercial practices, it may be prevented by the trademark owner.[259]

Article 8 of SMK stipulates inclusion of the trademark in sources of reference. Accordingly if a registered trademark is published on the hardcopy or electronic copy of a dictionary, encyclopedia or other source of reference without mentioning its registration and in such manner to give the impression of a generic name, the

[258] Yargıtay 11. HD. 03.10.2003 dated, E.2003/2346, K.2003/8743.
[259] Kaya, p.249, 250.

publisher shall immediately declare that this trademark was registered and correct that mistake at the request of the trademark owner if it was on an electronic copy or remove the trademark from that work. However if such trademark appears on a hardcopy document, it will not be possible to immediately delete it and so in the first edition of the publication made after the request, this mistake is corrected by declaring that trademark is a registered trademark or remove the trademark from the work.

2.1.6.2. Use of the trademark

Use of the trademark actually brings an obligation to the trademark owner, resulting in the loss of trademark rights if this obligation is not fulfilled.[260] Pursuant to Article 9 of SMK, if the trademark owner is not genuinely using in Turkey its registered trademark on the goods or services for which registration was sought for a period of 5 years after the registration request without a valid reason, this trademark will be cancelled. Article 9 of SMK requires genuine use of the trademark. For example use of the trademark only on documents or announcements just for the purpose of preventing its cancellation will not be considered as a genuine use. It must be stated that the period of 5 years mentioned in this Article runs only when there is no valid reason. Therefore, when there is a valid reason, the period of 5 years will not elapse as long as this reason is relevant.[261] If we have a registered trademark that is not used and if the trademark owner attempts to prevent third persons from using its trademark based on a registration it actually does not use, it will be an unfair situation, restricting the competition unfairly.[262] It will also restrict the freedom of persons trying to obtain registration for their signs but being unable to do so just because that sign was registered as trademark before and so it has been said that a cancellation decision rendered due to non-use actually serves to public benefits.[263]

Valid reasons are listed in this Article as great economic crisis or any condition developing out of the control of the trademark owner such as natural disasters. However if the economic position of the trademark owner deteriorates or if he loses

[260] İlhami Güneş, "Kullanılmayan Markanın İptali Sorunu", *FMR*, Issue.1, 2005, p.42.
[261] Suluk, Karasu and Nal, p. 220, 221.
[262] Güneş, "Kullanılmayan Markanın İptali Sorunu", p.42.
[263] Arzu Oğuz, "Markanın Kullanmama Nedeniyle İptali Konusunun Yeni Sınai Mülkiyet Kanunu Hükümleri Çerçevesinde Değerlendirilmesi," *Terazi Hukuk Dergisi*, Vol. 12, Issue. 128, (April 2017), p.25.

his business connections, his inability to use the trademark will not be seen as a valid reason.[264]

Besides that if a trademark is not used for an uninterrupted period of 5 years, it will be cancelled. However using the trademark with different components without changing its distinctive character or using the trademark on the goods and packing only for export purposes will be also considered as trademark use. Article 9/3 of SMK further stipulates that using the trademark with the prior consent of the relevant trademark owner is also considered as a use by the trademark owner.

There is another aspect of that Article which needs to be explained here. Although we find this Article in KHK No. 556, this Article was cancelled by the Constitutional Court (Anayasa Mahkemesi) on 14.12.2016 due to the reason that the right has been stipulated in the second part of the Constitution under personal rights and duties and so it cannot be stipulated by means of KHK (Legislative Decree). In its Article 9, SMK that was put into effect only 4 days after this cancellation rearranged the matter of cancellation arising from non-use and declared that trademarks not used for an uninterrupted period of 5 years will be cancelled. Article 26 of SMK stipulated that if circumstances described in Article 9/1 of SMK are relevant, the TP may decide to cancel the trademark. In addition to that Article 192 of SMK stipulated that Article 26 of SMK will come into effect 7 years after its publication. Temporary Article 4 of SMK declared that the authority to cancel may be exercised by the courts until Article 26 of SMK comes into effect. As a consequence, after annulment of the KHK, a legal gap occurred for 4 days in connected with the trademarks that are desired to be cancelled. However as a result of the provisions stipulated in Article 192 of SMK, cancellation lawsuits cannot be filed until 2023 which is a subject of a current debate now. [265]

Another condition relating to the use of a trademark is stipulated in Article 10 of SMK. Accordingly if a sign identical or identically similar to the trademark is registered in the name of the trading agent or representative without the prior consent of the trademark owner and such persons do not have a valid reason for that

[264] Güneş, "Kullanılmayan Markanın İptali Sorunu", p.44.
[265] Oğuz, p.27.

registration, trademark owner will be entitled to demand from the court to transfer the registration to it or prohibit use of that trademark.

2.1.6.3. Registration

If the trademark application was made without any deficiency or if these deficiencies were duly completed and the application was examined and published pursuant to Article 16 of SMK. If no objection was made against the application or all objections, if any, were finally dismissed, the trademark sought to be registered will be registered and entered into the trademark registry and published in the trademark bulletin provided that all documents, including information about payment of registration fee were submitted to TP in the predefined time period and all phases were thus duly completed. However if registration fee was not paid and information about this payment was not timely submitted to TP, the application will be removed from the list of applications.

If the trademark was registered although any of the above mentioned phases was not completed, this trademark will not be accepted as a registered trademark. In this case, application procedures must be continued from the missing phase and this fact must be published in the bulletin. If the application is decided to be registered again, registration fee that was collected before will not be claimed again.

If an uncompleted phase is discovered after elapse of 2 years from the date of registration of trademark, this will not prevent the registration of the trademark anymore. However this exception will be valid only if 2 years pass after the registration date. Trademark registry is publicly available and a copy of it will be given against a fee. SMK stipulates that methods and principles concerning recording to the registry, publication and registration will be determined in regulations to be issued for that purpose.

2.1.6.4. Protection period and renewal

SMK determined the protection period for a registered trademark as 10 years starting on the application date. This period can be renewed for further periods of ten years. Renewal request should be made by the trademark owner. Such renewal request should be filed in 6 months before the expiration of the protection period and

information about payment of renewal fee should be submitted to TP within this period. If renewal request is not made or if information about payment of renewal fee is not submitted to TP in this period, renewal request may be submitted again in a period of 6 months after expiration of the protection period. However in this case, additional fee must be paid.

A trademark may be renewed for all of the goods or services subject to registration or renewed in respect to a certain part of them. If the trademark is to be renewed, a demand made by one of the undertakings in the group will be sufficient. Such renewal will become effective from the day following the date on which previous protection period expired. Renewal will be also entered into the registry and published on the bulletin.

2.1.7. Infringement of Trademark Rights

Actions considered as infringement of trademark rights are listed in Article 29 of SMK. Accordingly using the trademark in the manner described in Article 7 without the prior consent of the trademark owner; imitating the trademark by using the trademark itself or a sign that is identically similar to it without the prior consent of the owner; selling, distributing, releasing to trade, importing, exporting or holding for trading purpose those products bearing the trademark or a sign identically similar to it although the seller knows or should know that trademark was imitated or offering a contract for such a counterfeit product without authorization; and expanding the rights conferred by the trademark owner under a license and transferring such rights to third persons without authorization of the trademark owner. These actions will be discussed in this section.

2.1.7.1. Using the trademark in the manner described in Article 7 without the prior consent of the trademark owner

Article 7 of SMK regulates the scope of protection to be afforded to a registered trademark. Accordingly, a registered trademark owner is entitled to object to the actions listed in Article 7., and in addition to that, performance of these actions will be considered a trademark infringement. Thus the trademark owner will be entitled to request prevention or prohibition of these actions. Exceptions to this right of trademark protection will be applicable when such use is honest and occurs in the

ordinary course of commerce for the following purposes: a real person giving his own name or address; making explanations about the type, quality, quantity, usage purpose, value, geographical source, production or release date or other characteristics of the goods and mentioning the usage purpose of the goods or services especially on the accessories, spare parts and any equivalent parts. As we explained before circumstances stipulated in Article 7, we will not discuss them in detail in the following sections but due to the reference made to Article 7 of SMK, knock-offs can be considered as trademark infringement.

Because of the similarity between the logo of the company Vibes Media and the logo of the perfume Kimoji Vibes of Kim Kardashian, Vibes Media initiated legal action with the claim of trademark infringement.[266] If we examine the logos of two trademarks, we can easily notice the similarity between the word "Vibes" written in white color inside a blue speech bubble which belongs to Vibes Media and the word "Vibes" written in white color inside a black speech bubble which appears on the perfume of Kim Kardashian.[267] If we look at this case from the perspective of SMK, we can see that the two logos used by these trademarks are not identically similar but if we evaluate the problem based on Article 7, this similarity will be considered as trademark infringement so long as if there is a likelihood of confusion on the average consumer.

2.1.7.2. Imitating the trademark by using the trademark itself or a sign that is identically similar to it without the prior consent of the trademark owner

As aforesaid, imitating the trademark by using the trademark itself or a sign that is identically similar to it without the prior consent of the trademark owner is considered as trademark infringement. However if this use is made with the prior consent of the trademark owner, it will not constitute infringement.

Imitation of a registered trademark is involved when relevant product is released to the market in bad faith in order to benefit from the reputation of the registered

[266] *Vibes Media LLC v. KKW Fragrance LLC*, US District Court Northern District of Illinois, Eastern Division, 1:18-cv-04910, https://us.fashionnetwork.com/news/Kim-Kardashian-s-KKW-Fragrance-sued-for-trademark-infringement,999809.html#.XK-auiOLQnU, (11.04.2019).
[267] See Image 16.

trademark.[268] It is also said that manner of expression in this provision is mistaken because the concept of imitation has the same meaning like use of the trademark directly or a sign identically similar to the trademark.[269]

Counterfeit goods are defined as goods on which exactly the same trademark or a sign identically similar to its essential elements are placed without the prior consent of the trademark owner. Besides that, counterfeit products cannot be determined when there no banderole on the product. In addition to that, workmanship put into the counterfeit product may be better in quality than the workmanship put into the original product and presence of this superior quality may not be used as presumptive evidence to prove that it is not a counterfeit product.[270]

If we review this Article from the perspective of fashion law, we will come across Grand Bazaar. It was claimed that bag master of Louis Vuitton was transferred to the Grand Bazaar so that he can design the counterfeit bags and design of the counterfeit bags was directly made by the real master.[271] It is possible to find exactly same or better counterfeit goods in the Grand Bazaar. Since leathers used by famous brands are imported from Turkey, exactly same leather or better quality can be used in the counterfeit bags. Although workmanship and material of the counterfeit product can be exactly same or even better, it does not mean that it is the original product.

In Louis Vuitton example, sign is not only thing to be imitated but since the bag is covered with this monogram, automatically this bag's itself will be imitated as well. However it must be stated that imitating the good's itself is not a requirement for imitation of trademark.[272] In other words, imitating of the sign solely will be sufficient in order to be constituted as trademark imitation.

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[268] Talha Ağaç and Fatih Şahin, *Marka Hakkına Tecavüz ve Cezai Sorumluluğu, Prof. Dr. Şükrü Yıldız, Marka Hukuku Dersi*, İstanbul Ticaret Üniversitesi, Hukuk Fakültesi, p.8., https://www.academia.edu/38303392/Marka_hakk%C4%B1na_tecavu_z_ve_cezai_sorumlulug_u.pdf (11.04.2019)

[269] Suluk, Karasu and Nal, p. 230.

[270] Çolak, p. 413.

[271] Salih Aydın, "Taklit Çetesine Louis Vuitton'dan Transfer", *Radikal*, 30.04.2011, http://www.radikal.com.tr/ekonomi/taklit-cetesine-louis-vuittondan-transfer-1047810/, (21.03.2019).

[272] Ünal Tekinalp, *Fikrî Mülkiyet Hukuku*; 4th. Edition, İstanbul: Arıkan Press, 2005, p.457, Cited By: Işıl Tüzün, "556 Sayılı Markaların Korunmas Hakkında Kanun Hükmünde Kararname Çerçevesinde Marka, Taklit Marka ve Taklit Mal Kavramları", *Hukuk ve İktisat Araştırmaları Dergisi,* Vol.3, Issue.1, 2011, p.16.

2.1.7.3. Performing actions which are stated in 29/1(c)

According to the Article 29/1(c), selling, distributing, releasing to trade, importing, exporting or holding for trading purpose those products bearing the trademark or a sign identically similar to it or offering a contract for such a counterfeit product although the seller knows or should know that trademark was imitated is considered as trademark infringement. Purpose of this provision is to motive third persons to act carefully and diligently to prevent trademark stealing and to establish honesty in commercial life. However the phrase "should know" used in the Article must be evaluated according to the circumstances of the relevant case. Accordingly a person selling the same type of goods since years and having knowledge of the brands in that area is expected to understand that a counterfeit product is concerned when it is offered to him for a much lower price. [273] However the fact remains that solely because the product is sold for a cheap price does not mean by itself that it is a counterfeit product because products for a previously completed season can be manufactured much cheaper in the country of manufacture and exported to Turkey through parallel importation and as a result, they can be sold much cheaper than the official distributer price.[274] In addition to that, the phrase "holding" used in the Article has a commercial purpose because if the person is holding the counterfeit trademark for personal needs, it will not constitute trademark infringement.[275]

At this point, we will look at the decision of the Supreme Court (Yargıtay)[276] . Accordingly the TP registered trademark, Versace claimed in the case that defendant's act to bring to the customs directorate counterfeit belt buckles that is so same like Versace trademark, causing confusion was a trademark infringement and constituted unfair competition. Defendant said that it did not act with the intention of causing unfair competition but belt buckles arrived in Turkey as a result of a mistake. However the court decided to accept the case.[277]

[273] Suluk, Karasu and Nal, p. 230.
[274] Çolak, p.413.
[275] Suluk, Karasu and Nal, p. 230.
[276] Yargıtay 11. HD. 03.07.2008, E.2007/7132, K.2008/8901.
[277] Noyan, p.738.

2.1.7.4. Expanding the scope of rights granted by the trademark under a license or transferring such rights to third persons without permission

Under this clause, expanding the scope of rights granted by the trademark owner without authorization and transferring these rights to third persons are considered as trademark infringement. If a right is granted by license, it will be subject to limitations in terms of time, location, specific product or service and any breach of these limits will constitute trademark infringement. In addition, unauthorized transfer of this right will also constitute trademark infringement.[278] However if the licensee is in breach due to the quality of the product or service it supplies, it will not constitute trademark infringement but seen as breach of contract.[279] It was also said that Article 19/2 can be put forward as defense in trademark infringement lawsuits. In such a case, in the calculation of 5 years of use, lawsuit date will be taken as a basis. Article 30 of SMK contains criminal provisions to be applied against trademark infringement. However in this thesis these will not be detailed.[280].

