

T.C.
İSTANBUL MEDENİYET UNIVERSITY
ENSTITUTE OF POST GRADUATE EDUCATION
PRIVATE LAW DEPARTMENT

COPYRIGHT INFRINGEMENTS AND INDEMNITY CLAIMS

MASTER THESIS

ŞÜHEDA ERCAN

SEPTEMBER 2021

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ABSTRACT

Intellectual and artistic works are protected by copyrights, which have increased in importance, especially in the modern era. Copyrights are accepted as real rights so that intellectual and artistic works are protected by extensive internal regulations and international agreements. However, the regulations about copyrights cannot keep pace with the rapid increase of the variety of possible work types and ongoing technological changes. Furthermore, the copyright literature in terms of doctrinal sources and justified court decisions is limited worldwide, with Turkey particularly behind in this regard. Through this thesis, various discussions on subjects related to copyrights that are uncertain, and highly debated are examined, discussed, and exemplified, and a profound understanding about copyright, works, author's rights, infringements of author's rights, legal actions against infringements, and indemnity claims are provided. Indemnity claims such as moral indemnity, material indemnity and the concept of three times the amount are analysed, and the simultaneous application of these claims is explained. It can be seen that indemnity claims that are mentioned in the Law on Intellectual and Artistic Works have various similarities to the indemnity claims mentioned in the general principles of the Turkish Code of Obligation. Therefore, via the comparison of the general principles of Turkish Code of Obligation and the more specific ones of Law on Intellectual and Artistic Works, indemnity claims are examined, discussed, and analysed.

Key words: Copyright, infringement, indemnity, legal action.

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ABBREVIATIONS

CCP	: 6100 numbered Code of Civil Procedure
IPL	: 6769 numbered Industrial Property Law
LIAW	: 5846 numbered Law on Intellectual and Artistic Works
INTERNET LAW	: 5651 numbered The Law on the Regulation of Public Transmission and Fighting Crimes Committed Through These Transmissions
TCC	: 5237 numbered Turkish Criminal Code
TCL	: 4721 numbered Turkish Civil Law
TCO	: 6098 numbered Turkish Code of Obligation

CHAPTER I

1. INTRODUCTION

Copyrights play a major part in many people's lives as either the owner or the consumer of such rights; most people have at some point encountered copyright-related dilemmas in their personal lives. Indeed, there is little doubt that many of the readers of this thesis are in possession of something that violates copyright in some way. For instance, videotaping a television broadcast, copying computer programs or using otherwise legitimate licences on more than one machine, downloading songs or movies, photocopying more than one chapter of a book, etc., are all examples of copyright infringement.¹ Infringement of copyright is so familiar that either consciously or unconsciously people violate copyright; however, this situation needs to change because copyrights are absolute intellectual rights, and hence, have to be respected and protected appropriately. "The legal exclusivity granted to copyright owners is intended to prevent unauthorised use of copyrighted content and ensure that authors are remunerated for their creative labours."² In this respect, copyright owners are granted copyrights which have the effect of property rights that allow their exclusive benefit and protect them against infringements. However, "innovation

¹ Edwin C Hettinger, "Justifying Intellectual Property," *Philosophy & Public Affairs* (1989), p.32.

² Adi Libson, and Gideon Parchomovsky, "Toward the Personalization of Copyright Law," *The University of Chicago Law Review* 86, no. 2 (2019), p. 527.

and technology have continually created challenges for copyright law to properly control and the digital age of computer-based content highlights this difficulty.”³ In order to protect copyrights, authors have to fight infringements and infringers; to exercise their rights, and prevent or prohibit infringements, authors can take legal and criminal actions against infringers. This thesis aims to guide authors in terms of how they can protect their rights against infringement in light of the provisions described by 5846 numbered Law on Intellectual and Artistic Works (LIAW)⁴, but unlike other documents it will focus on forms of infringement rather than merely discussing the rights of the author. The indemnity claims can be made in case of infringement of copyrights; thus, determining what is infringement and what kind of actions violate which rights is important for indemnity claims, and sources about copyrights usually does not exemplify these issues. In this respect, examining infringement forms according to work types is essential and provided in this thesis.

Moreover, indemnity claims against infringements need further examination since indemnity claims in copyrights have some innovative features that differ from other indemnity claims such as indemnity claims in general principles of 6098 numbered Turkish Code of Obligation (TCO)⁵. Therefore, the nature and characteristics of indemnity claims based on copyrights shall be examined in comparison with general principles of TCO in order to provide a better understanding about the issue.

In order to protect copyrights, the nature of the rights have to be clearly understood, in this respect, work, author, copyrights, authorities and limits, applications and infringements, and legal and criminal actions will be examined, but most importantly, indemnity claims, which is the main instrument of copyrights, should be understood. For these reasons, this thesis provides a profound understanding about copyright, copyright infringement, and indemnity claims.

In the first chapter of this thesis, the terms ‘copyright’ and ‘work’ are explained; work groups are mentioned and exemplified. The definition of ‘author’ is given from a copyright perspective, and the rights of the author are discussed. The rights of an author are moral rights, which are the right of disclosure, to be known as the author,

³ Elizabeth J Tao, "A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media," *Indiana Journal of Global Legal Studies* 24, no. 2 (2017), p. 620.

⁴ Fikir ve Sanat Eserleri Kanunu (FSEK), *Resmî Gazete* 7981 (13 Aralık 1951), Kanun No. 5846.

⁵ Türk Borçlar Kanunu (TBK), *Resmî Gazete* 27836 (2 Şubat 2011), Kanun No. 6098.

to prevent changes to the work, and to reach the work, economic rights, which are the right of adaptation, reproduction, representation, publication, broadcast and public transmission; also, the right of transference and right of withdrawal are rights held by authors. These rights are explained and exemplified individually, and how forms of infringement can vary according to the type of work and associated rights are analysed. The finitudes of copyrights in terms of time, place, public order, and public interests are examined.

In the second chapter, the legal actions that can be taken against infringements are examined and discussed. In this sense, action with regard to prevention, declaration, cessation, criminal actions, and the notice and takedown procedure are explained and analysed.

In the final chapter, the concept of indemnity with respect to TCO is examined. In this sense, the concepts of breach of obligation and breach of the tortious act are explained. The concept of indemnity with respect to LIAW is then examined. Moral indemnity, material indemnity, claims for the return of any profits so gained, and the application of these three claims in conjunction are explained, discussed, and analysed.

1.1. Purpose of the Thesis

The purpose of this thesis is to provide a profound understanding of authors' rights, forms of infringement, and indemnity claims, so as to provide guidance for authors about how they can protect their copyrights, what kinds of action they can take against infringement, and what their indemnity claims should include according to the form of infringement in question. In this respect, this thesis aims to examine indemnity claims extensively such as claims on three times amount, material indemnity and moral indemnity claims based on LIAW in comparison with indemnity claims based on general principles of TCO. Therefore, clarifying indemnity concept by providing discussions of doctrine, detecting the right claims for infringement forms and showing the application of indemnity claims together with other claims are the main purposes of this thesis.

1.2. Significance

The significance of this thesis is firstly that of providing detailed knowledge and discussions about copyright, infringements, and the legal recourse available against such, in particular, indemnity actions. Secondly, this thesis providing guidance for foreign right holders due to the language of the thesis; such authors can learn about the internal regulation of copyright and protect their rights more effectively. The third point of significance of this thesis is its focus on forms of infringement, and that it exemplifies the ways in which infringements can occur since the associated legal and criminal actions, in particular indemnity claims, are based on the form of infringement; thus, it is important to illustrate such forms. The final point of significance of this thesis is its comparison of the provisions described in LIAW and TCO in terms of indemnity claims to provide a deeper understanding of the associated similarities and differences, which is not given in many sources. For these reasons, this thesis is significant to the copyright literature.

1.3. Limitations

There are two limitations to this thesis: the first is the narrowing sphere of the thesis, and the second is reaching the related sources. The problem of narrowing occurs because copyrights are all related to each other, and omitting certain subjects necessarily limits our understanding of the subject. For example, the initial intention of this thesis was to discuss matters relating to indemnity claims, but without mentioning such terms as work, author, author's rights, forms of infringement, etc., that would not necessarily be fully understood. Therefore, although the narrowing the sphere of the thesis would not be possible for most of the subjects, one restriction is made is that the focus of the thesis is purely on the rights of author rather than the owners of related rights; in addition, computer programs and infringements on these works are left out from infringement discussion due to the technical character of the subject and being overly extensive length of the subject.

The second limitation is encountered in the gaining access to appropriate sources. Sources about copyrights are very limited in Turkey, as in comparison to other subjects copyright remains relatively unexamined. In addition to the scarcity of sources, printed books about copyrights could not be found in bookstores because there are no new additions of such books. Therefore, only the sources in libraries

could be used, which also were limited for the same reason. Further, there were also problems with using foreign sources in the forms of online articles and books, because Turkey's internal regulations and those adopted abroad are different, and the materials discussed in such articles usually reflect foreign laws and regulations that are not otherwise applicable to Turkish law. Therefore, only common subjects of copyrights could be used within the thesis.

1.4. Intellectual Property Law

Intellectual property law protects intellectual products, i.e., products which are the result of the mind, thought, feeling, and expression, and also the authors of said property. The law regulates the determination of the owner of an intellectual product, rights, protection, and being subjected to legal action.⁶ Intellectual property law is intended to protect and encourage the owner of the intellectual property. The scope of the intellectual property is designated as; Intellectual property is a wide concept that includes intellectual and artistic works (copyrights), patents, utility models, designs, trademarks, geographic signs, new plant varieties, integrated circuit topographies, biotechnology, gene technology, computer programs, data bases, business and company names, field names, know-how, and confidential business information. Intellectual property rights are divided into two main categories: intellectual and artistic works, and industrial properties.⁷ The range of the protection of the intellectual property varies and enlarges in accordance with technological advancements; therefore, these categories are not limited and may enlarge according to future changes in regulation.

Intellectual property is the result of an individual's contestations with nature, and their experiences and knowledge gained through their social life.⁸ An intellectual product does not necessarily imply a material representation and is not 'property', yet gives an absolute right over the work.

Intellectual products are intangible; they are separated from the object that they embody. For example, a painting is not about the toile or the colour; it is about the

⁶ Ünal Tekinalp, *Fikri Mülkiyet Hukuku* (3: repr., İstanbul: Beta Yayınları, 2004), p. 6.

⁷ Cahit Suluk, Rauf Karasu, and Temel Nal, *Fikri Mülkiyet Hukuku* (4. Baskı: repr., Ankara: Seçkin Hukuk, 2020), p.38, 3.

⁸ Ernst E. Hirsch, *Hukuki Bakımdan Fikri Say* (İstanbul: Kenan Basımevi ve Klişe Fabrikası Yayınları, 1942), p. 14.

idea that is represented in the painting itself. Moreover, dance choreography, a formula of a medication, a design of a dress, etc., are all intellectual products, and separately protected from embodied objects.

The result of the intellectual process is an intellectual product; in other words, intellectual work, and the rights pertaining to intellectual works are expressed as intellectual property or intellectual property rights. However, there is a conceptual discussion about the term ‘property’ in the 4721 numbered Turkish Civil Law (TCL)⁹ community because ‘property’, as a term, is used for physical objects, yet intellectual property represents intangible intellectual ideas, not objects alone. For this reason, intellectual property is not acknowledged as ‘property’ or an ‘object’ in Turkish law. Tekinalp expresses this matter by noting that even though intellectual product is not ‘property’, the reason why the word property is used for intellectual properties is to indicate the exclusive quality of absolute private right over the intellectual product. Since intellectual property is not ‘property’ in the sense of TCL, the provisions about possession in TCL cannot be applied to intellectual property, and cannot be defended by possessory actions¹⁰

Intellectual property is not ‘property’; thus, rights over intellectual property are not *right in rem*, yet intellectual property rights are absolute rights that empower its authors almost up to the point of *right in rem*, which gives absolute rights over the property.

2. COPYRIGHTS

Intellectual property law, as has been mentioned, is mainly divided into two categories, namely intellectual and artistic works, which are protected by LIAW, and industrial properties, which are protected by 6769 numbered Industrial Property Law

⁹ Türk Medeni Kanunu (TMK), *Resmi Gazete* 24607 (8 Aralık 2001), Kanun No. 472.1

¹⁰ Tekinalp, p.5-6.

(IPL)¹¹. The rights on intellectual and artistic works are expressed as copyrights. Since this thesis is focused on the protection of the rights over intellectual and artistic works, disregarding industrial rights and elaborating on copyrights seems appropriate with respect to the course of the thesis. The term ‘copyright’ is used to express the rights over intellectual and artistic works, thus constitutes a sub-section of intellectual property law. Copyright provides legal protection to the author of the intellectual and artistic works in question. Suluk points out that copyright protection starts as soon as the work is eventuated; there is no need for any further requirements like records, registration, declaration, entrusting, etc., to attain the rights arising from copyrights.¹²

Works that are under the protection of copyright protection can be stated as follows: the subjects of copyright are scientific and literary works including computer programs, musical works, fine art works, cinematographic works, adaptation and compilations including databases; moreover, the law also protects the related rights which are the rights of performers, organisations of performances, producers of phonograms, and broadcasting organisations, film producers, and Sui-Generis database producers.¹³

Copyright law protects the rights of the author over the associated intellectual and artistic works; thus, examining the main concepts of ‘work’, ‘author’, the ‘rights of the author’, and the ‘legal actions that can be taken against infringements by author’ seems necessary for the sake of this thesis.