If we examine those actions considered as trademark infringement in the fashion law, we can see that same or identically similar phrases used in SMK, Article 29/1, clauses (b) and (c) are used to describe these actions. These phrases refer to counterfeiting and close copying and consider them as trademark infringement. One must look at the arrangements made with Article 29/1, clause (a) for the knock-offs, one of the most controversial concepts in fashion law. This clause refers to Article 7 of SMK. SMK, Article 7/2(b) mentions a sign similar to the registered trademark and likelihood of confusion including likelihood of association by public. The phrase "similar" is also used in Article 7/2(c). This Article mentions a sign used to gain unfair advantage from the reputation of a trademark that has a certain well-known status in Turkey or is

[278] Suluk, Karasu and Nal, p. 230, 231.
[279] Çolak, p.495.
[280] Accordingly, any person that infringes a trademark not belonging to him by means of adaptation or ambiguity in order to produce a product or provide a service or offer for sale, sell, import, export, buy for commercial purposes, maintain, transfer or store such product shall be punished with imprisonment from 1 year up to 3 years and with a judicial fine up to twenty one days. In addition to that, the person removing the sign required for trademark protection from a product or packing without authorization shall be punished with imprisonment from 1 year up to 3 years and with a judicial fine up to five thousand days. Persons carrying out any transfer, licensing or other disposal with pledge over the trademark owned by another without authorization shall be punished with imprisonment from 2 years up to 4 years and with a judicial fine up to five thousand days. If the crimes listed in Article 30 are committed by a legal entity, security measures specific for legal entities will be imposed. However in order to make a conviction upon trademark infringement, such trademark must have been registered in Turkey. Although start of a prosecution or investigation for these crimes is possible only upon objection, if a person selling or offering for sale those products manufactured by imitating the trademark of another notifies to the competent authorities the source of these products and helps to reveal the producers of these products and enables seizing of any products so manufactured, no punishment shall be imposed on him.

detrimental to the reputation of that trademark or detrimental to its distinctive character. In these Article, the word similar is used instead of identically similar and in this manner, a protection possibility has arisen against knock-offs.

If we examine the source of the knock-offs created from a registered trademark, we will see three different situations. One of them is the knock-off where a name similar to the trademark is used and names of two trademarks are similar to each other. The second example of knock-off appears in shape trademarks. The shape of a swan belonging to the trademark Swarovski is an example of a shape trademark. If a shape similar to that swan shape is used, it can be considered as a knock-off. The third example of knock-off appears when a design is registered as trademark. Red bottom shoes of Louboutin and serpentine series of Bvlgari are enjoying trademark protection. Although we mentioned about fast cycles of fashion, we also know that certain innovative ideas of great brands are in a different status than the ideas doomed to extinction only in a few months and such ideas are protected diligently by these brands.

2.1.8. Reasons Causing Termination of The Trademark Rights

Reasons causing termination of the trademark rights are regulated in SMK as invalidity, cancellation and other reasons. As distinct from the annulled KHK, invalidity and cancellation are regulated separately in SMK. Other reasons of termination are expiration of the protection period, failure to renew the trademark on a timely basis and withdrawal of trademark rights by the relevant trademark owner. We will now detail these reasons under three headings in the following sections.

2.1.8.1. Invalidity

When a trademark is declared as invalid, the trademark owner cannot use or gain any benefit from that trademark anymore.[281] In one of the cases listed in Article 5 or Article 6 of SMK is relevant, the court will declare the trademark as invalid. In other words, if absolute or relative grounds for refusal are relevant at the registration phase, the trademark may be considered as invalid.[282] A request for declaring a trademark as invalid may be made to the court by the relevant beneficiaries, public prosecutors or

[281] Güneş, "Kullanılmayan Markanın İptali Sorunu", p.41.
[282] Suluk, Karasu and Nal, p.221.

relevant public establishments and institutes. Although TP is not indicated as party in a lawsuit concerning invalidity of a trademark, the lawsuit must be filed against the person who is registered in the trademark register as trademark owner on the lawsuit date or against his legal successors.

As mentioned before, invalidity will be relevant if registration was granted in spite of the existence of relative or absolute grounds for refusal. However owner of the previous trademark will be entitled to file a invalidity lawsuit even if he did not raise an objection to the existence of relative reason of rejection.[283]

If a trademark registered contrary to the provisions of SMK 5/1(b), (c) and (d) has gained distinctive character in connection with the goods and services for which it was registered as a result of regular use and if this distinctive character was gained before the request for invalidity, this trademark shall not be declared as invalid.

Invalidity of a trademark may be related to the whole product or service for which it was registered or to some part of that product or service. In this case, it will be decided on partial invalidity in terms of that product or service. However a invalidity decision may be not be rendered to change the sample of the trademark.

If the trademark owner knows or should know that the trademark with the later date has been in use and did not raise an objection to this situation for an uninterrupted period of 5 years and if the registration was not made in bad faith for the trademark with later date, it may not be claimed that trademark with later date is invalid. But if the registration granted to the trademark with later date was made in bad faith, invalidity of that trademark may be requested even if the relevant trademark owner had remained silent about it.

If invalidity lawsuit is filed pursuant to Article 6/1 of SMK, Article 19/2 of SMK may be put forward as defense. Here while determining the period of 5 years in connection with use of the trademark, lawsuit date will be taken as a basis. If the plaintiff's trademark has been a registered trademark for at least 5 years as of the application or expiration date of the trademark for invalidity was requested, the plaintiff has to prove

[283] Suluk, Karasu and Nal, p.222.

that conditions required under Article 19/2 are satisfied by him as of that application or expiration date.

2.1.8.2. Cancellation

Cancellation is regulated under Article 26 of SMK. Accordingly when the situations described in Article 9/1 of SMK are present, if trademark has become a common name for the goods or services for which it was registered because of the actions of the trademark owner or his failure to take necessary measures or if the trademark has gained a character that would mislead the public about the nature, quality or geographical source of the goods or services for which it was registered as a result of direct use by the trademark owner or another use permitted by the trademark owner or if the trademark is used contrary to the provisions of Article 32 of SMK, relevant persons will be entitled to request cancellation of that trademark and TP will decide on cancelation in line with the request. Such trademark cancellation requests must be made against the persons who are recorded as the trademark owner in the trademark registry in that date or against their legal successors.

If the trademark was used genuinely in the period between the expiration date of the 5 years period and date on which cancellation request was submitted to TP in respect to the goods and services for which it was registered, cancellation requests under Article 26/1(a) will be rejected. However this use must be a genuine use and if the trademark was used only to prevent the cancellation request, use of the trademark during three months preceding the date of submission of the request to TP will not be taken into account because this use will not be considered as a genuine use.

Genuine use of a trademark means it is used in a creative market manner. But if this use is made only to preserve the trademark rights with limited production activities and supply, it will not be considered as genuine use.[284]

CJEU makes following explanation about genuine use: **"***Genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does*

[284] Güneş, "Kullanılmayan Markanın İptali Sorunu", p.44.

not include token use for the sole purpose of preserving the rights conferred by the mark.[285]

Cancellation may be applicable for all goods or services or for certain part of the goods or services for which the trademark was registered. In this case, partial cancellation will be made for these goods or services. However this cancellation decision should not function to change the sample of the trademark.

If during cancellation process, holder of the trademark rights changes, then procedures will be implemented against the person whose name is entered into the trademark registry as right holder. Besides that a cancellation request is sent to the owner of the trademark that is desired to be cancelled and trademark owner must submit TP its evidences and responses to that request within 1 month. If holder of the trademark rights demands additional time within one month, TP grants additional time up to 1 month. The Institute may also demand submission of additional information and documents and will render its decision on the basis of the claims, defenses and evidences.

2.1.8.3. Effect of Invalidity and Cancellation

Invalidity is different than cancellation in that it is not decided based on the reasons arising later. However in cancellation, there will be results developing later although not evident during registration process. For that reason, invalidity decision is effective toward past, while cancellation decisions will be effective in the future.[286]

A decision rendered on the invalidity of a trademark will be effective as of the application date concerning that trademark and it will be deemed that no protection was actually afforded to the trademark under the SMK. However in trademark cancellation, this cancellation will not be effective as of the application date but will be valid as of the date on which cancellation request was received by TP. Albeit if conditions causing cancellation have arisen before the date of that cancellation request, then cancellation decision will be effective as of the date on which such conditions had arisen provided that a request was made for that purpose.

[285] *Ansul BV v. Ajax Brandbeveiliging BV,* CJEU, Case Number: C-40/01, 11.03.2003, http://curia.europa.eu/juris/document/document.jsf?docid=48120&doclang=en, (04.04.2019).
[286] Suluk, Karasu and Nal, p.221, 222.

Any decisions that are finalized and enforced before that decision in a lawsuit filed with a claim on trademark infringement and contracts established and performed before the decision will not be effected by the retroactive influence of invalidity and cancelation decision stipulated in the 2nd sentence of Article 27/2. However a right to claim compensation is reserved for the persons who suffered losses due to serious negligence or malicious intent of the trademark owner. Finally amount paid under the contracts established and performed before the decision may be claimed back in part or in whole pursuant to principles of equity.

Decisions finalized on the invalidity or cancellation of a trademark will be applicable for everyone and after finalization, the trademark is deleted from the trademark registry and this act is published in the bulletin. After finalization of the invalidity decision, the court will *ex-officio* forward this decision to TP.

2.1.8.4. Other reasons of termination

Article 28 of SMK regulates other reasons of termination. Accordingly the trademark rights will terminate if the protection period expires and the trademark is not timely renewed or if the trademark owner withdraws his trademark rights. Trademark rights will then terminate as of the date such reason has arisen.

In these cases, the trademark owner may withdraw all or certain part of the goods or services subject to trademark registration. Such withdrawal must be notified to the Institute in writing and termination of trademark rights due to withdrawal must be published on the bulletin. This withdrawal will be effective as of the date it is entered into the trademark registry. However trademark owner is not entitled to withdraw his trademark rights if consent cannot be obtained from the other right holders and licensees indicated in the registry in respect to that trademark. If a third person has claimed rights over the trademark and as a consequence, an injunction is granted and entered into the trademark registry, the right holder may not withdraw his rights arising from the trademark unless consent is obtained from this third person. However a trademark application may be withdrawn by the applicant before registration of that trademark. If trademark application is withdrawn, provisions concerning withdrawal of trademark rights will be applied.

CHAPTER 3

3.1. Design Aspect of Fashion Law

The word design comes from Latin from the root *signare* and *signare* root means making, performing[287] and pointing out.[288] TDK gives following definition for design: "*Any shape or concept born in the mind and initial draft of an artwork, structure or technical product or a drawing".*[289] In addition to that, Oxford Dictionary gives following definition: "*A plan or drawing produced to show the look and function or workings of a building, garment, or other object before it is made".*[290]

Design concept has a broad scope including outer appearance of an object or its structure, function or sustainability. In other words, a design is expected to make a contribution not only to the appearance and aesthetic of the product but also to its functionality.[291] This relationship is shortly expressed in the following sentence: "Design is the marriage between shape and function". However aesthetic is not necessary in a design in order to be protected with our law and what matters is the difference of the design from other designs. Although design has been defined as the marriage between shape and function, what will benefit from the protection afforded with design law is not function of the product but its shape or appearance because functions of the product will be protected by a patent or useful model if relevant conditions are met.[292] Besides that, design law affords protection to the reflection of the design idea on the relevant product but the product itself is protected under law of property.[293]

At this point we must emphasize the fact that meaning given to the design concept by SMK is different than design word used in daily life or the meaning given to the design word by different disciplines. For example in a thesis written about fashion

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[287] Cahit Suluk, *Avrupa Topluluğu Hukukunda Tasarımların Korunması, Topluluk Tasarımı, (Community Design),* Ankara: Seçkin Press, 2002, p.25.
[288] Erkut Eryayar, "Tasarım Hukukunda Ürün Tasarımı Açısından Benzerlik Kavramlarının İrdelenmesi", Marmara Üniversitesi Güzel Sanatlar Enstitüsü, *Unpublished Art Sufficiency Thesis*, İstanbul, 2008, p.56.
[289] *Türk Dil Kurumu,* "Tasarım", http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5c4b85501a7836.26988213 (03.05.2019).
[290] *Oxford Dictionaries*, "Design", https://en.oxforddictionaries.com/definition/design (03.02.2019).
[291] Cahit Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* Ankara: Seçkin Press, 2003, p.35.
[292] Suluk, Karasu and Nal, p. 309, 310.
[293] Suluk, Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması), p.75.

and textile design, design was considered both as the designing act and also as the product created with this act.[294] However same thesis also states that design is the act itself rather than the product itself because product is only the output of design act.[295] Calculation of the beam lengths by a civil engineer will be considered as design although mechanics is involved but fashion designer experiences the design process in a much more imaginative manner as contrast to the systematic approach of the engineer.[296] Design historian John Heskett defines design as follows: "To produce a design and to design a design".[297] Differences in the design approach adopted by various fields clearly show why many people call Da Vinci as the first designer.[298] According to their point of view, one cannot speak of any design concept before the 15th century.

Steve Jobs gives following definition for design :*"We don't have good language to talk about this kind of thing. In most people's vocabularies, design means veneer. It's interior decorating. It's the fabric of the curtains and the sofa. But to me, nothing could be further from the meaning of design. Design is the fundamental soul of a man-made creation that ends up expressing itself in successive outer layers of the product or service".*[299] As these definitions made by the designers indicate, design is interpreted as the whole process, but Information Technology specialists are more concerned about the function of a design rather than its appearance. However, legal protection afforded to the designs covers not the functions or whole process of design, but its appearance.

In daily life, the word design has a very broad meaning thanks to different approaches taken to the design concept by various disciplines. Under SMK, design concept is limited by sharp lines. Article 55 of SMK gives following definition for the design concept: "*Appearance of a product arising from its lines, shape, form, color, material or surface texture appearing on whole product or on certain parts thereof or on the decorations made to the product*". In addition to that, in annulled Legislative Decree

[294] Pınar Yılmaz, "Günümüz Tekstil ve Moda Tasarımında Tasarım, Tasarımcı ve Tüketici Açısından Tasarım Kültürü", Mimar Sinan Güzel Sanatlar Üniveristesi SBE, *Unpublished M.S.,* İstanbul 2004, p.2.
[295] Yılmaz, p.5.
[296] Gürünay Ökten, "İç Mimarlık Mesleği Özelinde Tasarım ve Tasarımcı Kavramlarının Algılanışı ve "Tasarımcı Kimdir?" Sorusuna Yanıt Aramak Üzerine Bir Okuma", Hacettepe Üniversitesi SBE, *Unpublished M.S.,* Ankara 2012, p.3.
[297] Mahmood, p.558.
[298] Thomas Hauffe, *Design; A Concise History*, Laurence King Publishing, 1998, p.11.
[299] Apple's One- Dolar -a –Year Man, https://money.cnn.com/magazines/fortune/fortune_archive/2000/01/24/272277/index.htm, (04.03.2019).

on Industrial Design, industrial design is defined under the general heading of design as follows: "*The whole created by various components or characteristics of a product or a part thereof or any decoration thereon which is perceived by human senses such as lines, shape, form, color, texture, material and flexibility*". These two definitions are different since the word flexibility used in the annulled Legislative Decree on Industrial Design is not used in SMK. Besides that, the phrase perception by human senses has been eliminated and the word appearance has been introduced in SMK. As the phrase surface texture used in SMK refers to the sense of touching and appearance refers to visual sense, SMK speaks of seeing and touching senses only.

In Turkish law doctrine, one of the definition regarding design is, "Appearance created by various components or characteristics of a product as a whole or a part of a product that could be perceived by human senses such as lines, shape, color, texture, flexibility of material and/or decoration".[300] Besides that, design is also defined as "Decorative or aesthetic appearance of a product that could be perceived by eyes or other senses".[301]

There are no sector restrictions affecting design protection. In other words, the design will be protected whether it is an industrial, artistic or artisan design. For that reason, SMK has replaced the phrase industrial design with the design word. [302] In fashion, functionality is not dominant in the assessment of an industrial design. Replacement of the phrase industrial design with the word design in SMK paved the way toward expansive protection also covering fashion designs. Although annulled Legislative Decree on Industrial Designs has in its title the phrase industrial design, in Article 3/b, product is defined as "product made by industrial methods or manually" and in this manner, it was made clear that a design should not be limited to only industrial design.