2.1. The Definition of Work

LIAW article 1/B-a defines work as “any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work.”¹⁴ Recently, it has become difficult to determine what qualifies something as such a work; it is as diverse as a concept as computer operating systems, tattoos, and wildflower gardens. Generally speaking,

¹¹ Sınai Mülkiyet Kanunu (SMK), Resmi Gazete 29944 (10 Ocak 2017), Kanun No: 6769.

¹² Cahit Suluk, Rauf Karasu, and Nal, p. 46.

¹³ Cahit Suluk, Rauf Karasu, and Nal, p.3.

¹⁴“Law on Intellectual and Artistic Works” is translated by Gül Okutan Nilsson, and Feyzan Hayal Şehirali Çelik, (2015).

copyrights protect all the original works of authorship fixed in a tangible medium of expression, and works do not need to be published or registered to be protected.¹⁵

“Any number of creative human endeavours may produce results which arguably do not fall within any of the enumerated categories of works of authorship, but which might nonetheless arguably constitute ‘works of authorship’.”¹⁶ It is provided in the literature that in order to acknowledge an intellectual product as a work, three conditions must be met: first, the formal condition, which is to belong to one of the groups mentioned above; second, subjective condition, which is reflecting the characteristic of the author; and third, objective condition, which has to be suitable for ownership and perceptible by third parties.¹⁷

In order to be counted as a work, there is no need for a record, registry, declaration, or entrusting; the protection starts when the work is constituted.¹⁸ Constituted work does not necessarily mean complete work. Tekinalp states that in order to accept an ‘incomplete work’ as ‘work’, it should come to a degree that the peculiarity can be seen, and the work reflects the characteristic of its author. In this way, drafts, plans, and worksheets, for instance, are protected as works.¹⁹ The characteristics of works, such as innovation (whether it has novelty or not), purpose (why the work was made), quality (whether the work is good or bad), quantity (the number or length), expense (the investment made to create the work), or the qualities of the authors (the focus is the work, not the author) are not important to determine something as a work. The important thing is to meet the formal, subjective and objective conditions.²⁰

2.1.1. Formal condition

Formal condition indicates that the works should carry the features of one of the groups of work mentioned in the law in order to be protected by LIAW, where the groups are designated in accordance with the finite number principle (*numerous clausus*); thus, works that do not belong to one of these groups are not protected by

¹⁵ Abraham Bell, and Gideon Parchomovsky, "Restructuring Copyright Infringement," *Tex. L. Rev.* 98 (2019), p.689-690.

¹⁶ R Anthony Reese, "Copyrightable Subject Matter in the Next Great Copyright Act," *Berkeley Tech. LJ* 29 (2014), p.1499-1500.

¹⁷ Cahit Suluk, Rauf Karasu, and Nal, p. 38.

¹⁸ Cahit Suluk, Rauf Karasu, and Nal, p. 44.

¹⁹ Tekinalp, p. 102.

²⁰ Cahit Suluk, Rauf Karasu, and Nal, p. 46-48.

LIAW. The groups that are mentioned in the LIAW and will be examined in this thesis are literary and scientific works, musical works, works of fine art, and cinematographic works. These main four groups have various sub-groups which are unlimited in number in law. In all, works should have the features of one of these groups in order to be accepted as ‘works’ and protected by LIAW.

2.1.2. Subjective condition

Subjective condition means that the work should bear the characteristics of its author. Subjective condition is not clearly explained either by law or the Civil Court of Cassation; thus, there are various views on what exactly constitutes this condition. The terms ‘characteristic’ and ‘originality’ are used as an expression of the uniqueness of the work, yet there are slight differences between these two terms that are worth examining. As is known, with the exception of new inventions that appear once in a while, most works are similar to each other. Since it is very rare to find a work that is original, unique and unprecedented, and most works have similarities, implications, or inspiration from other works, seeking ‘originality’ to fulfil a subjective condition is not really plausible. Moreover, works should carry the characteristics of their authors; this could appear in the form of the work, its style, content, order, etc. Characteristics are crucial, not just for the purposes of acquiring copyright protection, but also to prevent infringement of other’s works. The characteristics of the author should be dominant within the work. Although some similarities with other’s works are tolerable to some extent, they should not exceed the point at which they might be considered derivative, or copies. The fine line between similarity and copy is not an objective one, and neither the law, nor the Civil Court of Cassation suggests any satisfying criteria that might quantify the matter. The Civil Court of Cassation suggests that in order to acknowledge a study as a work, it is necessary and sufficient to determine that the work has been created by its author, it is not a copy of other works, and it should be the product of an intellectual effort.²¹ As can be seen, the Civil Court of Cassation does not clarify the limits of similarity. On the other hand, the doctrine is more interested with the criterion than the limit because the limit depends on the case, which experts can determine in accordance with the appropriate standard, if such exists. Looking into some authors’

²¹ Cahit Suluk, Rauf Karasu, and Nal, p. 39.

suggestions about the concept of characteristics might be helpful to envisage the matter more comprehensively.

Hirsch describes the characteristic as an intellectual work being something that involves innovative activity, and that the character of the author is reflected in the work in some manner. Further, the work should not be something that can be created by anyone, and works that are created by nature are not intrinsically characteristic.²²

Tekinalp adopts a bit different perspective on the concept of characteristic that is one of ‘expression/style’. He suggests that selection, style, and expression in a different manner can be accepted as the standard by which to determine the characteristic.²³

He means that the way in which the intellectual work is presented is representative of the characteristic of the author. Moreover, according to Yarsuvat and Belgesay, characteristic is synonymous with originality, but this view is not generally accepted since it narrows the scope of the law’s protection to too great a degree.^{24 25} Ateş says that work should be essentially different from works that can be created by anyone.²⁶ Furthermore, Öngören and Ceritoğlu advocate the idea that work should be significantly different from existing works.²⁷ Arslanlı, by contrast, suggests that innovative thought and imagination in a new form and form of presentation should be sufficient to define the term.²⁸ Ayiter, on the other hand, suggests that work should reflect the characteristics of its author’s intellectual individuality.²⁹

Through these definitions, it can be said that the term ‘characteristic’ is highly subjective, and thus adopting just one view may overly narrow the scope of the law for application to some works. Stating one standard for all intellectual properties is not a reasonable solution; for instance, a painting, a book, dance choreography, computer programs, and architectural works cannot all have exactly the same

²² Hirsch, p. 12.

²³ Tekinalp, p. 99.

²⁴ Yarsuvat, D. (1984). *Türk Hukukunda Eser Sahibi Ve Hakları*: İstanbul Üniversitesi Siyasal Bilimler Fakültesi Yayınları, p. 41-43.

²⁵ Belgesay, M. R., & Kocahanoğlu, O. S. (2001). *Fikir ve Sanat Eserleri Kanunu Şerhi*: Temel Yayınları, p. 13.

²⁶ Ateş, M. (2007). *Fikri Hukukta Eser*: Turhan Kitabevi, p. 77.

²⁷ Gürsel Öngören, & Ceritoğlu, F. (2007). *Türk Fikir ve Sanat Eserleri Hukuku Açısından Mimari Eserler ve İlgili Yargı Kararları* İstanbul: Öngören Hukuk Yayınları, p. 28.

²⁸ Arslanlı, H. (1954). *Fikrî Hukuk Dersleri: Fikir ve Sanat Eserleri*: Sulhi Garan Matbaası, p.6.

²⁹ Ayiter, N. (1981). *Hukukta Fikir ve Sanat Ürünleri*. Ankara: S Yayınları, p. 40.

standard from which to define characteristic. Leaving experts to decide whether the work holds characteristic features or not in accordance with appropriate standards, namely style, innovative idea, expression, dissimilarity, etc., as implemented in Turkey, might be the best choice for the present.

2.1.3. Objective condition

Objective condition means that the work has to be perceivable and suitable for ownership. This condition basically requires the work to exist in the outside/real world, not merely in the authors head. It can be said that “expressions of ideas are copyrightable; ideas themselves are not.”³⁰ It is noted that works that exist only in their authors’ thoughts that are neither written nor described cannot be protected.³¹ The work shall be presented to the world in some manner and have a material existence. This is important because the law cannot protect abstract ideas; it should be an intellectual ‘product’, amenable to protection.

2.2. The Work Groups Mentioned in LIAW

LIAW divides intellectual and artistic works into four main groups which include literary and scientific works, musical works, works of fine art, and cinematographic works. These categories are determined according to the *numerous clausus* principle; thus, they cannot be extended, but the works that can fall into one of these categories are not limited in number. It would seem appropriate at this point to describe these types of work in a general manner to allow for a better understanding of such.

2.2.1. Literary and Scientific Works

Literary and scientific works are defined in Art. 2 of LIAW as follows:

The following are literary and scientific works:

1. Works that are expressed by language and writing in any form, and computer programs expressed in any form together with their preparatory designs, provided that the same leads to a computer program at the next stage.
2. All kinds of dances, written choreographic works, pantomime and similar theatrical works without dialogue;
3. All kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models, industrial, environmental and theatrical designs and projects, lacking in aesthetic quality.

³⁰ Hettinger, p. 32.

³¹ Cahit Suluk, Rauf Karasu, and Nal, p. 43.

Ideas and principles on which any element of a computer program is based, including those on which its interfaces are based, are not deemed works.

By considering the above, literary and scientific works can be examined according to three categories, which are: works that are formed by language and writing; dumb stage works; and technical and scientific photographs, paintings, models, designs, and projects. It would be helpful to examine and exemplify these categories.

2.2.1.1. Works that are Formed by Language and Writing

Works that are expressed via language in any way such as statements, writing, formulae, numbers, or figures fall within this category, including computer programmes.³² LIAW art. 1/B g defines computer programs as, “A set of computer instructions arranged in a way that will make a computer system carry out a special process or task and the preparatory work that will lead to the creation and development of such set of instructions.” A computer program is formed by different combinations of the numbers 0 and 1 (the binary system), so program writing can be considered similar to creative writing; thus, it falls under the categorisation of scientific and literary works. A computer program has different components, and which components fall under the protection of copyright is determined by LIAW, as mentioned above. Briefly, the extent to which computer programs are protected is limited to source and object code, along with the final product and preparatory design, which is previous phase of final product.³³

2.2.1.2. Dumb Stage Works

The distinctive feature of this sub-group is emotions, thoughts, and ideas expressed not in verbal or written form but through artists’ gestures and body moves such as dance, choreography, pantomimes, gymnastic apparatus, acrobatics, ice ballet, ice shows, etc.³⁴

³² K. Emre Gökyayla, *Telif Hakkı Ve Telif Hakkının Devri Sözleşmesi* (Ankara: Yetkin Yayınları, 2000), p. 81.

³³ Mustafa Ateş, *Telif Hukukunda Eser Kavramı Ve Eser Sahipliği, Fikri Mülkiyet Hukuku Çalıştayı 19-22 Aralık* (Ankara: Türkiye Adalet Akademisi, 2019), p. 24.

³⁴ Engin Erdil, *Fikri Mülkiyet Hukuku* (İstanbul: Vedat Kitapçılık, 2016), p. 11.

2.2.1.3. Technical and Scientific Works that are Non-Aesthetic

These kinds of works are non-aesthetic because aesthetic works can also be protected as works of art. Works within this category are intended to teach or explain certain scientific or technical subjects.³⁵ Technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects, architectural models, industrial, environmental, and theatrical designs and projects that lack an aesthetic quality are placed within this category.³⁶

2.2.2. Musical Works

Musical works are defined in Art. 3 of LIAW as “Musical works are all types of musical compositions with or without lyrics.” Musical works are protected by law whether they have lyrics or are pure music but only if the work has the characteristic of its author. Ateş points out that in musical works the characteristic shows itself in the following of the voices in quick succession, the connection of voices and rhythm.³⁷ How musical works are represented, such as via CD, DVD, radio, TV programmes, or cinematographic works are not relevant to a musical work being accepted as a ‘work’. It is pointed out that in order for a musical product to qualify as work, the form of the work as following of voices, connection of notes and rhythm should be characteristic. Further, in a musical work, if the writer and the composer of the work are different persons, the permission of both should be sought in terms of addressing the moral and economic rights of the author.³⁸

2.2.3. Works of Fine Arts

This is described in LIAW Art. 4 as follows:

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

³⁵ Erdil, p. 11.

³⁶ Cahit Suluk, Rauf Karasu, and Nal, p. 54-56.

³⁷ Ateş, p. 24.

³⁸ Şule Binnaz Aydın Yunus, "Müzik Eserlerinin İzinsiz Olarak Umuma İletimi," *Fikri Mülkiyet Hukuku Yıllığı* (2013), p. 120-121.

Cartoons; 8. All kinds of personifications. The use of sketches, drawings, models, designs and similar works as industrial designs does not affect their status as intellectual and artistic works.

Even if the formation of the law makes it seem that works of fine art are limited to those mentioned above, this needs to be regarded merely as the exemplification of art works. In the doctrine, there are various classifications concerning fine art works. For instance, works of fine art can be divided into four categories that are 1- pure fine art works, 2- architectural works, 3- applied art works and 4- photographic art works.³⁹ As long as it reflects the characteristic of its author and have aesthetical value they should be regarded as fine art works regardless of these classifications.