Under annulled Legislative Decree on Industrial Designs, separate provisions were not made for unregistered designs and instead protection was afforded to these unregistered designs according to general provisions. However in SMK, separate provisions were made for unregistered design protection, stating that "*A design will be protected as a registered design if it was registered pursuant to the provisions of this*

[300] Erdil, p.223.
[301] Bozbel, p.602.
[302] Suluk, Karasu and Nal, p.309.

Law and protected as unregistered design if made available to the public in Turkey". Affording legal protection to unregistered designs with SMK is surely a very necessary novelty for the fashion designs if we take into account that brands in the fashion sector release at least two creations every year and there is a fast circulation in the fashion market. In this manner, legal protection is afforded to unregistered designs against counterfeit products for 3 years without the need for an application. Protection for unregistered designs is obviously very important in the fashion sector because when a fashion design is introduced in a fashion week and in this manner exhibited to the public, it will spread throughout the world very quickly and this unregistered design should be protected to preserve the benefits of the relevant designer.

In practice considerable problems were developing because separate provisions were not made in respect to unregistered design protection in the annulled Legislative Decree on Industrial Designs. Design was actually protected by FSEK or with unfair competition provisions. For the protection afforded by FSEK, the design had to be also a work and an unregistered design was protected against infringement only if relevant action constituted unfair competition. However while appearance of the product is protected in the design law, unfair competition law cares whether the right to compete has been exercised honestly. In unfair competition cases concerning designs, the Supreme Court (Yargıtay) examines whether there is any confusion arising from the products. In other words, when different brands were used for similar products, it was concluded that there would be no confusion or lesser confusion since the brands were different. Accordingly it was very difficult for the unregistered designs to obtain protection through unfair competition cases.[303]

The concept of product is regulated under the same heading like design in SMK. Product is defined as: "*Any object produced by industrial methods or by hand except for computer programs and a combined product or parts creating a product, packing, presentation of multiple objects, graphical symbols and typographic characters for perception together"*. Combined product used in this definition was described as "*Product comprising of parts that could be mounted and demounted or renewed"*.

[303] Servet Batuhan Bilgin, "6769 Sayılı Sinaî Mülkiyet Kanunu'nda Tasarım Hukukunda Getirilen Yenilikler", *FMR Dergisi*, Issue. 1, 2008, p.41,42.

A design must be new and distinctive in order to be protected and should not be contrary to general morality and public order. Conditions required for design protection are called positive protection conditions and conditions that are not desired, such as being contrary to general morality and public order, are called negative protection conditions.[304] Following section deals with positive protection conditions which are novelty and distinctive character.

3.1.1. Novelty

Pursuant to Article 56 of SMK, the design has to meet the criteria of novelty and distinctive character in order to be protected. However before examining the existence of distinctive character, it is checked whether the design is new or not. In other words, if a design is not new, it is not important even if it has distinctive character. Therefore novelty can be seen as a preliminary condition to examine the distinctive character. In the case filed by FLAŞ KLÜP Hazır Giyim Ticaret ve Sanayi Ltd. Şti. against the company Selin Triko Konfeksiyon Sanayi ve Ticaret Ltd. Şti, expert witness report written by M. Şahin Akkaya concluded that there was no need to examine the presence of distinctive character since there was no novelty.[305] For that reason, one can conclude that there is a hierarchy between the criterion on novelty and criterion of distinctive character.

SMK brings another novelty for design registration. According to the SMK, TP has to make an *ex-officio* novelty examination. Before this novelty, even common designs could have a chance to enjoy design protection. However it must be stated that the goal of this novelty shouldn't be interpreted as another obstacle for fashion design registration; in fact the main purpose is to increase the quality of the market.[306]

Article 56/4 explains in which circumstances a design will be considered new. Accordingly if a registered design has not been presented to the public before the application or expiration date, it would be new. Besides that, an unregistered design will be also accepted new if it has not been presented to the public before the date of presentation to the public. Such presentation may be in any part of the world.

[304] A. Aslı Bilgin, *Endüstriyel Tasarım Hakkı ve Tazminat Davaları*, 1. Edition, İstanbul: Vedat, 2006, p.28.
[305] Hamdi Yasaman, *Fikri ve Sınai Mülkiyet Hukuku; Fikir ve Sanat Eserleri, Endüstriyel Tasarımlar, Patentler ile İlgili Makaleler, Hukuki Mütalaalar, Bilirkişi raporları*, Vol. 2, İstanbul:Vedat Press, 2012, p.492-497.
[306] Sami Kocabıyık, "Moda Tasarımlarının Sınai Mülkiyet Kanununa Göre Tescili", Yener Ünver and Özlem Yenerer Çakmut (Ed.), *Hukuk ve Sanat,* (385-411), Ankara: Seçkin, 2017, p.402.

Consequentially, the novelty must be global or in other words, a definite novelty. However if there are only small differences between two designs, they will be considered same.

Any imitations made from nature will not be considered new. If same flower found in nature is imitated in order to make a flower design, it will not be afforded any design protection but an arrangement of these flowers may be protected as a design if it is new.[307] However if there is a copy, it does not need to be the copy of another person's design; even an imitation from the objects of nature will not have the quality of new.

The word new is defined as "something different, not same, not known, not used or little used, put forward for the first time, different than before", but novelty in the design concept must be perceived as "not announced before to the public". The condition of not being same as stipulated in SMK does not point out to a sharp difference. In other words it is not expected from the two designs to have completely different features. What matters here is the development of that design's foundation by the designer. However intellectual property law gives the designer the principle of utilization and simulating freedom.[308] Specific definition of a design's foundation and key element was made very differently by the court in a case between Playnomore and Hermes. In this case, the company Playnomore produced almost similar models from Hermes Birkin and Hermes Kelly bag models and applied the shape of an eye onto the bags. Hermes took legal action against this use but the court dismissed the case, stating that key element of the bags were these eyes applied onto the bags.[309]

There are various distinctions in the concept of novelty. First of them is the relative-absolute distinctions of novelty. Absolute novelty refers to a design that is not known in any part of the world until the registration application is filed and relative novelty refers to a design that will be released to the market for the first time in the country of registration irrespective of whether it is well-known in other countries or not.[310] However, if the design is well-known in a country other than the country of

[307] Nefise Koç Çelik, *Tasarımların Ulusal ve Uluslararası Hukukta Tescili ve Korunması,* 1. Edition, Ankara: Adalet Yayınevi, 2009, p.51.
[308] Cahit Suluk and Ali Orhan; *Uygulamalı Fikri Mülkiyet Hukuku Tasarımlar,* Vol. 3, Ankara:Seçkin Press, 2008, p.124, 125, 126.
[309] *Court Rules Against Hermes in Battle of Lookalike Bags in Korea,* (2017), http://www.thefashionlaw.com/home/court-rules-against-herms-in-battle-of-lookalike-bags-in-korea, (04.03.2019); See Image 17.
[310] Bozbel, p.609.

registration or if this design has been presented to the public before but forgotten later in that country and disappeared, coming forth of that design will be considered a relative novelty.[311] It must be stated SMK provides for absolute novelty.

Other distinction about novelty is known as objective and subjective. In case of objective novelty, a contribution is made to the design to achieve some sort of richness and variability. However in case of subjective novelty, design is totally produced with the independent ideas and abilities of the designer.[312] In subjective novelty, it does not matter whether the design has been presented to the public before in any other part of the world, but what matters is the independent efforts put to the design by the designer.[313] As SMK does not require a totally different design and considers two designs as same if there is difference only in small details, it is obvious that objective novelty is preferred in our law.

In another explanation about subjective and objective novelty, it is stated that a subjective novelty is not produced by means of copying the work of another and objective novelty will be relevant when the design has not been presented to public before in any part of the world. Therefore if a designer designs the same product without knowing that it was presented to the public before, subjective novelty will be relevant.[314] This explanation shows that objective novelty refers to the absolute novelty concept because in both of them, the criterion of presentation to the public in global terms is relevant which means that type of novelty required by law is objective novelty.

Although objective novelty is taken as a basis in our law, it must not be forgotten that SMK has granted protection against copying in respect to unregistered designs within the scope of design rights and limits. It is stated as follows in the relevant Article in that respect: "*Any design developed independently by a designer who has no reasonable means to know that protected design was presented to the public before his design shall not be considered as a design copied from the protected design"*. This refers to the definition of subjective novelty mentioned in above paragraph. And it

[311] Bilgin, p.30-31.
[312] Bozbel, p.610.
[313] Bilgin, p.331.
[314] Abdurrrahman Hamza Tüzgen, "Tescilsiz Tasarımların Hukuken Korunması", İstanbul Şehir Üniversitesi SBE, *Unpublished M.S.,* İstanbul, 2018, Sosyal Bilimler Enstitüsü, Özel Hukuk Yüksek Lisans Programı, Yüksek Lisans Tezi, Abdurrahman Hamza Tüzgen, İstanbul 2018, p.56.

indicates that our law takes into account the criterion of subjective novelty for the protection afforded to unregistered designs although it also recognizes objective novelty in general.[315]

Another distinction about novelty appears in simple novelty and qualified novelty. Simple novelty refers to a design whose similar was not developed before but remains at the level of simple, i.e. not unique. Qualified novelty refers to a novelty of essential elements which makes the design different than the other designs developed before. Determined on the bases of obvious details, qualified novelty does not require any difference in small details. A qualified novelty is required in Turkish law for the protection to be afforded to the relevant design.[316]

Natural products not produced by hand or by industrial means which belong to natural world or to the nature and words or series of letters consisting of letters only without any formal element cannot be registered as design or product under SMK.[317] The reason for this is the fact that the designer had no means to make a contribution to the design. An object already existing in nature cannot be novel and therefore, cannot be registered as a new design or product.

In the relevant Article of the law concerning novelty, it is required that design has not been presented to the public before in any part of the world and is not similar to the other designs. In the period when Legislative Decree on Industrial Designs was in effect, the matter of unregistered design was dealt with separately but novelty was regulated in parallel to SMK. In other words, although the requirement of not being presented to the public in any part of the world before was relevant in that Decree, it was also stated that the designs will be accepted as same if there is difference only in small details. In the period when Legislative Decree on Industrial Designs was in effect , Tekinalp said that Legislative Decree required an absolute and soft novelty in terms of time and geography. Not being presented to the public before is a soft novelty in the registration of the design. However if the design has been presented to the public in some part of the world before, there will be no novelty. It does matter here whether the designer, preparing to make an application for registration of his

[315] Tüzgen, p.56.
[316] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.240.
[317] Fatma Özer, "6769 Sayılı Sınai Mülkiyet Kanunun Genel Bir Değerlendirilmesi", *Terazi Hukuku Dergisi,* Vol. 12, Issue.128, (April 2017), p.140.

design knows this fact or not. The Article also states that the designs will be accepted as same if there is difference only in small details. Tekinalp says that differences will be small when the design takes as a basis an existing design and preserves the appearance of the existing design and when the difference made is an addition to that design or only deviates from it. [318] Since same criterion is required for novelty in both SMK and Legislative Decree on Industrial Designs, comment made by Tekinalp about the annulled Legislative Decree on Industrial Designs is also applicable for the relevant Article of SMK.

Based on the comment made by Tekinalp about differences, if we look at the case between *City Merchandise Inc, v. Balenciaga America Inc,* we see that Balenciaga took the straw bag developed before by City Merchandise without changing the New York skyline appearing in front of the bag but extended the black handle of the bag until the bottom as distinct from the original design.[319] Based on the comment made by Tekinalp, we can say that this is a small difference. However we do not know the court's special evaluation of the matter since the case is not finalized yet.

Presentation to the public is an important criterion in determining novelty. SMK defines presentation to the public as releasing to the market by various means including exhibition and sale; using and activities like describing, publication, introduction etc. However if there is an obligation of confidentiality, disclosure of the design to a third person will not be evaluated as presentation to the public. At this point, it doesn't matter this confidentiality obligations refers to explicit or implicit confidentiality.[320]

Here the word public means any group of third persons that is definite or indefinite in any part of the world.[321] Presentation to the public can be achieved when the design is released to the market by means of exhibition or sale or when the design is used, described, published, introduced etc.[322] In other words, presentation to the public

[318] Ünal Tekinalp, *Fikri Mülkiyet Hukuku, Temel Bilgiler, Milletlerarası Özel Hukuk, Milletlerarası Sözleşmeler, Fikir ve Sanat Eserleri, Markalar, Patentler, Endüstriyel Tasarımlar, Faydalı Modeller, Yeni Bitki Çeşitlerine İlişkin Islahçı Hakları, Entegre Devre Topografyaları ve Biyoteknolojik (Gene İlişkin) Buluşların Korunması,* Extended 3rd Edition, Beta Press, 2004, p. 611, 612.
[319] *Balenciaga is Being Sued for Copying its $2000 Kitschy New York Bags,* (2018), http://www.thefashionlaw.com/home/balenciaga-is-being-sued-for-copying-that-kitschy-new-york-bags, (04.03.2019); City Merchandise, Inc., v. Balenciaga America, Inc., 1:18-cv-06748-JSR (SDNY). See Image 18.
[320] Suluk, Karasu and Nal, p. 319.
[321] Tekinalp, (2004), p. 612.
[322] Erdil, p.227.

means that the public somehow knows about or is aware of the design. Upon presentation to the public, the information will spread uncontrollably but introduction of the design to third persons who are bound by limitations or confidentiality obligations is not seen as presentation to the public. Once the design is presented to the public, it is not necessary that public concretely knows it but it is sufficient if they can be only in the position to be informed about the design.[323]

SMK says that disclosure of the design to a third person bound by confidentiality obligations is not presentation to the public. Therefore when the design is shown to others in connection with an order or negotiations with another firm or when the design is shown to a specialist, business owner or assistants in order to obtain opinion, it will not be presentation to the public.[324] Tekinalp adds family to the scope of persons who will not be considered as public.[325]

A concrete example of this is as follows: When a design is presented to Karl Lagerfeld who serves as designer to Fendi and Chanel at the workshop of Fendi or Chanel, it will not be seen as presentation to public although Lagerfeld is the designer of a competitor.

Pursuant to Article 57/2 of SMK, if the design is presented to the public by the designer himself or his successor or by the third persons with the prior consent of the designer or his successor within a period of 12 months before the application or expiration date, this will not affect the novelty and distinctive character of the design. In addition to above provisions, Article 57/2 also stipulates that even if the design is presented to the public following a misuse of the relationship between the designer and his successors, novelty and distinctive character of the design will not be prejudiced. Thus it means that the design will not cease to be new at the moment it is disclosed to the public. Therefore the designer has a period of 12 months to make a registration application after his design is disclosed to the public.[326]

[323] Bozbel, p.611, 612.
[324] Erdil, p.227.
[325] Tekinalp, (2004), p. 612.
[326] Suluk, Karasu and Nal, p. 319.

3.1.2. Distinctive Character

The doctrine contains different opinions stating that concepts of distinctive character and novelty are not apart but the concept of distinctive character includes the concept of novelty.[327] Article 56/5 of SMK stipulates that if the general impression left by the design on a knowledgeable user is different than the general impression left by any other design presented to the public before the application or expiration date in case of registered designs or before the date it was first presented to the public in case of unregistered designs, it will be accepted that this design has a distinctive character. In addition to that according to Article 56/6, the degree of optional freedom enjoyed by the designer while developing that design must be taken into account in the evaluation of distinctive character.

Under annulled Legislative Decree on Industrial Designs, criterion brought for distinctive character refers to apparent difference. In other words, if an apparent difference is seen between the two designs after a comparison, there will be a distinctive character.[328] However SMK has revoked the requirement about apparent difference and required only difference. Determining distinctive character requires as difference test rather than quality test and what matters here is the difference of the product but not its poor or good quality.[329]

In an examination about distinctive character, similarities between the products are emphasized rather that their differences. However in comparisons made with previous designs to detect the distinctive character, each design is examined separately by comparing it with that previous design. In other words, features of other designs are not combined to make a comparison with the other design.[330] For example, if one design has *character a* and other design has *character b* and if it is necessary to determine the distinctive character of a design having both *characters a* and *b*, designs separately having *characters a* and *b* are not combined into one single design in order to make the comparison with that design.

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[327] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.245.
[328] Erdil, p.227.
[329] Suluk, Karasu and Nal, p. 317.
[330] Özer, p.147.

Zac Posen's led dress and Tommy Hilfiger's led dress can be given as an example for this issue. Zac Posen created a blue princess style dress with led and debuted it in 2016 Met Gala.[331] Two years after that, in 2018 Met Gala Tommy Hilfiger debuted its Cinderella dress with blue led.[332] Accordingly Zac Posen's dress' key element is a led lightning. This led light can be considered as a *character a* for our example. On the other hand Disney's own Cinderella dress' key elements are its crinoline and puff sleeves[333]; these elements can be considered as a *character b*, as well. Tommy Hilfiger's dress is different from Disney's own design since it has added a led ot it, and took it to the next level. Accordingly this dress is also different from Zac Posen's dress because of its puff sleeves and corset. In other word, Tommy Hilfiger's dress is a combination of *character a and character b.* As abovementioned, Zac Posen's dress and Disney's dress cannot be combined into one single design while determining the distinctiveness of Tommy Hilfiger's design.

Another prominent opinion about distinctive character is related to color, asking whether color is sufficient by itself to make the design a new design. Accordingly if the design takes on a totally different character after change of the color, it will be a new design. However Bilgin states that color is a secondary element and design itself is important and therefore, change in color would not add a new or distinctive character to the design.[334] On the other hand Çelik states that color is accepted as an element of novelty by itself in the English law. While color is not given any such function in the German law, approach taken to this matter is not really clear in the Community Law and Turkish law.[335] As an example of distinctive quality of color, we can show the registration application made by the brand Reginald Bendolph for its green bottom shoes.[336] However Louboutin has obtained registration for red bottom in the shoes. Reginald Bendolph only changes the color of this idea. Actually what matters here is the idea to add color to the bottom of a shoe rather than the red color. Bendolph tries to add a new and distinctive character to its design, by changing the color of this idea.

[331] See Image 19.
[332] See Image 20.
[333] See Image 21.
[334] Bilgin, p.36.
[335] Çelik, p.59.
[336] *A Young Brand Wants to Register its Green Sole as a Trademark and is Using Louboutin's Drawing to Do It,* (2019), http://www.thefashionlaw.com/home/a-budding-young-brand-wants-to-register-its-green-sole-as-a-trademark-with-louboutins-drawing, (14.03.2019).

Different criteria are taken into account in the determination of distinctive character, including a difference in general impression, eye of knowledgeable user, degree of optional freedom enjoyed by the designer in the creation of his design, product or area to which the design is applied and explanations made in the registration application. To explain them shortly, difference in general impression means the difference between the general impression left by the design on a knowledgeable user and general impression left on that user by the previous design. Eye of the knowledgeable user refers to an attentive and experienced user who does not need to be an expert. [337]

It is also said that a knowledgeable user would be a regular user of the product to which the design is applied and would have better knowledge than the average user. Following definition is given about a knowledgeable user: "A knowledgeable user is neither a non-attentive user nor an expert. A knowledgeable user does not lose himself in the details or miss any feature or detail of the product".[338] It is further said that a knowledgeable user is not the final user who has no previous information about the product or not an expert. Therefore knowledgeable user refers to someone who directly uses the product and has knowledge about the product types. Since that user does not have sufficient information to be regarded as an expert, he would not examine the details too much.[339]

The scope of protection to be afforded to the design will vary according to the degree of optional freedom enjoyed by the designer while developing his design. In other words, if the designer has sufficient freedom to develop the product, small changes made will not be enough to change the general impression left by the design. However if the designer is subject to strict limitations in the design process, even small changes to be made to the design will be sufficient to make difference.[340] Wing/ear detail used many of the Celine bags may be considered just a small addition, however since designer does not have much freedom while designing a bag; these small additions will be under protection.[341]

[337] Suluk, Karasu and Nal, p. 317,318.
[338] Bozbel, p.613,614.
[339] Koç Çelik, p.56,57.
[340] Özer, p.151.
[341] See Image 6.

Product or area to which the design is applied means application of that design to any product chosen by the designer.[342] In the comparison, other design to be compared does not have to be a registered design. Such design must be one well-known by the users and presented to the public before.[343] Explanations made in the application are considered among the criteria to be taken into account in the determination of distinctive character according to the court decisions rendered in the period of the previous legislation. However description to be given in the application is regulated as a voluntary act in Article 61/3 of SMK. [344] While apparent difference was required instead of difference only in the period of Legislative Decree on Industrial Designs, difference by itself is sufficient in Community Law.[345] The requirement on apparent difference has been removed and difference in general impression is made sufficient under SMK.

3.1.3. Novelty and Distinctive Character in the Fashion Designs

If we examine the design concept from the perspective of fashion law, we will see that all fashion objects that are called fashion design in daily language would not fit to the design definition made by SMK. In other words, as we use the word design in daily life according to the definition made by TDK, an ordinary pullover will be a design for us just because a designer has put some idea on it even if it is designed with the standard two arms. However SMK does not given such a broad meaning to the design concept and this ordinary pullover will not be considered as design and afforded protection unless it is new and has distinctive character.

One can show as example to the fashion designs on which novelty and distinctive character is apparent the led lighted dress emitting blue color, designed by Zac Posen. [346] And chandelier shaped dress designed by Moschino also fits to the design definition made by SMK.[347] We can also say that meat dress of Lady Gaga has novel and distinctive character since such a thing was not seen or tried before.[348] The bride's veil lifted up by flying balloons designed by Celia Kritharioti shown in the Paris

[342] Suluk, Karasu and Nal, p. 317, 318.
[343] Bilgin, p.34.
[344] Suluk, Karasu and Nal, p. 317,318.
[345] Koç Çelik, p.55.
[346] See Image 19.
[347] See Image 22.
[348] See Image 7.

fashion week in 2019 and and dress designed from small balloons is one of the typical examples of a design that is novel and has distinctive character.[349]

Apart from the above mentioned examples, a product does not need to possess an extraordinary character in order to be entitled to protection under the design law. If we look at the Birkin bags of Hermes brand, we can see that they are designed to fulfill normal functions of a standard bag but they also have a distinctive character in the design of the handle, shape and the accessory dangling from the handle.[350] Similarly, high heeled shoes of Giuseppe Zanotti with leaf figures have a distinctive character like Birkin bags although they have nothing extraordinary.[351] Here important issue is that an extraordinary structure is not required in a product in order to be accepted as a design. If the product is new and has distinctive character as required by SMK, it will benefit from the design protection. It must be stated that as the design area of the designer gets narrower, even small variances will make a difference.

We see different approaches to the concept of novelty when we look at the legal action taken by Vakko Holding A.Ş. and Vakko Tekstil ve Hazır Giyim Sanayi İşletmeleri against İmaj Tekstil Kuyumculuk İnşaat Sanayi ve Dış Ticaret Ltd. Şti. In this case, Vakko has applied to the fabric certain designs existing in the 16th and 17th century in the Ottoman Empire which are also exhibited in our museums, by using a well-known fabric technique called devore. Vakko obtained registration for these anonymous designs. However expert witness said that this registration was not correct but this type of fabric created by applying these designs onto the fabric using devore technique was new and had a distinctive character. In other words, technical expert witness accepted that the designs were anonymous and had no novel and distinctive quality but application of these designs onto the fabric with a different technique was new and had distinctive character. In the legal evaluation part of the decision concerning this comment made by the technical expert witness in the expert witness report, an opposition was raised and it was defended that use of a different technique on the design would not impair anonymous quality of that design. Concerning this

[349] See Image 23.
[350] See Image 24.
[351] See Image 25.

opinion, an example was given in the report from the Suluk's idea that application of a design appearing on a vase onto a fabric would not mean any novelty. [352]

3.1.4. Design Types

SMK makes a distinction between registered and unregistered designs. However except this one, there is no distinction between design types according to SMK and annulled Legislative Decree on Industrial Designs. However doctrines classify the designs into certain categories. These categories include functional-aesthetic designs[353], two and three dimensional designs[354], industrial-non-industrial designs[355], fashion designs[356], modular system and unit designs[357], part designs[358], spare part designs[359], invisible designs[360] and designs according to subjects[361].

In our thesis, we will discuss the details of registered-unregistered designs, functional-aesthetic designs, two and three dimensional designs and industrial-non-industrial designs and fashion designs will not discussed separately under this section since it is one of the major axis of this thesis.

3.1.4.1. Registered and unregistered designs

First arrangement made in the Turkish law about the registered designs was in the Legislative Decree on Industrial Designs. [362] Although Legislative Decree on Industrial Designs regulated the protection of registered designs, protection of unregistered designs was stipulated by general provisions. In the period when Legislative Decree on Industrial Designs was effective, TTK (Turkish Commercial Code), provisions concerning unfair competition in BK (Code of Obligations), FSEK

[352] Yasaman, p.484-491.
[353] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.65; Erdil, p.231.
[354] Erdil, p.231; Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.74; Tekinalp, (2004), p.609.
[355] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.76.
[356] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.77.
[357] Erdil, p.231.
[358] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.79.
[359] Suluk, Karasu and Nal, p. 313.
[360] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.79.
[361] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.78; Tekinalp, (2004), p.609.
[362] Suluk and Orhan, p.41.

(Law on Intellectual and Artistic Works) and Article 24 and succeeding Articles of MK (Civil Code) concerning protection of personality provided for the protection of unregistered designs.[363] SMK stipulates that in addition to registered designs, unregistered designs will be also protected. This was the first time that a legal arrangement was made about the protection of unregistered designs in our law.[364]

If we examine this distinction about the design from the perspective of fashion law, as the subject of this thesis, we see that it would be a great relief for the fashion world when unregistered designs are also protected on a firm basis since fashion develops and is consumed very quickly. Actually already in the period of Legislative Decree on Industrial Designs, attention was drawn to a need for legal protection for unregistered designs as emphasized in the doctrine. It was also stated that in sectors such as textile, number of designs was quite high and so their registration would bring excessive costs and long time required in the normal registration process would not fit to the needs of the fast fashion sector and designers were not well informed about it which brings to the mind a definite need for protection to be afforded to unregistered designs in the fashion sector. However Suluk said that in the period of Legislative Decree on Industrial Designs, certain group opposed to the protection for unregistered designs, saying that such protection that comes additional to the protection already afforded by the Legislative Decree on Industrial Designs and FSEK would be too complex. With this opinion, it was further defended that there was an uncertainty about whether a product sold in the market would be imitated or not.[365] Actually this approach is related to the issue of privacy paradox. When fashion sector is concerned, counterfeit products may be seen essential in turning of the fashion cycle, helping it to be completed just to give space for the new cycle.

Protection afforded to the unregistered community designs that we will discuss in the following part of this thesis was actually put into practice due to the requirements of the fashion sector because this type of protection meets the needs of sectors operating with short term products.[366]

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[363] Erdil, p.231.
[364] Suluk, Karasu and Nal, p. 311.
[365] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.62.
[366] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.62.

3.1.4.2. Functional and aesthetic designs

Before discussing the distinction between the functionality and aesthetic, it must be emphasized that functionality and aesthetics are present together in the modern designs.[367] Functional designs are defined as "designs serving to some need of the consumer".[368] Besides that, concept of functionality refers to those characters that are compulsorily found in the product for its use or purpose and it has been taken as the opposite of aesthetics.[369] An opposite opinion defends that the product serves to the needs of the consumer but aesthetic qualities of the product should not prevent us to describe a design as a functional design.[370]

Although aesthetic designs are described as "designs arousing the feelings of admiration and beauty"[371]or even as "design not seen ugly when compared to the previous designs and that is influential in the buying decision of the user"[372], we already explained in the part of this thesis dealing with fine arts works that the word aesthetic has a much broader meaning. And there is another definition for this word which is parallel to that given in the said part of this thesis: "Designs attracting only sense of vision or other senses.[373] Although it seems incorrect to limit the concept of aesthetic only with the visual sense, this definition is anyhow appropriate as it takes as a basis only visual sense due to the fact in a design, appearance is prominent.

Another difference between aesthetic and functionality is that aesthetics can be found in a two dimensional or three dimensional design, while functionality can be achieved only with a three dimensional design as a rule.[374]

At this point, it must be reminded that design law does not afford any protection to functionality but protects appearance of the product because functionality can be protected with patents or useful models. However assessment of the design law only in terms of aesthetic appearance would not be a realistic approach because appearance

[367] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.65
[368] Erdil, p.231.
[369] Suluk and Orhan, p.42.
[370] Bilgin, p.6.
[371] Erdil, p.231.
[372] Suluk and Orhan, p.42.
[373] Bilgin, p.6.
[374] Suluk and Orhan, p.41.

of most of the three dimensional products arises from their functions.[375] In other words, aesthetic quality is not required in a design for protection purposes and existence of certain functions in a design should not result in lack of protection. If appearance is compulsory to fulfill the technical function of the product, this product cannot be protected as a design.[376] In the light of these comments, we can conclude that concept of authenticity is more important in a design than aesthetic expression because although all of the specific characters of the designers are not required to be reflected to the design in order to afford any protection to it, it is still important that designer finds a free working environment in order to create a unique and different design.

Function and aesthetic are so intermingled in the fashion designs that sometimes we see that function of a dress serves to its aesthetic appearance. In other words, function of the dress helps to the creation of an aesthetic appearance. We know that military dresses serve to camouflage by creating an illusion and we can than image that such an illusion is used to change the shape of the body. With a technique similar to Müller Lyer illusion technique, Stella McCartney created the color blocked dress for showing shape of the body different.[377] Here function of the dress creates an illusion and this illusion is affecting human senses, serving to an aesthetic purpose.[378]

In our opinion, it is not true to assess the fashion designs only as aesthetic or functional. It remains a fact that a dress meets the clothing needs of a person but the difference created by the design in the mind of a person will surely result with an aesthetic feeling.

We already said that we will discuss cosmetics sector in our thesis on fashion law. Design of a makeup product or more specifically, design of lipstick serves to a functional purpose rather than aesthetic need but lipsticks designed by Christian Louboutin which could be used as necklace is appealing to the aesthetic feeling in human beings.[379]

[375] Suluk and Orhan, p.41, 42.
[376] Suluk, Karasu and Nal, p. 312, 313.
[377] See Image 26.
[378] Christopher Buccafusco and Benjamin N. Cardozo, "Fashion's Function in Intellectual Property", *Notre Dame Law Review,* Vol. 93, Issue.1, 2017, p.56-60.
[379] See Image 27.