2.2.4. Cinematographic Works

This is described in LIAW Art. 5 as follows:

Cinematographic works are works such as films of an artistic, scientific, educational or technical nature or films recording daily events or movies that consist of a series of related moving images with or without sound and which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices.

To speak of a cinematographic work with regard to LIAW, the subsidiary element is to create the work in accordance with the art and technicalities of cinema.⁴⁰ Cinematographic works, as mentioned above, include films, movies, photographs, recordings of images and, even though it is not mentioned in the article, TV program formats. In addition, although again it is not mentioned in the article, there are ongoing discussions about the cinematographic character of music videos and commercials. Tosun states that if there are characteristics of the work, director, or script that are constituted through cinematographic technics, there is no reason to neglect musical videos and commercials in terms of representing cinematographic works.⁴¹

2.2.5. Adaptations and Collections

Adaptions and collections are not included within work groups, but since adaptations and collections of original works are also accepted as works in terms of LIAW, it

³⁹ Ateş, p. 26.

⁴⁰ Ateş, p. 28.

⁴¹ Yalçın Tosun, *Sinema Eserleri Ve Eser Sahibinin Hakları* (İstanbul: XII Levha Yayıncılık, 2009), p. 204-217.

seems appropriate to note their status as types of works. They are defined and exemplified in Art. 6 of the LIAW as follows:

Intellectual and artistic products created by benefiting from another work but that are not independent of such work are adaptations, of which the main types are listed below:

1. Translations; 2. Converting a work like novel, story, poem or play, from said types to another type; 3. Converting musical works, literary and scientific works or works of fine arts into films, or converting them into a form which is suitable for filming or for broadcasting by radio and television; 4. Musical arrangements and compositions; 5. Transforming works of fine arts from one form to another; 6. Making a collection of all or the same type of works of one author; 7. Making a collection of selected works according to a specific purpose and in accordance with a specific plan; 8. Making an unpublished work ready for publication as a result of scientific research and study (ordinary transcriptions and facsimiles that are not the result of scientific research and study are excluded); 9. Annotating, commenting or abridging the work of another person; 10. Adaptation, editing or any modification of a computer program; 11. Databases obtained by the selection and compilation of data and materials according to a specific purpose and a specific plan, which are in a form that can be read by a device or in any other form. (This protection cannot be extended to the data and materials contained in the database.)

Adaptations bearing the characteristic of the person making the adaptation, which are created without prejudice to the rights of the author of the original work, shall be deemed works under this Law.

3. THE AUTHOR

The author is ‘the person creating the work’ according to Art. 1/B-b of LIAW. The term ‘author’ is not a general term that can be used to state ownership for any given intellectual product. It is used only to denote the creator of intellectual and artistic works due to the regulations of LIAW. Who can actually be the author of a work is a subject of debate, yet it is established in Turkey, and regulations so indicate, that only real persons can be the authors of intellectual and artistic works. Employers and legal entities can only be utilizers of the work but not the authors. Ateş expresses the concept that the creator of a work should be a real person, the real person should constitute the work with his/her own concrete action, and the result of the concrete

action on the part of the real person should be intellectual and artistic work.⁴² The principle of the author being a real person is also adopted by continental laws such as in Germany, Switzerland, France, Austria, and Italy. Correspondingly, in order to be an author in the British and American legal systems, it is not necessary to be a real person. Under EU regulations, it is left to member states' preferences as to whether they accept giving authorship status to legal entities as well as real persons or otherwise. In Turkey, only real persons who create a work can be authors; others can only be related right holders, or users of the rights.⁴³

3.1. Author's Rights

All rights over intellectual and artistic works belong to their authors including related rights if they are not transferred to third persons. The rights of the author, which are economic and moral, are absolute and in the nature of a monopoly that gives author sole authority of use. Although the rights of the author are absolute, they are not 'real' rights in the sense that intellectual work is not a physical object. These rights enable the owner to benefit exclusively from the work and prohibit others from gaining similar benefits.⁴⁴ Rights are divided into two groups with respect to the character of the rights. Some rights are effectively bound to the author, and cannot be revoked by transferees at some later point. These rights are the moral rights of the author that include the right of disclosure, the right to be known as the author, the right to prevent changes to the work, and the right to reach the work. The other group of author's rights are their economic rights, which are the right of adaptation, the right of reproduction, the right of publication, the right of representation, and the right of broadcasting and public transmission. The moral and economic rights of author are important in determining which rights are violated, what kind of legal actions could be taken and what kind of claims the author shall have against infringements. Thus, to provide a comprehensive understanding of the matter, the characteristic of the rights and forms of infringement, which vary according to work type, shall be examined in detail.

⁴² Ateş, p. 38.

⁴³ Ateş, p. 40-41.

⁴⁴ Fethi Merdivan, *5846 Sayılı Fikir Ve Sanat Eserleri Kanunu Hükümlerine Göre Eser Sahipliği, Eser, Eserden Doğan Mali Ve Manevi Haklar, Eserle İlgili Tasarruflar Ve Şekle Dair Hukuki Durum, Fikri Mülkiyet Hukuku Çalıştayı 19-22 Aralık* (Ankara: Türkiye Adalet Akademisi, 2019), p. 70.

3.1.1. Moral Rights

Moral rights generally protect an author's personality (or personhood) as part of their natural, inherent rights. Considered personal to an author, moral rights' function is to safeguard their non-economic interests, such as to protect their spirit as expressed and intertwined in their work. They are based on the notion of the "inalienable artistic worth that exists within a creation, regardless of its economic value." Just like economic rights, moral rights can serve to incentivize creation by guaranteeing "moral autonomy" to an author. In some legal traditions, moral rights are considered the essence of copyright⁴⁵

Moral rights are tightly bound to the author's identity; therefore, even if the rights over the intellectual work are transferred to third persons, the moral rights remain attached to the author, yet the specific clauses about the transference of the usage of moral rights within transference contracts are exceptional. Art. 6 of the Bern Convention clarifies the continuity of the author's moral rights even after the transference of the economic rights to third persons:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.⁴⁶

As can be seen, there is no time limitation to exercising one's moral rights after transference as long as the work and the right are deemed to be worthy of protection.⁴⁷ Moral rights are divided into four categories that are the right of disclosure, the right to be known as the author, the right to prevent changes to the work, and the right to reach the work. It seems necessary for the purposes of this thesis to examine these moral rights in detail and exemplify the forms of infringement which vary in accordance with the work type.

4.1.1.1. The right of disclosure

The right of disclosure can be described as making a work public by means of representation, publication, broadcasting or public transmission as such.⁴⁸ Art. 14 of LIAW refers to the right of disclosure as follows:

⁴⁵ Vezina, Brigitte. Moral Rights: "Copyright's Poor Relation." *Centre for International Governance Innovation* (2020), p. 4.

⁴⁶ Paris Act, "Berne Convention for the Protection of Literary and Artistic Works," *Director* (1979).

⁴⁷ Eşref Küçük, "Fikir've Sanat Eserleri Kanunu'nda Çeviri Eserler (Tanimi, Unsurlari, Korunmasi)," *Türkiye Barolar Birliği Dergisi* (1998), p. 624.

⁴⁸ Gökyayla, p. 143.

The author shall exclusively determine whether or not his work shall be disclosed to the public and the time and manner of its publishing.

Only the author may give information on the contents of a work of which the whole or a substantial part has not yet been made public, or whose main features have not yet been introduced to the public in any way.

The author may prohibit, even if he has given written approval to others, the promotion to the public or the publishing of both the work and its adaptation, where the manner of disclosing to the public or publishing of the work is of such a nature as would damage the honour and reputation of the author. Waiving such power of prohibition by contract shall be null and void. The other party's right to compensation is reserved.

The right of disclosure empowers the author to determine whether the work can be published at any specific time, place, and manner; also, they have the right not to disclose the work at all. To illustrate, many people are aware of the incident involving Franz Kafka, who was a novelist. Kafka's will requested that his friend destroy his work after his death, but rather than do this his friend instead published his works, though in Kafka's name. This may sound reasonable because Kafka was a great author, but in terms of copyright this is clearly a simultaneous violation of the right of disclosure and publication. The right of disclosure draws a line between personal rights and copyrights because if the work is not disclosed by the creator of the work, the owner has an absolute right over the work and unauthorised usage of the work shall be protected by provisions about personal rights. Copyrights can only protect works that are disclosed to public with the consent of the author.⁴⁹

It is obvious that the unauthorised disclosure of the work is an infringement of the moral rights of the author, yet there are some cases in which authorised disclosure can itself turn out to be an infringement of moral rights. Suluk points out that it is presumed that the person who takes over the moral rights over the work themselves gains the right of disclosure.⁵⁰ However, as mentioned in the article, the usage of the right should not damage the honour and reputation of the author⁵¹; if it does, this is considered to constitute reputational harm, which challenges with the dignitary interests of the author. Suluk states that in an instance where a naked mermaid painting was put on display in an erotic exhibition, this disclosure of the work harmed the respectability of the author.⁵² Presenting a work in a specific way as

⁴⁹ Arslanlı, p. 42-43.

⁵⁰ Cahit Suluk, Rauf Karasu, and Nal, p. 83.

⁵¹ Gökyayla, p.146.

⁵² Cahit Suluk, Rauf Karasu, and Nal, p. 84.

though to imply some form of impropriety to harm the author's reputation constitutes a violation of the author's right of disclosure.

The right of disclosure can be violated not only by publication but also representation, broadcast, and public transmission. For example, reading parts of a novel to a group of people without the author's permission violates the right of disclosure and representation. Reading it for the first time on radio, TV or internet without author's permission violates the right of broadcasting and public transmission, as well as the right of disclosure. These examples can also be seen in all literary and scientific works, musical works, works of fine art, and cinematographic works.

4.1.1.2. The right to be known as the author

The author has the exclusive right to put their name to their work. The author's real name is usually used for such if not otherwise specified by the author. Sometimes authors use a pseudonym for their works, yet the right to change this to their real name is preserved. Art. 15 of LIAW expresses this right as follows:

The author shall have the exclusive authority to decide whether the work shall be disclosed to the public or published with or without the name of the author or under a pseudonym.

The name or mark of the original author must be shown in the manner which is agreed upon or is customary, on copies of a work of fine arts created by reproduction and on the original and copies of an adaptation, and it must be clearly depicted that the work is a copy or an adaptation.

The real author of a work may ask the court to establish his rights if the creator of the work is disputed or if another person claims to be the author of the work. For architectural constructions that have the quality of a work, the name of the author shall be inscribed in an indelible way with material considered suitable by the author on a visible part of the work, upon written request.

To be known as the author is a right and an authority of the author. Therefore, in those instances where the author does not want to reveal their real name, violating this authority and revealing such also constitutes infringement of this right.⁵³ Other than this, infringements of this right can occur in three ways: not specifying the author's name on the work; using another author's name on a work due to its commerce value; and claiming someone else's work as one's own.

The first form of this infringement, as can be seen from the article, is not stating the name of the author on the work since the name of the author should be put to the

⁵³ Akın Beşiroğlu, *Düşünce Ürünleri Üzerinde Haklar: Fikir Hukuku* (3. Baskı: repr., İstanbul: Beta Yayınları, 2004), p. 218.

work unless an alternative is otherwise provided by the author. Disclosure, publication, representation, broadcasting and public transmission of the work without specifying author's name constitutes a violation of the moral right of the author.

The second form of infringement usually takes place when the author is famous, and the author's name on the work has an effect on associated sales. Unauthorised usage of the name of an author on someone else's work like this also constitutes infringement of the moral right of the author.

The third form of infringement is presenting a work under someone else's name, which constitutes a severe violation of the right to be known as its author. In such instances, the infringer may use his own or someone else's name on the work rather than that of the real author. In both cases, this kind of violation constitutes infringement of the author's moral right, namely the right to be known as the author.

However, in terms of academic texts, there is a specific term for cases when the infringer passes off work as his/her own: 'plagiarism'. Plagiarism is a somewhat complicated concept that needs further explanation to clarify the bounds of this infringement.

Plagiarism: Plagiarism of a work means the use of or otherwise benefitting from a work, either partially or fully, that belongs to someone else by presenting it as one's own.⁵⁴ This kind of infringement may or may not provide economic profit to the infringer, but in either case constitutes infringement of the author's moral right. It is established that in order to talk about plagiarism the benefitted work should first be disclosed to the public, and there should not be any or an appropriate reference/attribution to the author.⁵⁵

There are certain differences between plagiarism and copyright infringement, however. "The crucial and almost always unrecognized distinction between the two infractions is that plagiarism is use or reuse of words or ideas without acknowledgment, whereas copyright infringement is use or reuse of words or ideas

⁵⁴ Nihat Bulut&, and Mahmut Koca, "İktibas Serbestisinin İhlali, İntihal Ve Bunlara Bağlanan Hukuki Sonuçlar," *Fikri Mülkiyet Hukuku Yıllığı* (2013) p. 216.

⁵⁵ Bulut&, and Koca, p. 217-218.

without permission.”⁵⁶ Although the distinction between plagiarism and copyright infringement is important, it should be acknowledged that benefitting from a work without stating the author’s name neither has the permission, nor the acknowledgement of the author; thus, for such a case it is easy to say that this constitutes both plagiarism and copyright infringement of the author’s moral right. However, to clarify the concept of plagiarism and the ways of avoiding infringement, it seems beneficial to explain the concept further. In order to avoid plagiarism, an acknowledgement of the author is usually sufficient, and which is called the citation system. In some cases, LIAW allows legitimate benefit from works that are protected by copyrights without the permission of the author and only by acknowledgement. These kinds of exceptions are allowed in other countries as well, such as the USA and Canada, and the grounds for this regulation is termed ‘fair use’, which can be illustrated as follows:

In the terms of the open-source software people: one has to pay to buy a book or a subscription, but one does not have to ask permission to read or to quote. In copyright law, this is called “fair use,” or in Canada “fair dealing”—that is, the provision that allows us to quote without permission. It is seen as something of an exception in copyright law. But in citation cultures, this freedom is not an exception: it is the foundation.⁵⁷

In terms of the sphere of fair dealing, it is provided that “any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary would not constitute copyright infringement.”⁵⁸ The exceptions to copyright are mentioned in various articles of LIAW, but also in 5187 numbered Press Law Art. 3, which states that: “The press is free. This freedom; includes the rights of acquisition of knowledge, dissemination, criticism, commentation and creation of work.” This article enables the press to act in contravention to copyrights without causing infringements as long as such use does not exceed the limits of the press in terms of providing news and information to public, and does not violate the dignitary interests of others. Therefore, there is an exception to copyrights that is

⁵⁶ Laura J. Murray, "Plagiarism and Copyright Infringement: The Costs of Confusion," in *Originality, Imitation, and Plagiarism: Teaching Writing in the Digital Age* (Michigan: University of Michigan Press; Digitalculturebooks, 2008), p. 174.

⁵⁷ Murray, in *Originality, Imitation, and Plagiarism: Teaching Writing in the Digital Age*, p. 176.

⁵⁸ Melanie Johnson, Robin Wright, and Susan Corbett, "Harmony and Counterpoint: Dancing with Fair Use in New Zealand and Australia," in *Making Copyright Work for the Asian Pacific: Juxtaposing Harmonisation with Flexibility* (ANU Press, 2018), p. 167.

provided for by law for the sake of the press. It would also be helpful to note other exceptions mentioned in LIAW, for instance:

Reproduction for the purposes news reporting, teaching (including multiple copies ship, or research, is not an infringement of copyright. Essentially a defence against an infringement claim, factors that can be taken into account in such a use, the nature of the work, the proportion economic impact of the use on the market. The vague, but perhaps intentionally so, as it allows the law to deal flexibility with cases as they arise.⁵⁹

These exceptions do not challenge copyrights as long as the citations are made for the purposes of news reporting, teaching, research, and scientific purposes as mentioned above; personal usage is another exception suggested by law. To illustrate the exception made for the purposes of news reporting, Öncü states that according to the Art. 37 of LIAW, entitled "News", it is possible to take some pieces of the ideas and works of art in the news by way of transferring signs, sounds and/or images, depending on the daily events, provided that they have the character of news and do not exceed the aim of giving information. The reproduction, dissemination, representation or broadcasting of such parts by means of radio and television is free. This freedom cannot be used in a way that harms the legal interests of the right owner or is contrary to the normal exploitation of the work.⁶⁰

As for the personal exploitation that is provided for by law:

Art. 38/1. It is permitted to reproduce all intellectual and artistic works for personal use without pursuing profit. However, such reproduction may not prejudice the legitimate interests of right holders without good reason or conflict with the normal exploitation of the work.

Normal exploitation is not specified in law as a concept, but the doctrine suggests that the usage for personal interest cannot exceed one copy, but for the usage in education institutions it is only limited according to substantial need.⁶¹ Moreover, which usage falls under these purposes, and which constitute infringement can be determined by reference the nature of the work, the economic impact of the use, etc.

Benefitting from works can take two forms: long quotations and short quotations. Long quotations, by stating the name of the author and the work and without making

⁵⁹ Hal R. Varian, "Copying and Copyright," *The Journal of Economic Perspectives* 19, no. 2 (2005), American Economic Association, p. 125.

⁶⁰ Özge Öncü, *Fikir Ve Sanat Eserleri Hukukunda İktibas Serbestisi Ve Sınırları* (Ankara: Yetkin Yayınları, 2010), p. 201.

⁶¹ Cahit Suluk, Rauf Karasu, and Nal, p. 106.

any changes, can be used only for educational purposes. It is stated that long quotations such as large part of a work or, indeed, its whole are only allowed if such would help scientific development and enlighten the confusing parts, but the quotation must be specific and justify the ends.⁶²

Art. 34 It is free to create selected or collected works, which are dedicated to educational purposes, by way of making quotations in an amount justified by the purpose, from published musical, literary and scientific works and works of fine arts that are made public. Works of the type set out in the third subparagraph of article 2 and first and fifth subparagraphs of the first paragraph of article 4 may only be quoted to explain the content of the selected and collected work. However, this freedom may not be used in a way which would prejudice the legitimate interests of the author without good reason, or which would conflict with the normal exploitation of the work.

The first paragraph shall also apply to school radio broadcasts made exclusively for schools and approved by the Ministry of Education.

The permission of the author is necessary for making selected or collected works for purposes other than education, by way of quotations of published musical, literary and scientific works and works of fine arts that are made public.

In all such cases, the name of the work and the author shall be cited in the customary manner.

In the law of intellectual and artistic works, quotation is generally defined as the use of parts of a work in another work. However, under certain conditions LIAW allows to quote not only some parts of a work, but also its whole (See LIAW 35f.1-/paragraph 3–4), where the concept of quotation need not be understood as using some parts of a work in another work.⁶³ As it seems, long quotations are not counted as infringement if they are for the purpose of creating selected or collected works with educational purposes as long as they do not harm the authors' legitimate interests and do not exceed the limits of the normal exploitation of the work.

As for short quotations, Art. 35 of LIAW provides some standards to determine the limits to which one can benefit from the work.

Quotations of a work are permitted in the following cases:

1. Quoting a few sentences or passages of a work made public, in an independent literary or scientific work;
2. Incorporating certain elements of a published composition, at the most such as themes, patterns, passages or ideas, into an independent musical work;

⁶² Cahit Suluk, Rauf Karasu, and Nal, p. 115-116.

⁶³ Öncü, p. 5.

3. Reproducing works of fine arts that have been made public and other published works, in a scientific work for the purpose of explaining its content and to the extent justified by such purpose;
4. Displaying works of fine arts that have been made public by projection or similar means in order to explain a subject at scientific conferences or lectures.

The quotation must be made in a manifest way. In scientific works, it shall be necessary to mention not only the name of the work and the author but also the passage from which the quoted part has been taken.

As can be seen from the article, by reference to the author of the work, using quotations to an extent that does not exceed the needs of a legitimate purpose is allowed by the law. However, these exceptions cannot constitute reasons for the violation of an author's or third person's personal rights. In this sense, Öncü points out that the regulation on the freedom of quotation introduced in Art. 35 of LIAW is only a restriction on the economic rights of the owner of the work, not on other rights, and especially not on general personal rights. In this respect, compliance with the conditions in the regulation regarding freedom of quotation does not constitute a justification for violating the moral rights of the author (mentioned in Art. 14-17 of LIAW) or general personal rights (TCL Art. 24). Likewise, since the regulations regarding freedom of citation are only those that limit the economic rights of the author whose work is quoted, violations of the personal rights of third parties cannot be considered valid by the provisions on freedom of citation.⁶⁴

Art. 35 of LIAW, which regulates the freedom of quotation, determines the possibilities whereby quotation might be considered valid by making a distinction according to the types of work that can be quoted. As a result of this arrangement, the question as to whether there is any opportunity to quote the types of works not listed in the article or otherwise arises. In fact, in LIAW Art. 35, cinema works and fine art works do not acquire scientific quality, and are not considered to be within the scope of works that can be quoted.⁶⁵ 35/3 indicates that works of fine art can be quoted in scientific works for the purposes of explaining their content, and accordingly one might feel that this justification can be applied to cinema works, yet the passage points out that these works cannot be quoted in cinema works or works of fine art. For instance, parts of a movie cannot be used in another movie since this

⁶⁴ Öncü, p. 104.

⁶⁵ Öncü, p. 4.

does not serve a scientific purpose; documentaries are, however, exceptions in this regard.

There are some differences between the citation system and quotations in copyright. To begin with, as mentioned in the passage, quotation enables one to benefit from intellectual and artistic works without permission, and is an exception to copyright. On the other hand, for the citation system, benefiting from the work purely through the acknowledgement of the author and the work itself is the core of this system because even if the work is outside the scope of copyright protection so that does not require getting a permission from the author, it still needs to be shown as reference. This difference is important when an author copies their own works; since the author does not need any permission from themselves, they can benefit from their works as they choose, yet the benefit still has to reference the original works. Hence, an author copying their own works may not constitute copyright infringement, but would still represent a violation of the citation system and academic integrity.

In the academic citation system, it is expected that all sources, no matter how old, will be cited - ideas, facts, expressions, arguments - with the small exception of “common knowledge”.⁶⁶ Common knowledge is an exception to the citation system in the avoidance of plagiarism; it is also referred to as *scenes a faire* by the French Courts. According to the doctrine of *scenes a faire*, certain ideas, forms, and representations that are known and used by the general populace or are commonly used within similar works, and that do not belong to anyone, can be used freely without constituting copyright infringement. ‘The *scenes a faire* doctrine precludes certain elements that are standard, stock, or common in a particular category from copyright protection. These elements follow naturally from a work’s theme rather than from the author’s creativity’.⁶⁷ Products that cannot be created by everyone may given the title of works, and be worthy of copyright protection; however, if a product has such quality but can be created by anyone, characteristic is no longer relevant.⁶⁸ *Scenes a fair* are the elements that are common to the genre of the work and common knowledge is such a product that can be known or made by everyone, so neither have

⁶⁶ Öncü, p. 179.

⁶⁷ Paymaneh Parhami, "Williams V. Gaye: Blurring the Lines of Copyright Infringement in Music," *Berkeley Tech. LJ* 34 (2019), p. 1117-1118.

⁶⁸ Öncü, p. 84.

the specific features that one might consider characteristic to actually infringe. Furthermore, “Works in the “public domain” are not protected by copyright laws, which means that anyone can use the work without obtaining permission from the author or the author’s heirs.”⁶⁹ Works in the public domain mean that they have been released with the consent of the author to be used by public, or their protection period is ended and have been left for the general usage of the public. In this respect, works that are in public domain not protected by copyrights and can be benefitted from in effectively the same manner as common knowledge.

As mentioned, plagiarism is the act of benefiting from a work without acknowledging the author of the work. However, there is occasionally a degree of confusion as to the extent of the similarity between two given works; whether there is a substantial usage without citation, or there is a kind of similarity, the latter of which does not violate the citation system, should be clarified to determine the infringement, if any. When evaluating the similarity between two works, it is important to follow three steps: whether the work has been copied directly or indirectly should be determined; whether the copy falls within the scope of *scenes a faire* or not needs to be determined; and whether the copy exceeds the limit of inspiration, or not should be clarified. Following these steps is vital because one step may dispense the need to follow another. For example, if the copy is visible with the naked eye, it can be called as direct copy, and if there is no acknowledgement it could constitute plagiarism; further, if there is no exception to the copyright, it could also constitute copyright infringement without further investigation. However, in the case of indirect copies, the above determination is more complicated because whilst there are some similarities, whether these suggest copying or just coincidental resemblances should be examined on a case-by-case basis. In another case, if the similarities between two works seem to be within the scope of *scenes a faire*, it cannot be called infringement because no original work is used. If there are copies of original work that contain new additions it is important to differentiate whether they should be considered copies, adaptations, or inspiration in order to clarify the type of infringement. Inspiration differs from adaptation in terms of novelty. Öncü states that

⁶⁹ John Sample, "Copyright Law and the Correctional Educator," *Journal of Correctional Education* (1974-) 67, no. 2 (2016), p. 25.

in adaptations there is just limited amount of characteristic that is added to that of the original works, yet in free use some of the exploited work's particular elements are used as inspiration to create a new work.⁷⁰ Belgesay states that in the differentiation of adaptation and independent work, which constituted via inspiration, adaptation is the case if the utilisation of the work is apparent without hesitation; otherwise, it is called inspiration.⁷¹

Similarities between works have to be substantial in order to be considered copyright infringement. There are various ways to determine similarity, but in terms of literary and scientific works the extrinsic and intrinsic test may be considered most appropriate.

In determining whether two works are substantially similar, we employ a two-part analysis: an objective extrinsic test and a subjective intrinsic test.... The extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria.... The extrinsic test requires 'analytical dissection of a work and expert testimony.'.... 'Analytical dissection' requires the works "down into their constituent elements, and comparing those elements for proof of copying as measured by 'substantial similarity'".⁷²

There is no clear line describing inspiration and copy. Thus, after the first and second steps, detecting whether an indirect copy that does not fall within the scope of *scenes a faire*, whether it exceeds the limits of inspiration or not becomes a crucial step in the determination of copyright infringement.

There is a thin line between plagiarism and inspiration; if the beneficiary asserts that the similarities between works are the result of inspiration rather than copying another work, the determination of this line becomes crucial. Inspiration is defined as by benefitting from some parts of a work within a separate and independent work.⁷³ There are some considerable debates as to the exact criteria by which one might differentiate between copying and inspiration. Copyrights protect the ideas and forms of works, but the actual elements that are protected are debatable. Copyrights secure the embodied form of ideas that have characteristic, and characteristic has different

⁷⁰ Öncü, p. 230.