3.1.4.3. Two and three dimensional design

In the law of continental Europe, a two dimensional design is called drawing or design while a three dimensional design is called model. Although we see that distinction in the Turkish law before the enactment of Legislative Decree on Industrial Designs, currently we do not have this distinction two dimensional designs, length and width are taken into account, while in three dimensional designs, we also have depth.[380] Since two dimensional designs refer to graphical illustrations, they are seen as surface shapes. Three dimensional designs refer to an object. However designs are not always two dimensional or three dimensional and some designs can be both two dimensional and three dimensional.[381] As an example to this type of design, one can show Dior's bag named Lady Dior with flower designs on it.[382] Another aspect of three dimensional designs is that if the design is able to show the source of product or service to the consumer, it will be protected as a trademark.[383]

Under SMK, two or three dimensional designs are protected if they are new and have distinctive character. Although an embossed design on a dress can be considered as three dimensional, it will not be possible to file a multiple application; since ornaments are out of the scope of multiple application .[384]

Fashion law allows for both two dimensional and also three dimensional designs. While a dress is seen as a three dimensional design, decorations on the dress are considered as two dimensional. However these decorations can be also three dimensional.[385]

3.1.4.4. Industrial design and non-industrial design

Industrial designs refer to a product manufactured by industrial operations in serial production; non-industrial products are products produced manually but not by industrial means. Our law affords protection to both industrial designs and also to handicrafts as non-industrial designs. While industrial designs are protected with

[380] Erdil, p.231.
[381] Bilgin, p.6,7.
[382] See Image 28.
[383] Kutlu Oytaç, *Karşılaştırmalı Markalar Hukuku, Endüstriyel Tasarımlar İçerikli*, Extended 2. Edition, Nobel Press, 2002, p.38.
[384] Suluk, Karasu and Nal, p. 312.
[385] See Image 29.

SMK, non-industrial designs are protected under SMK and are also subject to copyright protection if they have aesthetic value and bears the charachteristics of its author pursuant to cumulative protection principle.[386]

The concept of industrial design was first put forward by Mart Stam in 1948. Stam defined an industrial designer as *someone who drafted, sketched, and planned*[387]. According to this definition, no distinction is made between industrial and non-industrial design and very appropriately, the heading industrial design is replaced by a more general concept of design in SMK.

3.1.5. Scope and Limits of Design Protection

As an absolute right, the design right will confer to its holder a protection over his design. Article 58 regulates the scope of protection that could be afforded to the designer. Accordingly the designer is entitled to exercise his rights arising from law, against a design that has no distinctive character as compared to his own design. However scope of this protection will depend on the optional freedom enjoyed by the designer while developing his design. If this design also meets the conditions set forth in FSEK numbered 5846, protection to be afforded under FSEK will not make any prejudice to the protection to be afforded by SMK.

Although a designer will not have much freedom when designing trouser, design of a pendant will be involve much more area of freedom. As an example to this, we can show the legal action taken by Galatea against Swarovski. After production of a very similar product to the Galatea design showing two interlocked hearts by Swarovski, Galatea made a claim about copyright infringement.[388] In this case, one can see that said design was protected as artwork. However it could also enjoy design protection pursuant to cumulative protection principle.

Fashion designs are regulated in FSEK in the part about works of fine arts. However this type of protection will not make any prejudice to the protection afforded by the SMK to the fashion designs based on the criteria of novelty and distinctive character

[386] Suluk, Karasu and Nal, p. 313.
[387] Bernhard E. Bürdek and Others, *Basel:Birkhauser*, 2nd. Edition, 2015, p.12.
[388] *Galatea Jewelry Corporation v. Swarovski North America Limited et al.*, US District Court for Central District of California, 04.12.2017, Case Number: 2:2017-cv- 08737, https://dockets.justia.com/docket/california/cacdce/2:2017cv08737/695736 (05.02.2019).

and design protection will be available pursuant to cumulative protection principle. In other words, even if the fashion design is afforded protection under FSEK due to its fine art quality, it may still enjoy the design protection afforded by SMK based on the criteria of novelty and distinctive character in line with the cumulative protection principle. In order to accept a fashion design as artwork, it must have an aesthetic value. If it does not have such aesthetic value, it will not be seen as artwork but if it is novel and has distinctive character, it will enjoy the design protection afforded by SMK .

As an example to this, we can give the expert witness report submitted to the case file numbered 2010/167 E. in the case of *Marque Associees v İmaj Tekstil Sanayi A.Ş.* This expert witness report was submitted in the legal action taken by Marque Associees against İmaj Tekstil Sanayi A.Ş. with a claim on prevention and prohibition of infringement and compensation. Expert witness made an evaluation to see whether the dress model registered in France by Marque Associees can be protected as an artwork or not. This dress model was manufactured by means of serial production and so it was not unique. Thus expert witness did not see the disputed model as an artwork. Expert witness further stated that disputed model was "ordinary/common" and did not have the individuality of its designer and so it can be protected with the design law instead of FSEK. However it was concluded that disputed model was not new and had no distinctive character. Expert witness also thought that disputed model will not enjoy the protection afforded by the Legislative Decree on Industrial Designs as it was not registered by TP but can be protected according to the general provisions.[389] If this case would have been filed in the period when SMK was in effect, the model would be entitled to protection under SMK, since SMK afforded protection also to unregistered designs and it would not be necessary for it to be protected according to the general provisions. However criterion of novelty and distinctive character is also applicable for unregistered designs and protection under SMK will not be possible in line with the conviction of the expert witness if it is not new and has no distinctive character.

Article 58/4 gives a list of cases where no protection will be available. These are: designs that are contrary to the public order or general morality; appearance

[389] Yasaman, p.397-402.

characteristics arising from the technical function of the product; appearance characteristics of those products that have to be produced in a certain shape and size in order to be mounted or connected to another product; signs of dominance as stipulated in 2nd repeated Article 6 of the Paris Convention and designs involving the public and inappropriately using the signs, arms, badges or designations for which no registration is provided by the competent authorities since these are public property as cultural assets. In the following section, we will discuss the limits of design protection.

3.1.5.1. Designs contrary to the Public Order or General Morality

Situations that are contrary to the public order or general morality change depending on the country or even to the specific time period in the same country. For that reason the judge will determine whether a design is contrary to the public order or general morality by evaluating the current value judgments in the society.[390] Use of religious dresses as a fashion object in the Met Gala organized in 2018 with the theme Heavenly Bodies and especially Rihanna wearing the short skirt version of Pope's dress attracted considerable negative reaction from the Catholic believers.[391] In the Victoria's Secret Fashion Show organized in 2010, underwear developed with Indian themes and worn by the model Karlie Kloss caused too much negative reaction and was not shown in the segment show.[392]

As racist movements are quite strong in our world now, many designs are causing intense criticism in the international society. The fashion brand owned by the singer Katy Perry was criticized intensely when in 2019 it developed a shoe model resembling the face of black person and had to recall the product from the market.[393] The earrings resembling the head of a black woman developed by Dolce and Gabbana in 2013 and t-shirts on which the same figure was printed were found racist and the

[390] Suluk, Karasu and Nal, p. 320.
[391] Andrew Griffin, "Met Gala 2018: Angry Catholics and Conservatives Accuse Organisers of Religious Appropriation Over Theme", *Independent,* 08.05.2018, https://www.independent.co.uk/news/world/americas/met-gala-2018-theme-catholic-rihanna-pope-heavenly-bodies-a8340846.html, (27.01.2019).
[392] Charlotte Cowles, "Karlie Kloss, Victoria's Secret Really Sorry About That Headdress", *The Cut*, 12.11.2012, https://www.thecut.com/2012/11/karlie-kloss-really-sorry-about-that-headdress.html, (27.01.2019).
[393] Clark Mindock, "Katy Perry Shoes Removed from Sale After Blackface Design Sparks Outcry", *Independent,* 12.02.2019, https://www.independent.co.uk/life-style/fashion/katy-perry-blackface-shoes-racist-line-pulls-design-a8774516.html, (15.02.2019).

brand got great negative reaction.[394] Pullover design showing a face mask developed by Gucci also got great negative reaction as the face mask resembled to the face of a black person.[395] In December 2018, the line product named Pradamalia launched by Prada got great negative reaction because of its figures resembling monkeys and black people and Prada had to recall the line.[396] The design having navigation themes developed by Burberry and exhibited in the fashion week in London in 2019 was criticized because of the knot hanging down the hood of the dress as it brought into mind suicide and as a result creative director of Burberry, Riccardo Tisci had to apologize and recall the design.[397] As above examples show, these designs would not enjoy any design protection even if an application would be filed for protection since they are contrary to the public order.

3.1.5.2. Appearance characteristics made compulsory by the technical function of the product

The designers do not pursue only an aesthetic purpose in the development of a design, but also take into account functionality of the product and try to achieve cost effectiveness. However design law affords no protection to the technical features of a product arising from functionality requirements but instead protects its appearance. However it would not be correct to deprive a product from design protection only because it has certain functions because besides being functional, if a design offers options to its designer and if the product is new and has distinctive character, it will enjoy the rights afforded by the design law. In addition to that, functions of that product will be protected by a patent pursuant to cumulative protection principle.[398]

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[394] Phong Luu, "Dolce&Gabbana in Racist Earring Row", *Telgraph,* 27.09.2012, http://fashion.telegraph.co.uk/news-features/TMG9571361/Dolce-and-Gabbana-in-racist-earrings-row.html, (27.01.2019).

[395] Sarah Young, "Gucci Blackface Scandal: Creative Director Breaks Silence over Controversial Jumper", *Independent,* 13.02.2019, https://www.independent.co.uk/life-style/fashion/gucci-blackface-scandal-jumper-apology-racism-controversy-alessandro-michele-creative-a8776641.html, (15.02.2019).

[396] Taylor Nicole Rogers, "Prada Asks Ava DuVernay and Theaster Gates to Lead Diversity Efforts After Blackface Blacklash", *CNN International,* 14.02.2019, https://edition.cnn.com/2019/02/14/business/prada-blackface-diversity-council/index.html, (15.02.2019); "Prada Pulls Figurines That Resembled Black Face from Hew York Store" https://www.theguardian.com/fashion/2018/dec/15/prada-new-york-blackface-pradamalia, (15.02.2019).

[397] Rob Picheta, "Suicide is not a Fashion: Burberry Apologizes for Hoodie with Noose Around the Neck", *CNN International*, 19.02.2019, https://edition.cnn.com/style/Article/burberry-noose-hoodie-scli-gbr-intl/index.html, (03.03.2019).

[398] Suluk, Karasu and Nal, p. 320.

Certain designs do not offer any choices to its designer because of their technical characteristics. In other words, technical features of the product give shape to the design. In this case, the product has to be designed in this fashion irrespective of the identity of its designer and originality of the designer will be eliminated. As a consequence, relevant product will not enjoy any design protection since its designer did not make any original contribution to the product.[399] Although the phrase "technical features" used in this Article refers to a technical area, Tekinalp says that it should not be interpreted according to its technical meaning in the patent law but should be understood as "satisfaction of a need".[400]

In order to see the reflection of this issue in fashion sector, one can give German Supreme Court's Hermes Kelly decision as an example. German Supreme Court stated that appearance of Hermes Kelly bag goes beyond of appearance of an ordinary bag which is compulsory for technical function; therefore it does have a distinctive character and identity.[401]

3.1.5.3. Appearance characteristics of those products that have to be produced in a certain shape and size in order to be mounted or connected to another product

If the design takes shape according to a product to which it will be connected or mounted, it will not be protected under the design law because relevant product will be produced in a standardized manner without any contribution from the designer.[402]

However Article 58/5 of SMK stipulates that in a modular system comprising of identical or different units, designs enabling establishment of finite or infinite connections between these units will be entitled to protection if they also meet the conditions set forth in Article 56. Therefore modular product designs will be protected even if they do not offer any options to their designer.[403] As may be seen, this is an exception in the design law.

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[399] Suluk, Karasu and Nal, p. 321.
[400] Tekinalp, (2004), p.616, 617.
[401] *Bundespatentgericht, Beschl. v. 19.12.2003-33 W(pat) 11/01,* Lerzan Yılmaz, *Marka Olabilecek İşaretler ve Mutlak Tescil Engelleri,* İstanbul: Beta, 2008, p.127, cited by: Işıl Özer, "Moda Tasarımlarının Marka Olarak Tescili", Yener Ünver and Özlem Yenerer Çakmut (Ed.), *Hukuk ve Sanat,* (293-337), Ankara: Seçkin, 2017, p.325.
[402] Ebru Ceren Cavit, "6769 sayılı Sınai Mülkiyet Kanununa Göre Tasarımların Korunması", *Fasikül Hukuk Dergisi*, Vol: 10, Issue: 100, (March 2018), p.257.
[403] Suluk, Karasu and Nal, p. 321.

3.1.5.4. Signs of dominance pursuant to Paris Convention and designs related to public assets

Signs showing the dominance of a state pursuant to the Paris Convention or designs involving the public and inappropriately using the signs, arms, badges or designations for which no registration is provided by the competent authorities since these are public property as historical, religious and cultural assets are not protected by law. Accordingly design of a dress containing the Turkish flag will not be protected and even wearing such a dress is forbidden under the Turkish Flag Legislation Article 26.[404]

3.1.6. Scope and Limits of the Design Right

After stipulations about the scope and limits of the design protection, SMK gives the scope and limits of the design right. Under Article 59/1, rights arising from a design exclusively belongs to the relevant designer and third persons will not be entitled to produce, release to the market, sell, import, use for trading purposes, hold or enter into a contract or cannot make a recommendation for contract for the design protected or for the product on which this design was applied without the prior consent of the designer.

As an absolute right, the design right can be alleged against anyone without making any distinction about good faith. Besides that, design right confers to the owner positive and negative powers. Positive powers include the exercising the design right, economically benefiting from the design, making disposals with the design and requesting announcement as designer or designation of his name as designer and negative powers include prohibition and prevention.[405] Design right further includes financial and moral rights. The right to be remembered as the designer is a moral right, whereas the right to use the design economically corresponds to a financial right.[406] Design right may also afford protection before registration, entitling the

[404] *Türk Bayrağı Tüzüğü,* http://www.mevzuat.gov.tr/MevzuatMetin/2.5.859034.pdf. (07.06.2019).
[405] Cavit, p.260.
[406] Erdil, p.236.

designer to request registration of his design and to take legal action against seizure, claiming back the design rights if it was registered in the name of another person.[407]

Article 59/1 gives a list of certain actions while describing the rights available to a designer. These actions include production, market release, sale, importation, using for trading purposes, and holding the design in possession for above mentioned purposes. Among these actions, the action of production has the broadest meaning because production of a product involves both product and also its spare parts.[408] Another action, i.e. market release has also a broad meaning. If a license was granted for the production of a product, it will be assumed that this license further extends to market release of that product. However infringement claim will be valid even if the product was released to the market only for once. In addition market release must have a commercial purpose but does not need to carry any sale purpose. In other words, presentation to public by means of leasing, borrowing and economic benefiting will be also considered as market release.[409]

The term sale used in this Article refers to transfer of direct or indirect possession. If the power of control on the product changes hands after the transaction, it will be seen as a sale. However providing the product for security purposes without transferring its ownership or usage rights will not be considered as sale. In importation, the product is purchased from the country in which it was registered and brought to the country. [410]

In using for trading purposes, the product is used for production purpose. In holding possession of the design for these purposes, such possession must be related to commercial purposes.[411] If a tailor makes an agreement with a depot owner in order to store his products and depot owner stores these clothing items, possession of these garments will not constitute an infringement since the garments will not be used for commercial purposes by the depot owner. However Supreme Court (Yargıtay) stated that when these are counterfeit garments are stored for any reason except for personal needs, then this possession will be considered as an infringement.[412] Therefore if a person importing counterfeit bags store these bags in the depot of another person, this

[407] Tekinalp, (2004), p.621.
[408] Tekinalp, (2004), p.622.
[409] Suluk and Orhan, p.208.
[410] Suluk and Orhan, p.213.
[411] Suluk and Orhan, p.214.
[412] Yargıtay 11. HD, 11.03.1996, E.1996/1078, K.1996/1630.

will constitute an infringement because of possession of counterfeit products even if the depot owner does not carry out any trading activities with these bags.

As explained in the relevant Article, persons not owning the design will not be entitled to make an offer to make a contract for that design. According to the Law of Obligations, selling the goods or services not owned is allowed although it brings a liability for compensation in respect to such goods or services. However here both sales activities and contracting are prohibited as contrast to the code of obligations.[413]

As aforesaid, SMK allows for protection to unregistered designs as distinct from the Legislative Decree on Industrial Designs. Owner of an unregistered designer is entitled to prevent the actions listed in Article 59/1 but in order to exercise this right, his design must have been copied to create an identical design or a identically similar design. Protection afforded in this Article to unregistered designs refers to copying. However if the protected design was presented to the public before it was designed by the relevant person and the designer could not reasonably be aware of this fact, it will not be accepted that this design developed independently was actually copied from the protected design. This provision thus protects the designer acting in good faith and his action is not seen as copying.

If we look at the concept of "not possible to know by reasonable means" from the perspective of fashion law, we can think as follows: When New York Fashion Week was first organized in New York in 1943, a designer in Paris was not able to see a design presented to the public during New York Fashion Week and it is then possible that he develops a design similar to that design since he does not know how a design exhibited in overseas country would look like. However in 2019, a designer in Paris cannot find a reasonable explanation about the similarity of his design to the original design, claiming that he was not in New York at that time.

Article 59/3 determines the scope of design right. Actions listed in this Article do not constitute any infringement. These actions include actions taken personal purposes without any commercial aim, actions taken for trial purposes, actions involving reproduction of the design in line with the rules of good faith accepted in commerce without endangering normal use of the design and actions for the purpose of citation

[413] Suluk and Orhan, p.213.

or teaching, actions involving importation of equipments used in the sea or air vehicles registered at abroad but temporarily used within the borders of Republic of Turkey and of the spare parts and accessories to be used in the repair of these vehicles and actions involving repair of these vehicles. Since the actions involving importation of equipments used in the sea or air vehicles registered at abroad but temporarily used within the borders of Republic of Turkey and of the spare parts and accessories to be used in the repair of these vehicles and actions involving repair of these vehicles are not related to the subject of this thesis, we will examine only remaining actions in the following parts of the thesis.

3.1.6.1. Actions taken for personal purposes without any commercial aim

According to Article 59/3(a), if an action is taken with a design solely for personal purposes without any commercial aim, it will not constitute design infringement. However here this action must meet both of the criteria set forth in the Article.

Actions taken for personal purposes include use of the design by a person for the benefit of himself or his family or close friends. If a dress designed before is imitated and sewed again by a person knowing how to sew just for use by his family or himself, this action cannot be prevented as part of a design right since it will constitute only personal use. However the doctrine says personal use must be interpreted very narrowly. Accordingly, any uses exceeding the limits of personal use will constitute design infringement even if they do not have any commercial aim. For example if a design identical to a protected design is imitated as same in multiple pieces and given as gift to too many people, it will exceed the limits of personal use because it will breach the economic rights of the designer. Besides that, use by legal entities cannot be taken as personal since they do not have any personal area of use. Therefore provisions of this Article are aimed to cover real persons.[414]

Actions taken for commercial purposes mean those actions involving earning of a profit. And actions with no commercial aim mean actions having teaching, sports or charity purposes. However in some cases, an action taken for purpose of teaching may also have a commercial aim. So each action must be examined according to relevant

[414] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.291.

conditions. In addition to that occupational use will be also considered as commercial use.[415]

Here what matters is whether an action involving teaching was taken for purposes of teaching or for personal and non-commercial purposes. According to Erdil, imitation of a design as homework by the students of fine arts must be seen not like an action having purposes of teaching but an action taken for personal and non-commercial purposes. [416] However even if we say that this action has purpose of teaching or personal and non-commercial purposes, such action will not constitute any design infringement.

3.1.6.2. Actions taken for trial purposes

According to the Article 59/3(b), it is free to examine and reproduce the designs for trial purposes. However if these products are sold later, it will constitute a design infringement. At this point, it must be emphasized that an action to be taken for trial purposes will be permitted even if it has a commercial aim.[417] In other words, this trial production will not constitute any design infringement if it was made for scientific purposes,[418] or for education, charity or even commercial purposes.[419]

For example, if a firm examines the led lighted dress of Zac Posen in order to understand how it works or even copies the same dress for trial purposes, it will not be taken as a design infringement. This result would not change even when this firm is a clothing firm making this examination for commercial purposes with the aim to produce a similar led lighted dress because infringement will be involved in the next phase, i.e. sale of that copied product.

However Tekinalp says that trial use by the designer of the design of another person in order to develop his own design is a controversial use and this provisions should be interpreted in a limited fashion.[420]

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[415] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.291, 292.
[416] Erdil, p.237.
[417] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.292.
[418] Erdil, p.238.
[419] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.292.
[420] Tekinalp, (2004), p.623.

3.1.6.3. Actions involving reproduction of the design for education or referencing purposes

According to Article 59/3(c), reproduction for purpose of teaching does not constitute any design infringement provided that it is made under certain conditions. Reproduction of a design for purposes of teaching during a class will not be any problem. It is also free to use these reproduced copies for personal purposes. Further, the doctrine does not take sale of these copies to close friends against money as infringement. However number of copies must not be excessive, beyond the limits of personal use. However according to the doctrine, sale of the reproduced copies in a kermis will constitute infringement. Finally copying the design of a stove and using that copy to heat the classroom will not constitute purposes of teaching.[421]

Other conditions required to be met for copying a product under this Article are that this copying is made in line with the rules of honesty applicable in the commercial practice without endangering normal use of the design and by showing the source of the original design.

Article requires the existence of good faith as well. In TMK, good faith is regulated in Article 3. Existence of good faith is required only where the statue regulates the necessity of a good faith of person in the concrete case. In addition to that, since the presumption of good faith is exist, the party who claims that lack of good faith must prove it.[422]

3.1.6.4. Right arising from previous use

SMK Article 60/1 regulates the right arising from previous use. Accordingly if the design has been in use within the country in good faith for commercial purposes or if genuine and serious measures have been taken for such use of the design before the registration application and independently from the registered design, in spite of the fact that registered design was protected, person owning this design will be granted a right to use that design based on his previous use. However this right will be granted

[421] Suluk, *Tasarım Hukuku (Karşılaştırmalı Endüstriyel Tasarım, Marka, Patent ve Faydalı Model Koruması),* p.293.
[422] Ümit Gezder, *Türk Medeni Hukuku, Başlangıç-Kişiler-Aile Hukuku, Soruları ve Cevapları*, İstanbul: Beta Press, 1. Edition, 2014, p.8.

to the extent necessary to meet reasonable requirements of the business. This right arising from previous use is entered into the register and published in the bulletin.

The phrase good faith used in this Article refers to the circumstances of a person who has no means to know about the registered design. Actually if a person not in the position to be aware of the registered design, designs a bag totally independently without being influenced from the registered design and offers such bag for sale or if such person makes a considerable investment to the material used for that bag, he will be granted a right based on such previous use. However it is further stipulated that this right will be conferred only to the extent required to meet the reasonable requirements of business. Pursuant to Article 60/2, scope of this right cannot be expanded or transferred by means of licensing. However this right can be transferred as part of the general transfer of that business.

3.1.7. International Protection

In our law, principle of territoriality is applicable in respect to the intellectual property rights. In other words, if a design is registered in Turkey, it will enjoy design protection only in Turkey. The designer wishes to enjoy protection at abroad, he must complete registration procedures in the relevant countries. However this process is very onerous and so an option is granted to obtain registration in multiple countries under a single application based on international agreements. In international registration, methods ordinarily used include international application, application for community design and individual application. There are also certain territorial systems allowing for such protection, such as BENELUX for Belgium, Holland and Luxembourg; Eurasian Patent Office for Eurasia; and ARIPO and OAPI for Africa. In the international application method, the design owner must file an application to International Office of WIPO in order to obtain registration for multiple countries. This right is conferred under Le Hague Convention and Turkey is party to the Geneva version of this Convention. This application can be directly made to WIPO or through Turkish Patent. [423]

As another international registration method, the right to obtain registration for community designs can be raised against everyone. With the community design right,

[423] Suluk, Karasu and Nal, p. 331, 332.

a protection similar to patent protection is afforded to the registered designs and protection only against counterfeit products is afforded in case of unregistered designs.[424] In this case, the designer may request for protection in all EU countries under a single application; and it is not necessary for that designer to be a citizen of the member states. Therefore Turkish designers and Turkish firms will find a chance to enjoy this type of protection. However if one of the member states rejects the design, the application will be rejected by the whole community. In addition to that a registration to be obtained in a country that is not party to an international or territorial convention may be also obtained by submitting an individual application to the patent office in that country. This is called individual application method.[425]

3.1.8. Protection Period and Renewal

Article 69/1 regulates the protection periods to be applicable for the registered designs. Such period is determined as 5 years after the application date. Protection period may be renewed for further periods of five years, up to 25 years in total. Pursuant to Article 69/2, *protection period for unregistered designs will be three years starting with the date on which the design for which protection was demanded was presented to the public for the first time.* As aforesaid, unregistered designs are separately regulated in the SMK in connection with the protection to be afforded to. A registration for a design will be renewed if requested by the designer, who shall pay the renewal fee and submit this information to the Institute on a timely basis. However this renewal request must be submitted to the Institute in a period of 6 months before the expiration date of the protection period, i.e. within the last 6 months of design protection. In addition to that information confirming payment of renewal fee must be submitted to the Institute again in this period. If renewal request is not made and information about the payment is not submitted in this period, renewal request may be made anyhow within 6 months after expiration of the protection period provided that an additional fee is paid. According to the SMK, such renewal will be effective from the day immediately following the expiration date of the protection period. The renewal will be also entered into the trademark registry and published in the bulletin. However if the design was not renewed, relevant design rights will terminate with the expiration of the protection period.

[424] Suluk, *Avrupa Topluluğu Hukukunda Tasarımların Korunması, Topluluk Tasarımı, (Community Design),* p.91.
[425] Suluk, Karasu and Nal, p. 331, 332.

3.1.9. Rights Holding and Seizure

Article 70 of SMK regulates the right holding. Accordingly design right shall belong to the designer or to his successors and it can be transferred to others. However if a design application or the design itself belongs to multiple persons, partnership shall be determined according to the agreement to be made by these persons. If there is no such agreement, then partnership will be determined according to the provisions of the Turkish Civil Code dated 22.11.2001 and numbered 4721 governing joint ownership. If the design application or design itself belongs to partners, each right holder will be entitled to perform following transactions independently on behalf of himself: transactions involving free disposal of his share; transactions involving use of the design after notifying the other right holders and transactions involving taking legal action against third persons due to infringement of design rights. However in a legal action taken against design infringement, the party taking legal action must notify the other right holders of this action within 1 month. If a license is to be granted on the use of the design, unanimous decision of all right holders is required. However if this unanimous agreement cannot be achieved, the court will grant the licensing right to one or multiple right holders according to equitable principles. Finally a design cannot be divided into parts for application or transfer purposes or for establishment of any rights thereon in the event it is owned by multiple persons.

The word designer used in this Article refers to a real person. However in some cases, the designer and design owner are different persons. The design owner does not need to be a real person like the designer and design owners may be legal entities.[426] As a real person, Olivier Rousteing designs the garments of Balmain brand but owner of these designs is the legal entity of Balmain. This shows that designer and design owner may not be the same person at all times.

Article 71 regulates seizure of the design. According to Article 71/1, if design application was made by or registered in the name of a person who is not the actual right holder or if the design was presented to the public by a person who is not the actual right holder, then the person claiming to be the real right holder will be entitled to be recognized as the design owner and request that rights arising from design ownership are transferred to him. Other rights and claims arising from the design right

[426] Suluk, Karasu and Nal, p. 322.

shall be also reserved for such person. In other words, this Article gives example of three situations about seizure: first of them occurs when the design application is made by a person who is not the actual right holder; second one is registration of the design in the name of the person who is not the actual right holder; and third one is presentation of unregistered design to the public by the person who is not the actual right holder. In all of these cases, actual right holder is entitled to make a request to the court so that he is recognized as the design owner or design is transferred to him. However if only a partial right is claimed over the design, application to the court must be made according to the provisions of Article 71/1 and provisions governing shared ownership as mentioned above. Such claims must be made within three years from the date on which registered design was published in case of registered designs and from the date on which the design was presented to the public in case of unregistered designs. After this period, the claims will be invalid due to lapse of time. However prescription period of 3 years will not be applied if the person who is not the actual right holder was acting in bad faith.

This legal action and claims made in this legal action, final decree passed after the action or other conditions finalizing the case will be entered into the trademark registry and published in the bulletin if so requested. These decisions will be effective on third persons as of the date they are entered into the trademark registry. However if legal action was taken due to seizure of the registration application before grant of registration and registration was granted while this case was pending, the case will be transformed to a case with a claim on seizure of design from a case with a claim on seizure of design application.

Article 72 regulates the consequences arising once seizure is ended. Accordingly if the design owner has changed and this change has been entered into the trademark registry pursuant to Article 71, all rights exercised by third persons over the design shall terminate. If the person who is later found that he is not the actual right holder or the person who made a license contract with the former, started to use that design or made serious investments for such use before actual right holder is entered as design owner into the trademark registry, the latter may request the former to grant a non-monopolized license within two months. Start date of this two months period will the date on which the Institute informs relevant parties about recording the name of actual

design owner into the trademark registry. However if this person is acting in bad faith, he will not be entitled to request this license.

3.1.10. Designs Made by the Employees

SMK also stipulates the status of designs made by the employees. Article 73 contains provisions on the status of right holder acting in a relationship of service or involved other type of relationship. Accordingly the design developed by the employee in connection with his activities he is obliged to perform in the company or the design developed using mostly the experiences and know-how of the company during employment relationship shall belong to the employer unless it is otherwise stipulated in the special contract between the employee and employer or otherwise required due to nature of the relevant business. However the parties may decide otherwise pursuant to this Article. If the employee was involved in his normal activities in the company while developing that design or if that design was mostly developed with the support of the experiences and know-how of the company, it will be owned by the employer unless decided otherwise by the parties or unless it is otherwise required due to nature of the business. When a tailor is obliged to sew in a fashion house and sews a dress, design of that dress will not belong to that tailor. Similarly even if the designer of that dress designs it not as part of his normal obligations at the work site, this design will not belong to him provided that it has been developed with the help of the experiences and know-how of the fashion house.

If the employee develops that design outside of his normal obligations at the work site and does not use the experiences and know-how of his company in the development of his design, but uses the information and devices available at the work site, the design will belong to the employer if a request is made for it and it will belong to the employee if this request is not made. In this case, the employee will be entitled to claim a fee for his design and if the parties cannot reach an agreement on the amount of this fee, it will be set by a court. If we go back to the example of the fashion house, when the designer is not using the experiences and knowhow of the company and is developing the design outside of his daily obligations by using the fabrics, beads, various devices and equipments of the company, then it will belong to the employer, i.e. fashion house owner upon its request but the designer will be entitled to claim a design fee for his design.

Same provisions will be applied on the designs developed by a student or trainee who serves without being bound by any fixed period and without compensation or by a university instructor specified in Article 3/1(l) of Higher Education Law dated 04/11/1981 and numbered 2547 as a result of scientific studies and research. If a led lighted dress was designed by an instructor of Fine Arts Faculty as a result of his scientific studies and researches but mostly using the experiences and know-how of that university or if design of that dress was part of his service obligations at the university, led lighted dress design will belong to the university. However if the instructor designed the led lighted dress although he was not obliged to do so in the university and did not use the experiences and know-how of the university principally but found the fiber-optic fabric needed for the dress in the Faculty, the design of that dress will belong to the university upon its request. However if the instructor claims a fee for his design, amount of this fee will be equal to minimum half of the revenues to be obtained from that design. In such cases the fee will be set by the board of directors of that university. However if there is a contract between the employer and employee concluded not as part of the service relationship, holder of design rights will be determined with a contract to be concluded by the parties.