⁷¹ Filiz Ceritoğlu Sengel, *Fikir Ve Sanat Eserleri Hukukunda İntihal Ve Esinlenme*, 1. Baskı ed. (Ankara: Seçkin Yayıncılık, 2009), p. 131-132.

⁷² Lateef Mtima, "Copyright Infringement: Defining the Scope of Contemporary Copyright " *IP Litigator* (2020), p. 14.

⁷³ Sengel, p. 128.

meanings that vary according to works in question. For example, a painting of a tree can have characteristic not because of the original idea of a tree but because the representation of the tree is different from trees in other paintings; it may be because of the painting technique, the combination of colours, the style of the painter, etc. The important point is that characteristic may come from the form, not the idea itself. On the other hand, in terms of articles, books, and journals, ideas might have more characteristic than forms. For instance, without directly using the expressions within an intellectual work, some may copy the original idea independent from the form such as using original character of a novel, exact storyline, or original approach in a scientific document etc. Hence, determining which elements are protected by copyrights, what makes an intellectual work characteristic, and to what extent the form and idea are protected is indefinite, and needs further clarification.

For instance, a character, place or event in a novel might be original, and thus fall under copyright protection. Also, expressions in written works are protected, and in cases of copying expressions directly without citation, since the infringement is very apparent and easy to detect, there is no debate as to their protection under copyright. However, when it comes to indirect use of ideas, can ideas be protected alone? Copyright does not protect abstract ideas but those that have a material form, but ideas that are formed into tangible forms can be protected alone if the idea alone is original, or has characteristic in some respect. In the evaluation process whether the ideas alone have characteristic, not the criteria is indefinite as it is mentioned before. Although there are various standards suggested in the literature, the criterion usually differs in accordance with the case. In short, in some infringement cases, copyrights focus on protecting the form of works, and sometimes focus more on the ideas; the determining feature here is where the characteristic of the author represented. It would be unreasonable to expect all aspects of the work to be original. In this respect, Öncü states that, through the content or form of a work, it is enough to show something new that differs from what has been known hitherto.⁷⁴ Free exploitation by means of inspiration should be accepted in cases where the elements used in the new work are abstracted in such a way that, although recognisable, are no longer preserved but remain only as a contextual thought structure or a general form of

⁷⁴ Öncü, p. 85.

expression. In other words, the element used should no longer emerge as a characteristic element in the new work, but rather as an inspiration that has been reduced to a thought or a form of shaping.⁷⁵

According to the theory of fading, the work that is used for inspiration fades so much in the new work that the use that is now in the new work does not violate the rights of the owner of the original work. Also, there is no obligation to give a citation for using another work through inspiration. In other words, when a work is created through inspiration from another work, there is no need to report the owner of the original work, or the original work itself.⁷⁶

Inspiration is a legitimate way of benefiting from other works as for quotation. The illegitimate usage of works where neither citation nor inspiration is evident is the focus point of copyright infringement; thus, clarifying the limits of inspiration is essential. Öncü states that, while the use of previous works by means of inspiration is permitted only by taking inspiration from work without directly taking its elements, in case of quotation there is the obligation that the work or piece of work is taken as is, without changing it. In order to benefit from a work through inspiration, it is not necessary for that work to be public, unlike quotation. However, in order to be able to quote from another work, this work must at least have been publicised.⁷⁷

As can be seen, inspiration is a form of indirect copy of some original parts of other works, yet in a manner that does not stand out, and blends in with the particular form of the new work. Benefitting too much from another work cannot be accepted as inspiration so needs citation or would otherwise constitute plagiarism and copyright infringement.

4.1.1.3. The right to prevent changes to the work

The author has the exclusive right to determine any changes to their works. The transference of economic rights over the work does not include the right to change the original work if it is not precisely defined in the contract or permitted by the author. For example, if a naked mermaid in a painting from our earlier example has been clothed by another painter, this harms the right to prevent the changes to the

⁷⁵ Öncü, p. 234.

⁷⁶ Öncü, p. 239.

⁷⁷ Öncü, p. 238.

work.⁷⁸ In such instances, the author has the right to preserve the original work by preventing the changes made; thus, the author may ask for restitution from the court, or erase the author's name from the work if restitution is not possible; if it is possible, the author may demand that any infringement be prevented, or if not can claim indemnity for moral and economic damages.⁷⁹ However, changes due to the nature of the work can be excused. For instance, the conversion of a novel into a screenplay/movie may require certain changes as well as translations and adaptations. However, substantial changes cannot be made without the author's consent.

4.1.1.4. The right to reach the work

The transference of the moral rights over a work does not break all ties between the work and its author. The author has the right to reach the original work in terms of art works, or first editions of books and manuscripts if there is only one available, and if it does not represent too much inconvenience for the owner of the work. Art. 17 of LIAW determines the right to reach the work as follows:

Where necessary the author may, provided that the conditions for protection are fulfilled, demand the owner or possessor of the original to temporarily avail him of the original of works of fine arts listed... If the work exists in a single original form, the author may request the work for use in retrospective works and exhibitions covering all of his working periods, subject to conditions of protection and to be returned.

3.1.2. The Economic Rights

Art. 20 of LIAW describes economic rights as follows:

The right to exploit, in any manner or form, a work that has not yet been made public belongs exclusively to the author. The exclusive right granted to the author to exploit a work that has been made public consists of the rights stipulated as economic rights by this Law. Economic rights are independent of one another. The disposal and exercise of one does not affect the other.

As can be seen, the economic rights of the author are the subject of law when the work is presented to the public. The character of the economic rights is suitable for transference contracts. Thus, unless otherwise is stated, the author's economic rights remain even after their transference. However, which economic right is going to be

⁷⁸ Cahit Suluk, Rauf Karasu, and Nal, p. 84.

⁷⁹ Gökyayla, 154.

transferred should be specified within the contract because, as the law states, the disposal and exercise of one does not affect the others.

There are five economic rights available to the author, which are the rights of adaptation, reproduction, publication, representation, and broadcasting and public transmission. Infringements of copyrights can occur in different ways; one infringing action may violate various of the author's rights. Detecting infringements is important in terms of determining appropriate penalties and indemnities. Thus, economic rights will be examined in detail, and forms of infringement, which vary according to the types of the works, will be analysed in detail.

4.1.2.1. The right of adaptation

Art. 21 of LIAW notes the right of adaptation to be as follows: "The right to exploit a work by adapting it belongs exclusively to the author." Gökyayla defines adaptation as creating a new work, which is subordinated to the original work yet independent of it, by processing the work.⁸⁰ Since adaptation is independent work, the copyright protection covers the adaptation apart from the original work. Adaptation may appear as translations, transforming the work from one form to another, or making certain changes to the work. The right of adaptation belongs exclusively to its owner, yet can be transferred to other people. Transference contracts have to be specific about which rights are transferred and for how long, otherwise contracts that entail the transference of all rights are not valid in terms of LIAW. Gökyayla points out that the transferee, who takes over the right to translate a work from English to Turkish, cannot translate the work into another language. However, it should be accepted that the person who takes over the right to translate the work will have the right to publish the translation due to the nature of the transference. This applies to the case where an individual who has the right of adaptation of a novel into a play should also obtain the right of representation.⁸¹ The limits of adaptation have to be clear within the associated contract, and exceeding these limits constitutes copyright infringement. This right can even be violated by the author if the right is transferred; by transferees if they exceed the terms in the contract; and by individuals who can access the work. Moreover, the owner of the adaptation can use the economic rights over the adaptation to the extent permitted by the author. This issue is stated in Art.

⁸⁰ Gökyayla, p. 159.

⁸¹ Gökyayla, p. 161.

20/2 of LIAW as follows: “The author of an adaptation may exercise the economic rights granted to him in such capacity, to the extent permitted by the author of the original work, except the cases where adaptation is free.”

Adaptation certainly has some limitations, which are embodied in LIAW 17/2, “The owner of the original of a work may dispose of it according to the terms of the contract he has concluded with the author. However, he may not damage or destroy the work or prejudice the rights of the author.” The key to adaptation is not harming the author’s rights over the work; and conversion, translation, and changes made on the work should not reach the level of falsification or otherwise harm author’s reputation. In principle, owners of artistic work can make use of the work as they will; however, if the work is one of a kind, it cannot be damaged by cutting, burning, falsifying, as such; otherwise, this would be a violation of the author’s rights as provided by the above-mentioned article. The article prohibits damaging and/or destroying the work or diminishing the author’s rights over it, but which rights are specifically being referred to here is somewhat ambiguous. To give an opinion on this matter, it may be suggested that the probable right of share and lien, the author’s right to borrow the work in order to exhibit it in an exhibition that displays the author’s all time works for artistic works if only one copy exists, and also right to prevent changes to the work with respect to the dignitary interests of the author.

The right to change the original work is only possible with the specific consent of author, otherwise changing, adding, or removing anything constitutes an infringement of the author’s moral (moral) rights over the work. Falsifications of the work also harms the author’s reputation since the author is known through the work; thus, these kinds of violation can also be considered reputational harm, which is defined by Balganesch as:

Moral rights protection is in the form of the rights of integrity and attribution. A common feature of both rights is that they derive from the need to protect the author’s reputation. In essence, therefore, they are directed at reputational harm. Yet the reputational harm is fairly unique in that it is limited to the author’s reputation *as manifested in the work*. The integrity right focuses on protecting against a mutilation or distortion of the work in the recognition that this would impact the authorial reputation directly. The attribution right focuses on ensuring that a work is not wrongly attributed to the author, and that the right work is accurately attributed to the author, again with the recognition that attributions contrary to the author’s actions and intent do harm to authorial

reputation. And again, the principal focus of the attribution is through the work. This form of harm is therefore best characterized as “*in situ* reputational harm” and, while noneconomic in character, it is nevertheless circumscribed by the need for the harm to emanate from an action *to* the work at issue and not independently.⁸²

4.1.2.2. The right of reproduction

Article 22/2 of LIAW defines reproduction as follows:

The making of a second copy of the original of the work or the recording of the work on all types of devices now known or to be developed in the future enabling the transmission or repetition of signs, sounds and images, all kinds of sound and music recordings as well as the application of plans, projects and sketches of architectural works are deemed reproduction. The same provision shall apply to molds with relief or perforation. The right of reproduction also covers the acts of loading, displaying, running, transmitting and storing a computer program to the extent that such acts require the temporary reproduction of the computer program.

As can be understood from the article, reproduction of intellectual and artistic works may appear in different forms that differ in accordance with the work type. The violation of the right of reproduction harms the author’s economic rights, and sometimes moral rights. These kinds of harm, as caused by the unauthorised reproduction of the work, are described as ‘appropriative harm’.

The first, and most common, form of copyright harm emanates from acts of unauthorized copying and is best described as “appropriative harm.” Here, the harm ensues from the wrongful appropriation by the defendant of the plaintiff’s protected expression, which in turn produces either economic or noneconomic harm to the plaintiff. The economic harm is principally substitutionary in nature in that it interferes with the market for the original work and dissipates the creator’s revenue therein, while the noneconomic harm is associated with the idea that the appropriation is interfering with the creator’s ability to speak and is acting as a form of compelled speech. Since the right to prevent unauthorized copying is often seen as copyright’s core—or gatekeeper—right.⁸³

Reproduction of a work differs according to the type of the work. The reproduction of literary and scientific works, fine art works, musical works, and cinematographic works are different to each other. In order to provide a better understanding of the term ‘reproduction’ and the associated forms of infringement, the reproduction of literary and scientific works will first be explained, and then forms of infringements will be examined. Then, reproduction of musical works and forms of infringement will be explained. The reproduction of the works of fine art and associated forms of

⁸² Shyamkrishna Balganesesh, "Privative Copyright," *Vand. L. Rev.* 73 (2020), p. 10-11.

⁸³ Balganesesh, p. 10.

infringement will then be illustrated. Finally, the reproduction of cinematographic works and associated forms of infringement will be analysed.

4.1.2.2.1. The reproduction of literary and scientific works

Reproduction of literary and scientific works is the most common form of infringement, so shall be examined in detail. Literary and scientific works are divided into three categories: works that are formed by language and writing; dumb stage works; and technical and scientific works that are non-aesthetical. Since the reproduction and forms of infringement differ according to which of these three groups one considers, they will be examined in order.

Reproduction of works that are formed by language and writing: this category also includes computer programs and databases; however, this subject is beyond the scope of this thesis, so it will not be discussed further herein. Works that are formed by language and writing, such as books, novels, stories, journals, academic texts, etc., are reproduced in the same way. Reproductions of these works can be in form of printing or, for online sources, by saving documents/files to a hard disk. The work can be reproduced partially or as a whole. For example, taking photocopies of some parts of a book is partial reproduction of a work; photocopying the whole book is complete reproduction. Reproduction of a work can also appear in form that state the author's name, and do not state the author's name.