3.1.11. Termination of Design Rights

Design rights will expire due to invalidity, expiration of protection period, non-renewal of registration and withdrawal of design rights by the right holder.

Article 77 of SMK regulates conditions of invalidity. Accordingly the court will decide on invalidity if the design fails to comply with the definitions made in Articles 55/1 and 55/2; or if the design fails to meet the conditions set forth in Article 56 and 57 or is subject to the provisions of Article 58/4 and 64/6(c); or if it is proven that application was made in bad faith based on unauthorized exploitation of an intellectual property right. Apart from that, if it is proven that actual right holder was another person or persons, the court may decide on the invalidity of design again. And finally the court will declare invalidity when the date of application of an identical or similar design that was presented to the public later comes before the application date of the registered design.

If a partial invalidity claim for the design was accepted in connection with a certain part of the design pursuant to Article 64/6 (b) and (ç) or due to unauthorized exploitation of intellectual property rights, then registration relating to only that part of the design will be declared invalid but general registration will continue after this partial invalidity only if the design retains its original identity and satisfies the protection conditions.

SMK also contains provisions on the specific parties entitled to claim invalidity of a design. Article 78/1 stipulates that anyone having a benefit from the design is entitled to make such a request except for those conditions mentioned in Article 78/2. Article 78/2 stipulates that a claim on the invalidity of the design can be made by the previous right holder pursuant Article 77/1(c) or by the persons holding rights over the design pursuant to Articles 70 and 73.

A legal action with a claim on invalidity of the design can be taken during the protection period and within 5 years after expiration of the protection period. This legal action must be taken against the person whose name is entered into trademark registry as design owner at that date. Besides that, a notice must be served to such person or persons so that they can participate into that legal action. If the design is an unregistered design and invalidity is claimed, legal action must be taken against the person claiming to the right holder.

Article 79 of SMK stipulates the consequences of invalidity. Accordingly if the design was declared invalid, relevant decision will be effective retroactively and the protection once afforded will be deemed to have never been afforded. However retroactive effect of invalidity will not extend to finalized and enforced decisions taken due to infringement of the rights conferred with the design before declaration of invalidity and to those contracts concluded and performed before declaration of invalidity. However in such cases, right to claim compensation will be reserved for the parties suffering losses because of severe negligence or bad faith of the design owner. Besides that, amounts paid under those contracts concluded and performed before declaration of invalidity may be claimed back in part or in whole pursuant to principles of equity. Finalized decision on the invalidity of design will be effective on everyone and once finalized, the court will *ex-officio* notify the decision to the

Turkish Patent. And after receipt of this notice, Turkish Patents will delete the design from the trademark registry and publish this deletion in the bulletin.

Additional tpes of expiration other than invalidity are regulated in Article 80 of SMK. Accordingly protection of design rights will expire when protection period expires or registration is not renewed or designer withdraws the design rights. Application holder or registration owner may withdraw the design rights partially or totally. However this withdrawal must be informed in written to the Turkish Patent. The withdrawal will be effective on the date it is entered to the trademark registry. Designer owner may not withdraw his design rights if withdrawal is not permitted by the right holders or licensee whose name is entered to the trademark registry. Similarly if a third person is claiming right over the design and an injunction decision is entered to the trademark registry as a result of this claim, design owner may not withdraw the design rights without the prior consent of that third party.

3.1.12. Infringement of Design Rights

Design right infringement occurs when any of the unfair actions stipulated in SMK are taken against the design without the prior consent of the design owner. Existence of a default is not necessary to determine this infringement but it will be necessary if there is a claim for compensation. Here protection is not afforded only to the design rights but also covers the application right. In other words unauthorized use of the design that is in the application phase will constitute infringement of design rights. If the person infringing the design rights was acting in bad faith, then legal action for design infringement may be taken against such person even at the application phase before publication of the design.[427]

Such actions of infringement may be taken not only by real persons, but also by legal entities. These actions may be taken directly or indirectly. In direct infringement, the action is taken directly without any vehicle. In indirect infringement, action is taken with the help or motivation of another person. Production of a design that is identical or similar to a registered design constitutes direct infringement, whereas action taken by the person to provide devices, know-how and materials needed in this production

[427] Suluk, Karasu and Nal, p. 340.

constitutes indirect infringement.[428] Besides that, as design right affords an absolute protection, default, malicious intention or negligence of third persons will not be necessary for the infringement of design rights. As a matter of fact, even if infringing person is unaware of his infringement, it will constitute infringement anyway. [429]

If we take into account the concepts of counterfeiting, knock-off and close copying detailed in the first part of this thesis, we will see that there is a distinction here in connection with a registered or unregistered design. A registered design will be surely protected against the counterfeits because it involves imitation. However close copying actually refers to the concept of being identically similar for which protection will be afforded in terms of registered designs. And most problematic concept in the protection of registered designs is the knock-offs. As mentioned in the first part of this thesis, knock-off concept is broadly interpreted as inspiration in the fashion world and since the principle of utilization and simulation freedom is applicable in the intellectual property law[430] knock-offs are not treated like counterfeits. In spite of this fact, existence of knock-offs is found essential in continuing the fast cycle of fashion and fast fashion chains somehow made knock-offs legitimate in the eyes of the society. However there is no consensus on the knock-off concept. As aforesaid Susan Scafidi evaluated knock-offs as counterfeit and scope of knock-off concept will be determined on case by case basis.

When unregistered designs are concerned, evaluation of counterfeit, close copying and knock-off concept will be different. Pursuant to Article 59/2, unregistered designs will be protected against the identical or identically similar designs. Based on this provision, it is obvious that unregistered designs will be protected against the counterfeits. In close copying, there is not a total imitation but the product will be identically similar in terms of general impression. When knock-offs are concerned, protection that will be enjoyed by an unregistered design will be much lower or will be non existed than the protection that will be enjoyed by a registered design. Here specific position of the knock-off in the relevant case will be taken as a basis.

Article 81/1 regulates the actions considered as infringement of design rights. Accordingly, actions listed below will constitute design infringement.

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[428] Koç Çelik, p.107-108.
[429] Bilgin, p.76.
[430] Suluk and Orhan, p.124, 125, 126.

3.1.12.1. Performing actions which are stated in 81/1(a)

According to Article 81/1(a), *to produce, put on market, sell, offer for contracting, import, use for commercial purposes or stock for those purposes an identical or similar product in which the design is incorporated or to which it is applied without the consent of the right holder* will be considered as a trademark infringement.

One of the most important Articles in terms of fashion law and design is this Article because knock-off concept or condition of inspiration detailed in the first part of this thesis comes into play here. From time to time, fashion brands design an identical product or a product that is identically similar in terms of general impression to an original product and launch them as a inspiration due to a necessity of the fast fashion cycle.

Legal action between Yves Saint Laurent vs. Ralph Lauren heard in 1994 became a cornerstone in the protection of fashion designs in the European Union. Accordingly Yves Saint Laurent took legal action against Ralph Lauren with claim on copyright infringement, seizure of design and unfair competition because they imitated their own black tuxedo dress and the Court accepted the case of Yves Saint Laurent. In this action, a sanction was for the first time imposed against the counterfeit of fashion goods and in this way, the designers became sure that they will be able to protect their fashion designs as industrial product.[431] The fact that this legal action was heard in recent history, in 1994 shows how fashion designers are generally deprived of protection in the fashion law.

If an action similar to the described above is taken against a fashion design, the fashion brand takes legal action based on a claim on unfair competition instead of design infringement. As an example, we can show the legal action taken by Hermes against the company named Playnomore. In this case, the company Playnomore produced bags that are very similar to Hermes bags, which resulted in a legal action taken by Hermes.[432] In this case, claim made by Hermes was based on unfair

[431] Amy M. Spindler, "Company News; A Ruling by French Court Finds Copyright in a Design", *The New York Times*, 19.05.1994, https://www.nytimes.com/1994/05/19/business/company-news-a-ruling-by-french-court-finds-copyright-in-a-design.html, (28.01.2019); *Societe Yves Saint Lauren Couture S.A. v. Societe Louis Dreyfus Retail Mgmt. S.A. E.C.C. 512 (Tri. Comm. Paris);* See Image 30.

[432] See Image 17.

competition and copyright infringement rather than on design infringement.[433] Similarly in the legal action taken by Louboutin against the monochrome shoes of YSL, claims were not based on design infringement but on trademark infringement and counterfeiting, false designation of origin and unfair competition, trademark dilution, unfair competition, unlawful deceptive acts and practices.[434]

Although great fashion companies are seeking their rights against design infringement based on trademark infringement or trade dresses which is not present in Turkish Law [435] these options are not really available for the independent designers that are new in the sector, unable yet to establish their own brand in the market. And just at this point, design right infringement comes into play as an available option. In 2018, a designer named Saul Lopez claimed that he sent his designs to Dilara Fındıkoğlu as part of his internship application and Dilara Fındıkoğlu stole one of his designs.[436] Here before attempting to understand whether there is any similarity between the two designs, we must look for the specific type of infringement that can be used by Saul Lopez to demand justice. Lopez was in independent designer and had no registered brand in his name and did not obtain any trademark registration for this design. As Lopez cannot use the claim based on trade dress or trademark infringement, only option available to him would be design right protection. This example shows us the importance of design protection in helping the young designers to protect their rights in the fashion sector.

If we examine Lopez's design and design of Dilara Fındıkoğlu by taking into account that Lopez's design was not registered, we will see that two designs are not identical because one of the designs is an overalls while the other is designed as a set of jacket and pants. Another option available under Article 59/2 is related to a product that is identically similar in terms of general impression which corresponds to the concept of close copying. And if we look the two designs again, we see that although they are

[433] *Court Rules Against Hermes in Battle of Lookalike Bags in Korea*, (2017), http://www.thefashionlaw.com/home/court-rules-against-herms-in-battle-of-lookalike-bags-in-korea, (05.03.2019).
[434] *Christian Louboutin S.A. v. Yves Saint Laurent America Inc,* United States Court of Appeals for the Second Circuit, 05.09.2012, Case Number:11-33-03cv, https://law.justia.com/cases/federal/appellate-courts/ca2/11-3303/11-3303-2012-09-05.html, (04.03.2019).
[435] *An Ugly-yet-Iconic Sweater Brand is Suing Nike, the NBA, and the Brooklyn Nets over Lookalike Jerseys,* (2019), http://www.thefashionlaw.com/home/an-ugly-sweater-brand-is-suing-nike-the-nba-and-the-brooklyn-nets-over-lookalike-jerseys, (04.03.2019).
[436] Moda Hukuku Enstitüsü, *Moda Hukuku Gazetesi,* Issue.21, (August 2018), p.2, https://issuu.com/modahukukuenstitusu/docs/moda_hukuku_gazetesi_no.21_-_a_usto, (04.03.2019)., See Image 31.

similar, they are not identically similar which means that there is an obvious inspiration between them. Apart from that, design of Fındıkoğlu can be even seen as knock-off. However as Lopez's design is not registered, options available to him are claims based on counterfeiting and close copying. However it doesnot mean that even if this situation is considered as knock-off; limits of the inspiration must be taken account. In other word, it is possible that, said garment can be rendered as a close copy.

Although Lopez's design is not registered, it may prevent the registration of that design by Dilara Fındıkoğlu. As aforesaid, for registration of a design, elements of novelty and distinctive character are necessary. In our case, Lopez presented his design to Fındıkoğlu by means a mail which means that the design was presented to the public. For that reason, the design will not meet the criterion of newness and its registration can be prevented.

Similarly, a designer named Edda Gimnes claimed that her designs in ss 2016 and s 2017 collections were used by Moschino. Moschino refused these claims and as a result Edda Gimnes said that she will not dwell on the subject any more.[437] Edda Gimnes said that she will not take any legal action or spend any time on it. As he was not entitled to any trade dress protection[438] or trademark protection, this designer obviously decided hold back because legal struggle with a great fashion house like Moschino would be fruitless.

Case of Edda Gimnes is different that the case of Lopez. If we assume that designs of Gimnes were not registered, we can see that options based on counterfeiting or close copying were available to Gimnes. As distinct from Lopez's design, we observe a identical similarity between the designs of Gimnes and Moschino. In other words, it may be evaluated in the framework close copying rather than the knock-off concept. And in this case, Gimnes's design can be protected even if it was not registered.

[437] Amy De Clerk, "Moschino Denies Copying the Work of an Emerging Designer", *Harper's Bazaar*, 27.09.2018, https://www.harpersbazaar.com/uk/fashion/fashion-news/a23484434/moschino-forced-to-respond-to-plagiarism-claims/, (04.03.2019); See Image 32.

[438] Trade dress notion is defined as, "includes the total look of a product including its packaging, and even includes the design and shape of the product itself". Trade dress notion can be used for garments, restaurants, tablets or different designs., Mahmood, p.561.

We can now give following example of a case about design infringement in the Turkish law. Here the company named B.O.N.O.V.A. Tekstil Konfeksiyon İnşaat Turizm Uluslararası Nakliyet Sanayi ve Ticaret Ltd. Şti. took legal action against ALKIŞ Tekstil Ürünleri Sanayi ve Ticaret A.Ş.'ye because of manufacturing his pants that were its registered designs without authorization and against GEL-AL Tekstil Toptan Pazarlama San. Ve. Tic. Ltd. Şti'ye because of selling these products without authorization and based his legal action on the claims of determination, prevention and elimination of the results of design right infringement and unfair competition plus destruction of relevant products and removal and deletion of the products' images from the brochures, catalogues and similar promotional materials plus a claim for material damages in the amount of TY 10.000,- and moral damages in the amount of TL 5.000,- Defendant ALKIŞ Tekstil defended that these products were manufactured with the order placed by GEL-AL and at that time, plaintiff's products were not registered but registration was obtained after completion of the manufacturing and sale process and GEL-AL Tekstil said that these designs came to them from the Turkish republics without any label and so they do not know the identity of the designers and anyway, these designs are not new and have no distinctive character. In the case, expert witness examined all trousers one by one and concluded that black and white trousers were counterfeit. However expert witness found the defendant's claim that manufacturing and sale process was completed before registration inappropriate. Important matter in this case is that defense made by the defendant GEL-AL Tekstil that these designs were sent to them without any label and so they had no means to know about the identity of their designers was found inadequate by the expert witness, assuming that defendants should be aware of this fact as both parties operated in the same sector. According to the expert witness, the defendants did not act as a prudent merchant. In spite of this fact, expert witness recognized the need for the existence of a default in connection with the claim for damages and concluded that defendants were in default since they were traders and operated in the same sector like the plaintiff. However the defendant GEL-AL Tekstil said that the trousers were not really sold but given to close friends and relatives as gift, and they still had a remaining stock of 164 pairs. This defense was replied by the expert

witness stating that it was sufficient when the defendants stored these pants for commercial purposes and earning profits did not matter for the defendant.[439]

3.1.12.3. Expanding the rights granted via license by the design owner and transferring these rights to third persons without authorization

If the licensee expands the scope of rights granted to it under a contract or transfers this licensing right conferred under the contract to others without any authorization, this action will constitute design infringement. Besides that, unauthorized sublicensing by the licensee is also considered as design infringement. If the licensee makes sales in the European Side of Istanbul although it has sales authority only in the Asian Side, it will be unauthorized expansion of rights granted under the contract and constitutes infringement.[440]

3.1.12.3. Seizure of design right

As aforesaid, seizure of design right is regulated under Article 71 of SMK. Seizure of the design right will be involved when design application is made by a person who is not the actual design owner or design is registered in the name of this person or the design is presented to the public by a person who is not the actual right holder although design was not registered.