Partially reproduction of a work provides for the author's name to appear on the work (not against the citation system) and is included within the group of copyright exceptions which, as mentioned before, does not constitute copyright infringement. However, complete reproduction of a work, even though it includes reference to the author, without author's consent would constitute copyright infringement. There is only one exception to this, long quotations, even if this means benefitting from the whole work is permitted for the purposes of creating selected or collected works for educational purposes, as long as this does not harm the author's legitimate interests and does not exceed the limits of normal exploitation of the work. Complete reproduction of a work by stating the author's name is also known as 'piracy of works'

Partially reproduction of a work without stating the author's name constitutes the simultaneous infringement of both the moral rights of the author, which include the right to be known as the author, and the economic right of the author, which is right of reproduction. This kind of infringement can appear in two ways: partially reproducing the work in the name of the infringer, which is called 'plagiarism', or reproducing the work with someone else's name rather than the real author, or allowing the work to remain otherwise nameless. In both ways, these constitute copyright infringements of the moral and economic rights of the author. Also, complete reproduction of a work without stating the name of the author constitutes infringement to their moral and economic rights. Complete reproduction of the work without indicating the author's name can be done by anyone, but is usually performed by printers and publishers, that is, people who have access to the work. For these kinds of cases, this kind of link strongly indicates infringement of the right of reproduction and the right to be known as the author.

Reproduction of dumb stage works: the reproduction of dumb stage works can appear to be copying an artist's gestures and body moves within choreographs, dances, ice ballet, acrobatics, pantomime etc. in another work. However, dumb stage works are dependent on performers since the ideas and thoughts are not expressed in verbal or written forms but solely through the artist's gestures and body moves. Therefore, complete reproduction of dumb stage works is not quite possible. On the other hand, partial reproduction can occur when there is apparently too much resemblance and similarities between two works. Yet, in the course of determining whether there are too many similarities between two works, the standard between inspiration and infringement must be considered carefully. If similarities are present to the extent of the reproduction of the work, this would constitute infringement in terms of the moral and economic rights of the author, namely the right to be known as the author and the right of reproduction.

Technical and scientific works that are non-aesthetical: these types of works are mentioned in the art. 2 of LIAW as such,

All kinds of technical and scientific photographic works, all kinds of maps, plans, projects, sketches, drawings, geographical or topographical models and similar works, all kinds of architectural and urban designs and projects,

architectural models, industrial, environmental and theatrical designs and projects, lacking in aesthetic quality.

It is pointed out that in order to acknowledge an architectural work as having been reproduced, the plan, drawings, or project should be applied to a construction, and the construction should be completed⁸⁴ “In the plans or designs that own scientific and technical character only the *drawings* are protected; whereas in the designs that qualify as fine art work, the delineated, in other words the work that becomes concrete in the building, is protected.”⁸⁵ As can be seen, with the exceptions of technical and scientific drawings, works that are non-aesthetical are only protected by copyright if they are actualised within a definite appearance, since only then they accepted as having been reproduced. However, these works can be protected by copyright if they are intellectual products that carry the characteristic of its author. In terms of the reproduction of projects, Doğrul states that if the projects have been drawn with the technical knowledge required by the science of architecture, yet do not carry any personal or creative characteristics of the architect, they do not acquire the characteristic of a piece of intellectual work. Architectural projects that do not carry the characteristic of the architect and are merely the application of technical knowledge are not accepted as works with respect to Art. 2 of LIAW; thus, it is suggested that it is not possible for these projects and their architects to benefit from copyright protection.⁸⁶ Thus, ordinary architectural works are not protected by copyright, and unauthorised reproduction of technical and scientific works that are non-aesthetical but carry the characteristic of their authors constitute infringement to their economic rights, which is the right of reproduction. Moreover, Bozgeyik clarifies that independent of the contract between parties, the owner of the property does not have to apply the architectural project drawn by an architect, and the architect/author/owner of the work does not have the right to demand the application of the project. Therefore, non-application of the project does not constitute a legitimate reason to withdraw the contract, unlike with publishing contracts, for

⁸⁴ Gökyayla, p. 165.

⁸⁵ Cahit Suluk, and Yasemin Kenaroğlu, *Emerging Issues in Turkish Intellectual Property Law* (İstanbul: İstanbul Ticaret Odası Yayınları, 2011), p. 121.

⁸⁶ Gürhan Sefa Doğrul, “Mimarın Telif Hakkı” (Gazi Üniversitesi, 2013), p. 101.

instance.⁸⁷ In this respect, in terms of architectural works, not reproducing the architectural work does not constitute infringement as long as it is not against the terms of the associated contract.

4.1.2.2.2. Reproduction of musical works

Musical works comprise a wide variety of verbal and nonverbal compositions according to Art. 3 of LIAW. Musical works express contents through sounds and include symphonies, operas, operettas, songs, ballads, anthems, chants, etc.⁸⁸ The types of musical works are not limited by law, so the types listed above are just exemplary. Musical products are considered works if they have the characteristic of their authors, and the characteristic of musical works are determined according to the style of work, which means succession of sounds, sequence, and rhythm have characteristic.⁸⁹

Reproduction of musical works can occur in two ways: complete reproduction and partial reproduction. Complete reproduction constitutes piracy of the work, which occurs with the unauthorised reproduction of the work by stating the author's name on the work, and constitutes infringement of the right of reproduction.

Partial reproduction of a musical work means benefiting from some parts of a work to use it in another. This could also proceed by stating the name of the author, or not stating it. In some cases, LIAW allows one to benefit from musical works by referencing the author, which is called 'freedom of quotation', as mentioned previously, yet the application on musical works will be examined first. Secondly, the partial reproduction of musical works without stating the author's name will be elaborated upon in terms of inspiration and copy concepts, and evaluation standards.

Firstly, partial reproduction of musical works by stating the name of the author shall be examined. According to Art. 35 of LIAW, "Quotations of a work are permitted in the following cases: Incorporating certain elements of a published composition, at the most such as themes, patterns, passages or ideas, into an independent musical work", the quotation of musical works are allowed on the condition of referencing

⁸⁷ Hayri Bozgeyik, "Telif Hakları Bağlamında Mimarlık Sözleşmeleri," *Fikri Mülkiyet Hukuku Yılığ* (2013), p. 178.

⁸⁸ Engin Erdil, *Fikir Ve Sanat Eserleri Hukukunda İşlenme Eserler*, 1. Baskı ed. (İstanbul: Beta Yayınları, 2003), p. 26.

⁸⁹ Erdil, *Fikir Ve Sanat Eserleri Hukukunda İşlenme Eserler*, p. 27.

the author of the work. Thus, if the quotation exceeds the limits specified in this article, the author's right of reproduction would be considered to have been violated. Öncü points out those quotations of musical works are limited to parts of the composition from which they can be quoted, so they can only be short quotations. Music works cannot quote from other works, except for a composition. For example, a musical work cannot quote from a literary work.⁹⁰

Secondly, the partial reproduction of musical works without stating the author's name will be examined in terms of inspiration and copy concepts, and evaluation standards. Infringements of musical works in terms of reproduction are somewhat different from other kinds of works because the process of determining an infringement is complicated; the tools and criteria for evaluation are ambiguous because of the variety of musical works. Reproduction of musical works occurs when the similarities between two works are substantial. In the determination of infringements of musical works, any similarities should first be detected; then, common features/*scenes a faire* should be excluded; after that, whether the similarities are substantial or otherwise should be evaluated.

The similarities between musical works are generally detected by considering the lyrics, rhythm, harmony, etc. These elements should be similar to a copyrighted work to be considered as copy, where too much copying is referred to as improper appropriation.

When determining copyright infringement generally, courts require a showing of both copying and improper appropriation. Copying signifies that the work was copied from an existing copyrighted work rather than independently created. Improper appropriation indicates that the defendant copied too much protected expression; in other words, actionable copying as a legal proposition. In theory, each of these tests should constitute a separate stage of analysis. In *Arnstein v. Porter*, a musical infringement case, the Second Circuit described the tests for copyright infringement in a clear and systematic fashion. The court noted that only after copying is established, either by direct or circumstantial evidence, does the issue of improper appropriation arise. In practice, however, courts sometimes blend these two steps or use some of the same evidence to prove both copying and improper appropriation.⁹¹

As can be understood from the above passage, which is written about an American Court decision on *Arnstein v. Porter* case, works containing similar elements is indicative of copying, and too much copying of protected elements is indicative of

⁹⁰ Öncü, p. 75, 88.

⁹¹ Parhami, p. 1114-1115.

improper appropriation. Improper appropriation means that the copies in the work violate the copyright protection area beyond what the law permits. “Technically, infringement requires the plaintiff to demonstrate two simple facts: that the defendant copied expression, and that such copying resulted in the creation of a ‘substantially similar’ work.”⁹²

There is no proper way to determine the existence of a reproduction, which rather depends on expert reports and court evaluation. Yet, there is an approach that might be accepted as standard. Parhami points out that courts use both direct and circumstantial evidence in the determination of copying. After the use of direct evidence, if this proves insufficient to determine reproduction, courts will then generally accept circumstantial evidence as proof. Typical circumstantial evidence includes access (proven via wide dissemination or dealings with publishers or record companies), and substantial similarity (proven through melodic, harmonic, and rhythmic similarities, and parallel musical errors).⁹³

Detecting copying and its extent are crucial to the determination of improper appropriation because the similarity between works must be substantial in order to be accepted as infringement, and which can only be determined through the copied elements. There are several tests that are suggested by scholars to determine substantial similarity within a copy, and these can be chosen by the courts in accordance with the case. To illustrate:

In musical infringement cases, courts typically apply the protected expression and audience tests to determine improper appropriation. The protected expression test requires the plaintiff to show that at least some of the elements that the defendant copied constitute protected subject matter. To determine protected expression, courts must usually first dissect the plaintiff’s composition to determine which elements are protectable by copyright law, and then dissect the defendant’s work to determine which of the plaintiff’s protected elements it copied. Courts essentially take a qualitative approach to determining protected subject matter, as they consistently reject quantitative approaches such as the “six bar rule” that reflects some musicians’ apparent belief that any phrase less than six bars long can be copied by others. Courts usually focus heavily on melody, since it offers the greatest potential for originality and memorability, although they have sometimes protected rhythm, harmony, and tone colour as well.⁹⁴

⁹² Patrick R Goold, "Unbundling the Tort of Copyright Infringement," *Va. L. Rev.* 102 (2016), p. 1836.

⁹³ Parhami, p. 1116.

⁹⁴ Parhami, p. 1116.

There are two tests that are typically used to detect similarities between musical works: the extrinsic test and the intrinsic test. As to which test should be used for the assessment, this is decided by the courts in accordance with the particulars of the case. In Turkey, this determination is usually made by expertise, and it is not clear which tests these expertise uses, but these tests and standards seem to be applicable in Turkey as well. Even though extrinsic and intrinsic tests were mentioned previously, a reminder of such would be helpful here.

In determining whether two works are substantially similar, we employ a two-part analysis: an objective extrinsic test and a subjective intrinsic test.... The extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria....The extrinsic test requires ‘analytical dissection of a work and expert testimony.’....‘Analytical dissection’ requires the works “down into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’”⁹⁵

After the detection of any similarities, the common elements, the *scenes a faire*, are excluded in order to decide whether the remaining similarities are substantial or otherwise. The *Scenes a faire* concept is mentioned before, yet it can be summarised as common elements in works that can be created by anyone and do not carry any characteristic of their author. Using these elements within musical works does not constitute infringement since they are not protected by copyright. Therefore, substantial similarities between works must be determined subsequent to excluding such elements.

In order for similarities to constitute improper appropriation, they must be substantial. Determination of substantial similarities in musical works is more difficult in comparison to other types of works since some tests do not properly show the similarities. For instance, in a case between *Skidmore v. Led Zeppelin* the American Court has made a very appropriate assessment about the evaluation criteria for substantial similarity and the extrinsic test that could be exemplary for musical infringement cases in Turkey as well. The extrinsic test is understood to be an objective analysis of musical works by comparing the numerical representations of pitch sequences and visual representations of notes without regard for other elements

⁹⁵ Mtima, p. 14.

of the compositions. However, is the fact has been discussed that no approach can completely neglect pitch sequence and rhythm from harmonic chord progression, tempo, and key.⁹⁶ The court in this case argued the idea that the extrinsic test is superficial for the assessment of musical works, and later it suggested the intrinsic test for this evaluation.

With respect to the extrinsic assessment of the presence of protectable elements, the Court observed that “In the musical context, the extrinsic test can be difficult to administer....Although individual elements of a song, such as notes or a scale, may not be protectable, ‘music is comprised of a large array of elements, some combination of which is protectable by copyright.’” Noting that copyright protection can extend to “a sufficiently original combination of otherwise non-protectable music elements”, the Court concluded that the district court had failed to properly instruct the jury on this point, particularly in as much as plaintiff’s expert had testified that “there was extrinsic substantial similarity based on the combination of five elements—some of which were protectable and some of which were in the public domain.”⁹⁷

As it can be seen from the above quote, the court supported the use of the intrinsic test for evaluation by audiences and also suggested that notification about the extrinsic similarities may falsely direct the audience so extrinsic similarities should be disregarded for this case. Musical works are more than the elements they contain, but the unique composition of these elements, just focusing on extrinsic similarities, does not seem appropriate for musical infringement cases.

4.1.2.2.3. Reproduction of works of fine art

Works of fine art are mentioned in art. 4 of LIAW; even though the law numbers the possible types of art works, it is suggested that art works are not limited to those mentioned in law. Works that carry aesthetic value and are characteristic of their author are acknowledged as works of fine art. The reproduction of art works vary according to the nature of the work. Thus, it would be helpful to categorise fine art works and examine the aspects of any reproduction in detail. Ateş divides works of fine arts into four categories, which are 1- pure fine art works, 2- architectural works, 3- applied art works, and 4- photographic art works.⁹⁸

Reproduction of pure fine art works: Art. 4 of LIAW mentions art works, where works considered to lie within the first and second clause can be accepted as pure fine art works, which are “oil paintings or water colours, all types of drawings,

⁹⁶ Mtima, p. 14-15.

⁹⁷ Mtima, p. 20.

⁹⁸ Ateş, p. 26.

patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing; Sculptures, reliefs and carvings.” The reproduction of these works cannot be a complete reproduction due to the nature of the work. These works are formed by artists; they carry the characteristic of their authors, and can only be reproduced by their author. Even if there are attempts to reproduce pure art works, they can never be considered a reproduction of the original work but are rather mere imitations. Thus, imitations of complete works or parts of works such as ideas, colours, contrasts, etc., are not particularly different from reproductions, differing only in terms of the moral right of the author, namely the right to be known as authors.

Reproduction of architectural works: Architectural works are every kind of construction and building made by human hand. Architectural works can be shaped as buildings, fountains, walls, bridges, and even pools. Architectural works can be functional, but this is not a prerequisite to be considered as a work.⁹⁹ Architectural works that acquire aesthetic value and the characteristic of their authors are protected as fine art works by Art. 4 of LIAW, which mentions architectural works under the title works of fine arts as follows: “Art. 4. Works of fine arts are the following works, which have aesthetic value: ... 3. Architectural works.” The reason for referring to architectural works in different articles is to distinguish those architectural works that carry aesthetic value from works that carry technical value. It is important to classify the architectural work’s dominant character, i.e., whether it is technical or aesthetical, in order to determine the type of infringement and the scope of any associated protection. According to Erdil, to protect an architectural work in the sense of Art. 4 as a work of fine art, the architectural work must be an intellectual work, which has both characteristic and aesthetic value. On the other hand, architectural plans, projects, designs and models that are not artistic works are protected by Art. 2 because of their non-aesthetical character.¹⁰⁰ For instance, if a building is raised by application of an architectural project without the permission of the author, according to Suluk, two possibilities arise: first, the aesthetic character of the building dominates its functional character, which constitutes copyright

⁹⁹ Ateş, p. 26.

¹⁰⁰ Erdil, *Fikir Ve Sanat Eserleri Hukukunda İşlenme Eserler*, p. 31.

infringement; and second, the functional character is dominant or the building does not have any aesthetical value, in which case this would not constitute copyright infringement in the sense of Art. 4.¹⁰¹ The reproduction of architectural works, as mentioned before, is only possible if the plans of the architectural works are actualised in a building; therefore, the conditions such as the aesthetic value of the work, or carrying the characteristic of the author can be sought after the determination of the reproduction to clarify whether the work lies within the scope of Art. 2 or Art. 4. In this sense, the first possibility mentioned in the example constitutes copyright infringement in terms of Art. 4 because it is accepted as a reproduction of an architectural work and it has aesthetic value.

Applications of architectural works that are acknowledged to be fine art works may violate authors' copyrights in terms of being unauthorised reproductions, as mentioned, inappropriate applications, or otherwise considered tampering with the work. Changes to the work should only be undertaken with the permission of the author, so inappropriate applications and tampering constitute copyright infringements with respect to an author's moral right, which is the right to prevent changes to the work. On the other hand, unauthorised reproduction of architectural work is a violation of the author's right of disclosure, if it is reproduced from a architecture plan, and a violation to the right of reproduction, which is an economic right, since it does not have the author's consent.

Reproduction of applied art works: These are works whose functional values have priority over their aesthetic values, or serve other artistic products. Internal design, pottery, glasswork, etc., are all within this group as well as handicrafts, minor works of art, miniatures and works of ornamentation, decorations, textile, and fashion design. The use of sketches, drawings, models, designs and similar works, which have aesthetical value, as industrial designs does not affect their status as intellectual and artistic works; in practice this is referred to as 'cumulative protection' ¹⁰²

¹⁰¹ Cahit Suluk, and Yasemin Kenaroğlu, *Emerging Issues in Turkish Intellectual Property Law* (İstanbul: İstanbul Ticaret Odası Yayınları, (2011), p. 121-122.

¹⁰² Ateş, p. 27.

Reproduction of photographic art works: Photographic works are created using a camera as operated by an individual. Photographs reflect the present image in just the same manner. Photographic works and slides that carry aesthetic value are acknowledged to be fine art works.¹⁰³ In this respect, not every photograph is accepted as work; those that have aesthetic value and carry the characteristic of its author are protected by copyright. However, in the United States and in many countries, all photos are accepted works and protected by copyrights as soon as it they are taken, regardless of the characteristic condition.

Photographs easily fulfill the statutory requirements for a copyrightable work as original works of authorship that are fixed, either physically or digitally, at the moment of capture. Copyright protection has extended to photographs since the late nineteenth century. Photographs garner copyright protection in the moment that the image is captured by a camera because when a photograph is taken, the image becomes immediately fixed in the tangible medium of either film or digital storage. This copyright protection endows the owner with exclusive rights over copies and derivative works of the image.¹⁰⁴

Unlike the US, in Turkey not every photograph is accepted as a work, yet what makes a photograph an artistic work is not determined by law; any actual determination is left to the courts and appropriate expertise. The protection of photographs is important in terms of online infringements, especially via social media, which come under the title of online infringements in detail.

Reproduction of photographic art works can appear as unauthorised copies of the work; these may, or may not, include the name of the author. If the unauthorised copy of the work does not include the name of the author, it constitutes infringement of the author's moral right, which is the right to be known as the author, and the author's economic right, which is the right of reproduction; if the unauthorised reproduction does include the name of the author, it only constitutes infringement of the right of reproduction.

4.1.2.2.4. Reproduction of cinematographic works

As in all intellectual and artistic works, cinematographic works also needs to carry the characteristic of their author in order to be considered as such. According to Erdil, characteristic in cinematographic works can be sought through two criteria, namely the general criterion and the particular criterion. In terms of the general

¹⁰³ Ateş, p. 27.

¹⁰⁴ Tao, p. 621.

criterion, techniques that are indigenous to the art of cinema such as scenario, light order, colour scheme, direction and camera works, filming plans, etc., should be used in accordance with the author's characteristic taste. As for the particular criterion, films should reflect the features of the genre that the work belongs to.¹⁰⁵ In short, cinematographic works are protected if they represent the characteristics of cinema works and are constructed with cinema techniques.

Cinematographic works are counted in Art. 5 of LIAW, which include movies, films, recordings, TV series, and although there are some debates on the issue, TV programme formats are also accepted as cinematographic works. The law mentions those works that are protected by copyrights, yet the variations of subtitles are left open to prevent any loss in the sense of copyright. In this sense internet broadcasts also accounted as cinematographic works to the extent that comply with television broadcasts due to the similar character with works of cinema and usage of similar operation.¹⁰⁶ Similarly, TV programme formats even though they are not explicitly mentioned within the law, it can be seen from the Civil Court of Cassation verdicts that they are acknowledged to be cinematographic works because of their similar character.

TV programme formats are not defined in law, but are recognised by the Civil Court of Cassation through the '*Televole*' case, where it is expressed that television programme formats shall be protected by copyright according to Art. 5 of LIAW as cinematographic works, but the definition, features, or details of the protection are not specified within the decision.¹⁰⁷ Television programme formats are defined by Suluk as a basic structure that contains the characteristics of a television programme, the contents of which can be recognised by an audience, has a style, and can be filled in differently in each part of the programme.¹⁰⁸ Tosun, on the other hand, provides a detailed definition to explain the characteristics of television program formats as being sketches that show the programme's name, number of episodes, subject,

¹⁰⁵Erdil, Fikir Ve Sanat Eserleri Hukukunda İşlenme Eserler, p. 35.

¹⁰⁶ Ateş, 2007, p. 277.

¹⁰⁷ Cahit Suluk, and Yasemin Kenaroğlu, *Emerging Issues in Turkish Intellectual Property Law* (İstanbul: İstanbul Ticaret Odası Yayınları, 2011)", p. 128.

¹⁰⁸Cahit Suluk, and Yasemin Kenaroğlu, *Emerging Issues in Turkish Intellectual Property Law* (İstanbul: İstanbul Ticaret Odası Yayınları, 2011), p. 109.

content, technical matter, and transmission method in a detailed manner via written, visual, or auditory elements.¹⁰⁹

The biggest obstacle to television programme formats being accepted as works is because they are characterised as abstract ideas, and abstract ideas are not protected by copyright in any of today's regulations. However, television programme formats do not have the kind of simple structure that they can be seen as merely abstract ideas. Also, in the process of constituting programme formats, abstract ideas get concrete appearances that are protected by copyright.¹¹⁰ The point at which abstract ideas constitute concrete appearances is a somewhat controversial issue. To illustrate, the Civil Court of Cassation's decision on a particular case shall be examined, which is about a TV programme format that applied to three episodes, and debated whether these could be accepted as works or otherwise. In principle, in order to gain royalty, the work has to be completed and delivered. However, if it fulfils certain other conditions, namely being in a concrete form and carrying its author's characteristic, even if it is not published, the format can be acknowledged as work; so, the assertions of copyrights and royalties in this case were found to be plausible.¹¹¹ This example indicates that the television program formats should have some sort of application in order not to be abstract ideas. On the other hand, in another court decision, the format itself was acknowledged as a work. In this case, the plaintiff claimed that they had prepared and delivered four programme formats, and the channel had advertised them, so the plaintiff was asking for royalties. In this case, even though the programme has never released, the court decided that is the programme constituted a work by considering Arts. 5 and 13 of LIAW¹¹²

Reproduction of cinematographic works are all the same for movies, films, TV programme formats, etc., which can be appear in two ways; first, complete or partial unauthorised reproduction of cinematographic works by stating the author's name; and second, unauthorised usage of elements of cinematographic works without stating the author's name. The first form of infringement is usually found in the form

¹⁰⁹ Tuğçe Karabağ, "Fikir Ve Sanat Eserleri Hukuku Açısından Televizyon Programları Ve Özellikle Televizyon Program Formatları" (İstanbul Bilgi Üniversitesi, 2012), p.30.

¹¹⁰ Mustafa Arıkan, *Fikri Mülkiyet Hukukunda Televizyon Program Formatlarının Korunması*, 1. Baskı ed. (İstanbul: XII Levha Yayıncılık, 2012), p. 173-175.

¹¹¹ Arıkan, p. 33.

¹¹² Arıkan, p. 34.

of piracy of the work, which is a violation of the right of reproduction. In terms of the second form of infringement, the extent of usage determines the line between reproduction and *scenes a faire*.

Copyrights protect the original elements within the cinematographic works, so unauthorised usage of those elements is prohibited. However, in the determination of copying, unprotectable elements must be eliminated first, and then any substantial similarities between works determined. What is being referred to by the term ‘unprotectable elements’ are common elements/*scenes a faire* which can be seen in similar kinds of works. For example, in a spy movie, there should be spies, plots, betrayals, action scenes, similar characters, places, and weapons. These elements cannot be protected alone. However, as Mtima noted, “Specific combinations of unprotectable elements may be copyrightable provided that the elements combined are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”¹¹³ After detection of similar elements that are protectable, the determination as to whether these elements are substantially similar or otherwise is crucial in terms of infringement since similarities at the level of inspiration do not constitute infringement. “Under this approach, a finding of substantial similarity can be based on a comparison of specific elements and also on a comparison of the overall “look and feel” of the two works.”¹¹⁴

Generally, an allegedly infringing work is considered substantially similar to a copyrighted work if ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’.... ‘What must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation.’¹¹⁵

After the exclusion of common elements, if the similarities between cinematographic works are substantial, this would constitute copyright infringement in terms of the right of reproduction.

4.1.2.3. The right of publication/distribution

Art. 23 of LIAW states:

The exclusive right to rent, lend, put up for sale or distribute in any other way, the original or copies of a work, belongs to the author.

¹¹³ Mtima, p. 12.

¹¹⁴ Mtima, p. 13.

¹¹⁵ Mtima, p. 13-14.

The author has the exclusive right to import copies of a work that have been reproduced abroad with his permission and to exploit such works by distribution. Copies that are reproduced abroad may not under any circumstances be imported without the permission of the author and/or the holder of the right of distribution who has the author's permission. Provided that the authorities of rental and public lending remain with the author, the resale of specific copies following their first sale or distribution within the country by way of transfer of ownership as a result of the exercise of the distribution right by the right holder shall not infringe the right of distribution granted to the author.

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

“It is noted that the term ‘publication’ is defined as the distribution of copies of a work to the public by sale or other transfer of ownership.”¹¹⁶ Also, as seen from this article, even though the right of distribution comes to an end when it is transferred, the renting and lending of the work or its copies constitutes an exception since these rights remain with the author after the transference of the right of publication unless otherwise specifically expressed within the transference contract. Suluk expresses this issue as the right to release original or copies of a work in any way belongs to its author. The releasing action may occur in the form of sale, rent, or loan, but is not limited to these. The person who buys the work or its copy cannot rent or lend the work without the permission of the author.¹¹⁷ Therefore, transferring the right of publication does not comprise the right of renting and lending, unless specifically stated within the contract. The author's right to rent and lend remains after the transfer of the right of publication, and the author's right to publication comes to an end if not otherwise provided for specifically within the contract; thus, the transferee can resell this right to other people without the need for the consent of the author.¹¹⁸ Moreover, hiring and lending concepts needs to be clarified to provide a better understanding on infringement types of these rights. Suluk states that renting is the release of copies of a work for a third party's usage for a limited period of time and for a certain fee. As for lending, on the other hand, this is the giving of something to someone else for a limited period of time with no fee. In terms of copyright law, the

¹¹⁶ Corinne Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press, 2018), p. 40.