However if the design has multiple owners and if one or several of these persons owns the design or obtains registration for the design in his name, it will constitute partial design infringement. In case of seizure of the design right, the design owner is entitled to claim his right arising from the design provided that he complies with the timing required by law and to request transfer of the design to him or its declaration as invalid. [441]

In other types of infringement not involving any seizure, the person who is entitled to make a request for protection shall be the person whose name appears on the trademark registry. However in the event of seizure, protection can be claimed against the person who appears as the right holder in the trademark registry, which will be

[439] Yasaman, *Fikri ve Sınai Mülkiyet Hukuku; Fikir ve Sanat Eserleri, Endüstriyel Tasarımlar, Patentler ile İlgili Makaleler, Hukuki Mütalaalar, Bilirkişi raporları,* p.467-482.
[440] Suluk, Karasu and Nal, p. 341.
[441] Suluk, Karasu and Nal, p. 341.

anyhow available for registered designs only. In other words, in the event of seizure, protection will be afforded not for the benefit of the person whose name appears on the trademark registry but against this person. Here the person in whose favor protection will be afforded will be the person claiming to be the actual right holder.[442]

Options available to the actual right holder upon an infringement of a registered or unregistered design are regulated again in Article 81 of SMK. Accordingly, if the design was registered in accordance with Article 65, design owner may take legal action if any of the actions listed in Article 81/1 are relevant. If the person infringing the design was informed about the design application and its scope, it will not be necessary for that application to be published. In this case, the infringement will be deemed to have occurred before publication if the court concludes that person infringing the design was acting in bad faith.

If the design is a registered design, record of this registration must be indicated on the product or its packing or relevant invoice. The person infringing the design right may not render its action legitimate by claiming that registration record was not present on the invoice, packing or product after such person carries out any of the actions listed in Article 81 of SMK.

If the design is an unregistered design, the right holder may take legal action against design infringement if the design was presented to public pursuant to Article 57 of SMK.

[442] Tüzgen, p.112.

CONCLUSION

Although fashion seems to exist since Renaissance, fashion law was started to be examined only recently as a separate legal discipline. Fashion is a widespread concept involving different branches of law, but with the birth of a fashion item, intellectual property law is first involved. Once the fashion item is discussed under the intellectual property law, it will slowly penetrate to other areas of law. For that reason, this thesis examines fashion law from the perspective of intellectual property law.

As a comprehensive area of law, intellectual property law can be examined in two parts: intellectual rights and industrial rights. In this manner, we can examine the fashion law according to FSEK in terms of its relation with the intellectual rights and according SMK in terms of its relation with the industrial property law. However in this thesis, fashion law is discussed on the basis of design and trademark law as parts of the industrial property law, with a focus on SMK, which recently came into force, rather than FSEK.

Protection for trademarks seen as the initial subject of examination in the fashion law has been regulated in SMK dated 10.01.2017 and numbered 6769. Before enactment of SMK, trademark protection was afforded by the Legislative Decree No. 556 on the Protection of Trademarks. SMK introduced too many novelties to protection, including its approach to the signs considered as trademark. In the fashion world, we frequently see domination of product by the fashion brand and therefore trademark protection is very important in the functioning of fashion. Trademark protection is available both to the trademark itself and also to the shape trademarks such as the swan of Swarovski. In addition to that, trademark protection can be obtained for iconic designs in the fashion world. And as one of the most controversial concepts in the fashion law, knock-offs stay on the line between inspiration and copying. Trademark protection is afforded against counterfeits and close copying and also can be against knock-offs.

At this point, specific role of the knock-offs in helping consumption the fast fashion cycles must be emphasized since they are tolerated much more in the fashion sector as compared to the other sectors. However certain knock-offs are perceived as an act of

honor to the original product and certain are seen as inspiration. Limits of this inspiration will vary in each product. In this thesis, knock-off concept has been evaluated as something that is close to both ends: inspiration and imitation and in the discussion about the protection afforded to trademark and design, attempt has been made to explain the extent of protection that could be obtained against knock-offs along with the protection to be afforded against counterfeits and close copying.

Generally knock-offs are considered as inspiration, however in some cases fashion firms may have an intention to enjoy the protection against to knock-offs, if knock-offs go beyond the limits of inspiration. Although designs are afforded protection via trademark protection, knock-offs are sometimes evaluated as trademark infringement or seen as inspiration only. However such "inspirations" are essential in the fashion sector to achieve the fast cycles of fashion. In spite of that fact, knock-offs of device trademarks and normal trademarks appear obviously with actions not involving any good intention and they will confuse the public and attempt to earn unfair benefits from the reputation of the original trademark. This act would be contrary to Article 2 of the Civil Code. Thus in spite of the tolerance shown to knock-offs in the fashion law, they will not be considered really innocent.

Protection to designs is afforded under SMK very much like the protection afforded to the trademarks. Before SMK, Legislative Decree on the Protection of Industrial Designs regulated the design protection. Two novelties were introduced to the design protection by SMK. One of them was the replacement of industrial design phrase with the more general concept of design only. At this point, we must remind that there was no distinction between industrial and non-industrial designs in the above mentioned decree on industrial designs.

Second novelty introduced to the concept of design protection was something whose influence could be easily seen in the fashion law. This was the protection afforded to unregistered designs under SMK. If we take into account that fashion cycle turns very fast with the impact of social media etc., importance of the protection afforded to unregistered designs will be understood better. Before SMK, protection to unregistered designs was available under unfair competition provisions. The Supreme Court made decisions, stating that no confusion would arise if similar designs are used by different brands. However protection afforded to unregistered designs

pursuant to Article 59/2 of SMK is possible only if an identical design or a identically similar design is concerned. Therefore in the fashion law, an unregistered design can be protected against counterfeiting and close copying. However it must be stated that unregistered designs can also enjoy protection against knock-offs, if the said knock-offs goes beyond the limits of inspiration.

Registered designs will be afforded protection against designs that have no distinctive character as compared to the registered design. In connection with that distinctive character, while an apparent difference is required under the Legislative Decree on Industrial Designs, only difference is found sufficient in SMK. This shows that extent of difference is broader in SMK as compared to the Legislative Decree on Industrial Designs. According to Article 56/5 of SMK, a distinctive character appears when the general impression left on the same user by that design is different. Thus a registered design is protected against counterfeiting and close copying. Furthermore protection to be afforded to the registered design against knock-offs will be possible depending on the special circumstances of the case.

It must be stated that industrial property is not the only option for the fashion productions. Fashion designs can be protected under intellectual right as well. Fashion designs are called as artwork in FSEK. If a fashion design has the quality of a work and even the quality of artwork as an aesthetic value according to FSEK, it will enjoy the protection afforded by FSEK and if it also meets the conditions set forth for designs under SMK, it will obtain double protection pursuant to the cumulative protection principle.

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VISUAL ATTACHMENT



Image 1: Chloe and Zara Bags



Image 2: Zuhair Murad and Dior Gowns



Image 3: Chaos' Poster and Sarah Shakeel Artwork.



Image 4: Louis Vuitton’s monogram fabric



Image 5: Louboutin’s Red Bottom Shoes



Image 6: Celine Bag with “wings”



Image 7: Lady Gaga’s meat dress

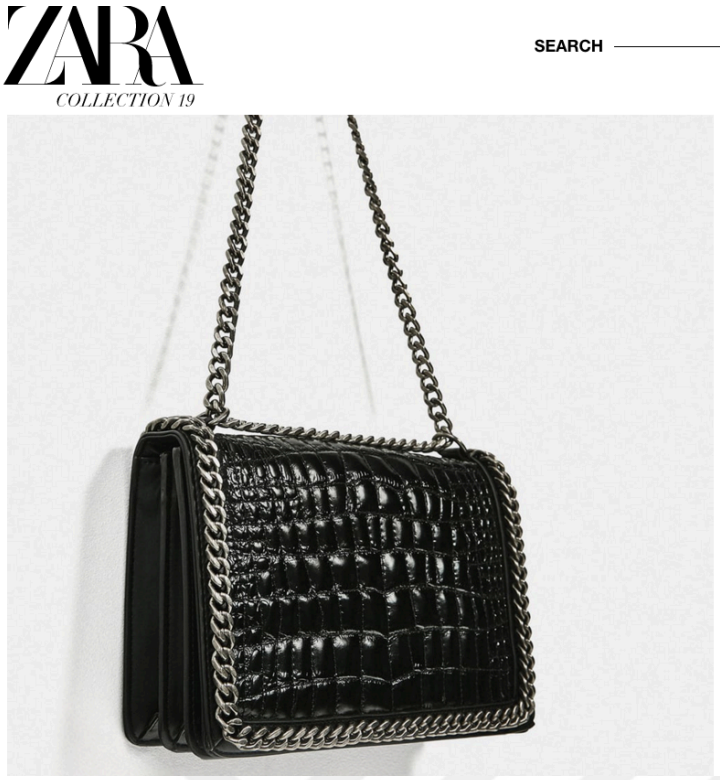


Image 8: Zara Bag with embossed chain



Image 9: Stella Mccartney Falabella Bag

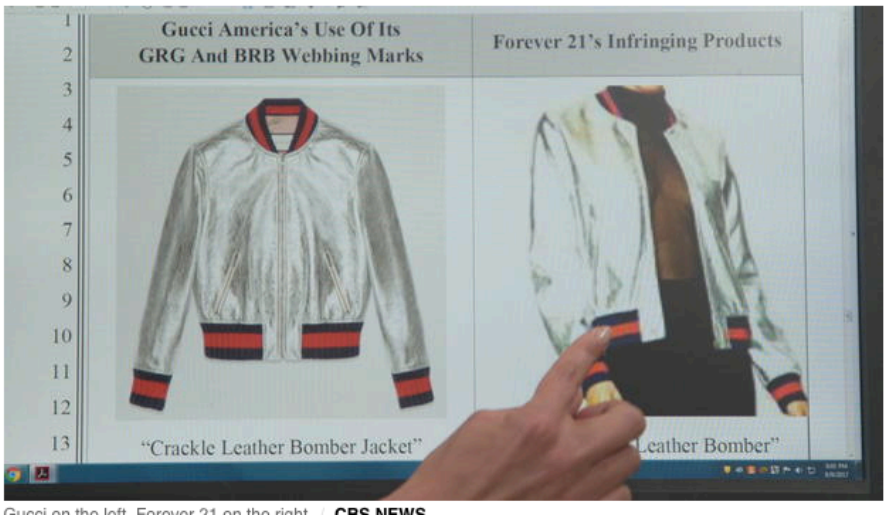


Image 10: Gucci and Forever 21's Bomber Jackets



Dorielle Hammonds, *We Love: Forever 21*, LA2DAY MAG., Aug 12, 2008, http://www.la2day.com/fashion/we_love_forever_21

Image 11: Dresses by Jonathan Saunders and Forever 21





FOLEY & CORINNA **FOREVER 21**

Adventures in Copyright Infringement, Part Six, FASHIONISTA, Apr. 12, 2007, http://fashionista.com/2007/04/adventures_in_copyright_infrin_3.php

Image 12: Dresses by Foley & Corinna and Forever 21



Image 13: YSL Monochrome red shoes

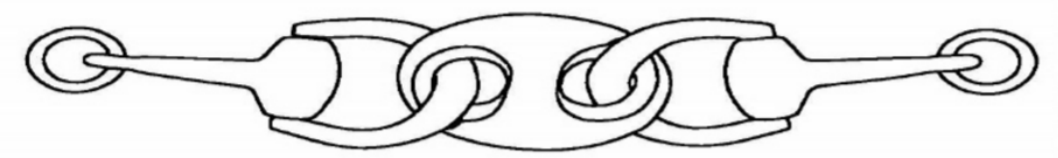


Image 14: Gucci Chain



Image 15: Dilara Fındıkoğlu Logo



Image 16: Kim Kardashian KKW Fragrance logo (top) and Vibes' Media's logo (bottom).



Image 17: Playnomore Bag and Hermes Kelly



Image 18: City Merchandise bag and Balenciaga bag



Image 19: Zac Posen’s led dress



Image 20: Tommy Hilfiger’s led dress



Image 21: Disney’s Cinderella



Image 22: Moschino’s Chandelier Dress



Image 23: Veil designed by Celia Kritharioti



Image 24: Hermes Birkin Bag



Image 25: Giuseppe Zanotti Cruel Shoes



Image 26: Stella McCartney Octavia dress

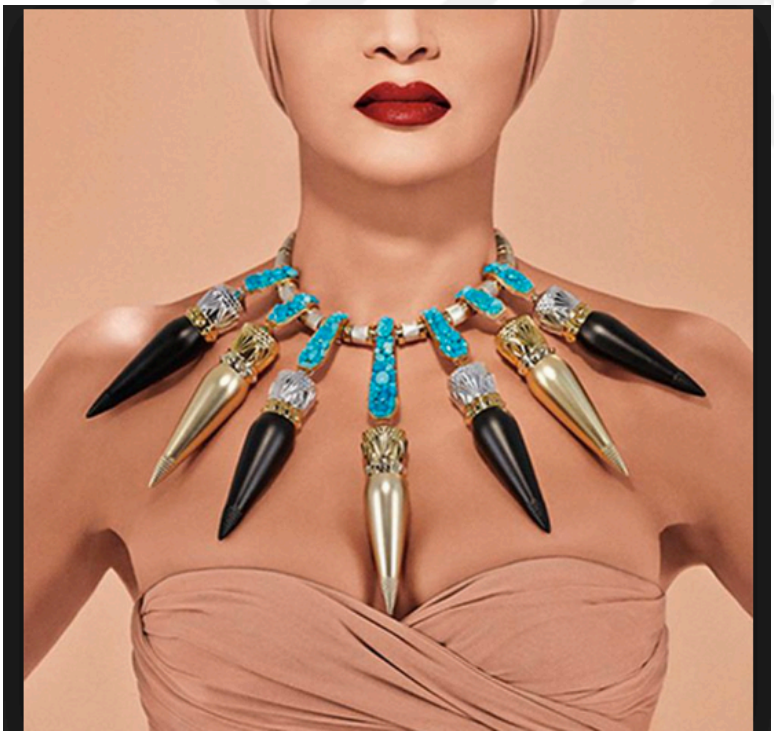


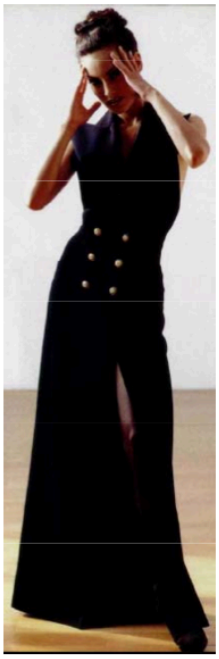
Image 27: Christian Louboutin’s Lipsticks



Image 28: Dior Bag



Image 29: Dolce and Gabbana’s 3d floral jacket



YVES SAINT LAURENT



RALPH LAUREN

Profils d'Hiver, L'OFFICIEL DE LA MODE, Sept. 1992, at 211 (Yves Saint Laurent); *Femmes en Smoking*, JOURS DE FRANCE, Dec. 7, 1992, at 138 (Ralph Lauren)

Image 30: Tuxedo Dresses by Yves Saint Laurent and Ralph Lauren



Image 31: Saul Lopez's design and Dilara Fındıkoğlu's design



Image 32: Edda Gimnes' designs and Moschino's designs

ÖZGEÇMİŞ

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2014-2015	Güven Hukuk Bürosu	Stajyer Avukat

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German : Intermediate