¹¹⁷ Cahit Suluk, Rauf Karasu, and Nal, p. 91-92.

¹¹⁸ Erdil, *Fikri Mülkiyet Hukuku*, p. 49.

concept of lending is understood as lending to the public, such as libraries lending books to readers; and personal lending is free.¹¹⁹ Also, as mentioned in the article, renting or lending should not exceed its purpose, and lead to widespread copying of the work such as to violate the right of reproduction.

Infringement of the right of publication can appear in three forms that are, first, unauthorised publication of the work; second, exceeding the limit of the contract; and third, publication of the work without *banderol*.

Unauthorised publication of the work: This can occur when selling, hiring, lending, or distributing the work without the consent of the author and/or rights holders. This kind of infringement also may combine with other infringement types such as the publication of unauthorised copies, which violates both the right of reproduction and the right of publication at the same time. Also, if the work has not been previously released, publication of the work constitutes infringement of the right of publication, reproduction, and disclosure. Balganesch calls the damages caused by this kind of act ‘disseminative harm’, which is an assault on the economic and dignitary interests of the author. Dissemination of a work before its disclosure violates both the right of disclosure and publication. “An unauthorized dissemination can, however, do much more damage than just economic harm. In some situations, the dissemination is harmful not for its economic effects, but instead because of its interference with an author’s unique dignitary interest.”¹²⁰

Privative claims attempt to redress a form of noneconomic copyright harm that is routinely ignored in modern discussions of copyright law—disseminative harm—and they do so primarily through the distribution right, and on occasion via the display right, even though they often implicate other rights. Disseminative harm is authorial in its roots and emerges from the strong dignitary interest that the creator has in the work. And while the claim is strongest for unpublished works, it by no means is limited to that category, except that the nature of the harm (and the corresponding interest) gets significantly attenuated when the author has voluntarily relinquished control over the work through publication or public distribution.¹²¹

Privative claims are intended to redress non-economic copyright harm, which is also called disseminative harm. In the violation of the right of disclosure, which is a

¹¹⁹ Cahit Suluk, Rauf Karasu, and Nal, p. 92.

¹²⁰ Balganesch, p. 11.

¹²¹ Balganesch, p. 16.

moral right of the author, copyright claims can result effectively, but in terms of publication of personal works, the protection mechanism is somewhat more ambiguous. Publishing letters, memoirs, and similar articles that are not made public by the author would be considered a violation of personal rights under 5237 numbered Turkish Criminal Code (TCC)¹²². It should be accepted that presenting the reproduced copies of letters, memoirs, and similar writings to the public in any way, including publication, is prohibited by TCC and LIAW¹²³ Article 85 of LIAW expresses this issue as follows:

Even if they do not qualify as works, letters, memoirs and similar writings may not be published without the consent of their authors or, in case of their death, without the consent of the persons referred to in the first paragraph of Article 19; consent shall not be necessary once ten years have elapsed after the death of the author.

In addition to the conditions prescribed in the first paragraph, letters may not be published without the consent of the addressee or, in case of his death, without the consent of the persons referred to in the first paragraph of Article 19; consent shall not be necessary once ten years have elapsed after the death of the addressee.

The law also mentions unauthorised disclosure and publication of pictures and portraits that do not qualify as works, and again restricts such action.

Art. 86- Even if they do not qualify as works, pictures and portraits may not be exhibited or disclosed to the public in any other way without the consent of the person depicted in such picture or portrait or, in case of his death, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed after the death of the person depicted.

These kinds of personal works are not accepted as ‘work’ in the sense of copyrights, yet are still mentioned in LIAW. The important question here is why disclosure and publication of letters, memoirs, pictures, and portraits is restricted by LIAW, even though they are not acknowledged as works. Disclosure of personal works constitutes a violation of personal rights, which are protected under provisions of TCO. Although LIAW forbids these works to be disclosed or published, it does not suggest what kind of action should be taken in such situations. Provisions in TCL can certainly be applied to these cases since such an action is a violation of personal rights, but it comes to mind that it is possible that the law paves the way for copyright protection, which is privative claim in this case, in order to protect the

¹²² Türk Ceza Kanunu (TCK), *Resmi Gazete* 25611 (12 Ekim 2004), Kanun No: 5237.

¹²³ Öncü, p. 103-104.

author and the rights holders with more suitable provisions. Privative action actually aims to protect the dignitary interest of right holders through copyright protection. “Privative action is criticised by scholars since dignitary interests can be protected through the law of privacy specifically through privacy torts”¹²⁴ Although each argument has its merits, it is reasonable to think that the law regulates this issue within LIAW for some reason, and this might be for the purpose of enabling privative claims. Also, the issue will be examined under the title indemnity claims specifically in moral indemnity, and it is seen that in case of violation of personal rights by infringement, the author may claim moral compensation either by the general provisions in TCO or the provisions of LIAW.

Exceeding the limit of the contract: The right of publication can be transferred to third persons with or without other copyrights. When this right is transferred, there might be specific clauses that specify the publication place, time, amount, etc. If there are such clauses within the contract, publications that are not in accordance with these terms exceed the limit of the contract, and such action constitutes copyright infringement in terms of the right of publication.

With respect to the place of publication, if the publication of the work happens to be outside the place specified in the contract, this constitutes infringement. For example, the right of publication may be transferred with a condition that limits the place of distribution to that of a country, region, or even a city. Neither the author nor transferee can publicise the work anywhere other than the place stated in the contract, i.e., this contractual liability binds both sides; thus, contradictions of contractual liabilities by the author or right holders constitute copyright infringement. If there is no certain limitation specified in the contract, the transference contract shall be read with strict construction which leads to the conclusion that contracts do not provide broad authority to publicise a work worldwide; therefore, if the author wants to publish the work in other countries, this would not be a contractual violation; yet publication of the work in other countries by the right holders without the author’s consent constitutes a violation of the right of publication of the author.

¹²⁴ Balganes, p. 21.

With respect to time of publication, if the publication of the work happens to be outside the timeframe stipulated in the contract, this constitutes infringement. If there is a specific time given for the publication of the work, early or late publication violates the author's right. Moreover, even if there is no specified timeframe for the publication of the work, late publication may harm the author's moral and economic interests; thus, the author might claim for the exercise of publication, compensation for late application, or withdrawal of the contract and negative compensation.

Reproduction of the work without banderol: According to Art. 81/1 of LIAW:

It is compulsory to affix banderols on the reproduced copies of musical and cinematographic works and on non-periodical publications. It is also compulsory, upon the request of the author or right holder, to affix banderols on the reproduced copies of other works that can be easily copied. Banderols shall be printed and sold by the Ministry. Banderols may also be sold through the agency of the collecting societies at the sale price determined by the Ministry.

Since banderols are compulsory, original works that do not acquire banderol violate copyrights in terms of the right of reproduction. This infringement can be caused by authors, right holders, or people who make unauthorised copies of the work.

4.1.2.4. The right of representation

The right of representation, or to say as per the law, the right of performance, is defined in Art. 24 of LIAW as:

The right to exploit a work by performing it in such ways as reciting, playing, acting or displaying it on public premises either directly or by means of devices enabling the transmission of signs, sounds or images belongs exclusively to the author. The right to transmit the performance, from the premises where the performance to the public took place to any other location by means of a technical device also belongs to the author.

The representation of a work provides only for the temporary opportunity for exploitation to the public.¹²⁵ The right of representation can be divided into two subcategories: direct representation, and indirect representation. The main divergence between these two types lies in the usage of devices. Performances, such as concerts, plays, exhibitions, etc., take place in front of a certain crowd, but sometimes it is transmitted via devices. Hence, the live performance is acknowledged to represent direct representation, and the representation of the live performance

¹²⁵ Erdil, *Fikri Mülkiyet Hukuku*, p. 51.

through devices located in other places is referred to as indirect representation. It is stated that the distinction between direct and indirect representation is mostly of importance with regard to the transference of the right. Unless otherwise specified, the transference of the right of representation includes only direct representation.¹²⁶ Furthermore, indirect representation shows some similarities to public transmission. Representation of works differs from public transmission in terms of the concepts of perception and accession. According to Suluk, the right of representation enables the work to be perceived by the public, and the right of public transmission enables the work to reach to the public. For example, playing a CD in a café is indirect representation since it can be perceived only by the people in the café, yet playing it on the radio constitutes public transmission since it reaches the public and can be perceived by anyone within the broadcast area.¹²⁷

As for the copyright infringement of the right of representation, this can occur in the form of unauthorised representation of plays on the stage, playing music and songs at concerts, exhibition of paintings or photographs, or the first reading of a book to a small group, showing certain parts of a cinematographic work to a certain crowd, etc. In principle, unauthorised representation is an infringement, but it is acceptable in some cases. For example, Erel remarks that people can listen to or watch a work published by means of radio, television, or the internet in their personal environment for free, yet republishing or transmitting this publication would constitute an infringement of copyright. However, in Turkey, such actions are accepted if there is no purpose to gain profit from such. If the representation is subject to a fee, it is prohibited¹²⁸, and constitutes copyright infringement. For example, playing Turkish pop songs through speakers in a hotel, restaurant, or some such similar place is accepted in practice.¹²⁹ Briefly, watching or listening to a radio or TV broadcasts in an environment that does not seek gain does not constitute infringement in terms of the right of broadcasting or representation.¹³⁰ The representation of a work can be made by means of direct or indirect representation, yet the important point in the representation is staying within personal domain rather than public premise, aims for

¹²⁶ Cahit Suluk, Rauf Karasu, and Nal, p. 96.

¹²⁷ Cahit Suluk, Rauf Karasu, and Nal, p. 96.

¹²⁸ Şafak N. Erel, *Türk Fikir Ve Sanat Eserleri Hukuku* (Ankara: Yetkin Yayıncılık, 2009), p. 184.

¹²⁹ Çiğdem Kaymaz, "Tiyatro Ve Telif Hakkı" (Haliç Üniversitesi, 2017), p. 67.

¹³⁰ Yunus, p. 126.

personal usage and not taking charge for representation.¹³¹ On the other hand, in case of a performance of musical work of a composer by the singer/artist being conducted without permission, the composer may prevent the singer from using his songs by having the courts take action since there has been no permission to do so from the author, constituting a violation to the right of representation.¹³² This kind of action constitutes infringement mainly because it is not conducted within personal domain but represented in public sphere. Briefly, as Ateş pointed out representation of works for the purpose of personal usage and exercised within personal domain within any charge does not constitute infringement.

4.1.2.5. The right of broadcasting and public transmission

It mentioned in Art. 25 of LIAW as such,

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

The author has the right to permit or prohibit the sale or other distribution or supply of the work or its reproduced copies to the public by wire or wireless devices and the communication of the work to the public by providing access to it at a time and place chosen by natural persons. The distribution and supply of works by means of communication to the public as regulated under this article shall not prejudice the author's right of distribution.

This article clearly states that the right of public transmission and broadcasting belongs exclusively to the author of the work, so they have the right to permit or prohibit usage of the work in that manner. However, there are some exceptions mentioned under the title of right of reproduction that benefiting from the work by means of news, and for educational and scientific purposes are permitted by law. The second clause of this article mentions these exceptions and states that these kinds of usage should not be to an extent that harms the right of distribution/publication. The limits of the usage of the right of broadcasting and public transmission also expressed in the Bern Convention Art. 11(bis) as, "They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by

¹³¹ Ateş, M. (2003). *Fikir ve Sanat Eserleri Üzerindeki Hakların Kapsamı ve Sınırlandırılması*. Ankara: Seçkin Yayınları, p. 429.

¹³² Gürsel Öngören, "Müzik Eseri Sahiplerinin Manevi Hakları," *Legal FSHD*, S 100 (2009), p. 31-32.

competent authority.” From this clause, it is understood that the usufruct of the rights shall not harm moral rights of the author, such as dignitary interest. Also, some payment should be made for the unauthorised usage to compensate the economic interests of the author. LIAW is regulated in accordance with this article in terms of infringements and protection of the author’s moral and economic rights, and which now need to be examined.

With respect to infringements of the rights of public transmission and broadcasting, this occurs when these rights are exercised without the consent of the author and/or right holders. Öngören points out that broadcasting a musical work on a channel, radio, or television programme, and its transmission on the internet without the consent of the author, if not included as exceptions to “notifying” in law, will constitute a violation of the author’s right of transmission and broadcasting; furthermore, if the real author’s name is concealed or the work is falsified, this would additionally violate the author’s moral rights.¹³³ In studies dealing with the legal dimension of benefiting from intellectual and artistic works on a virtual platform, it can be seen that a work that is placed in computer memory or storage without the permission of the owner and made available for public use, widely presented to the public through a website, copying a website that is a compilation work and transferring it to another website, are described as copyright violations. When the subject is considered from a technical point of view, saving a work included on a website without the permission of the owner of the work, taking a print of a work with a printer, even entering the website where the work is presented to the public without permission while surfing on the internet, and displaying the work in question on the computer screen temporarily, can be considered infringements. On the other hand, in disputes before the English and American courts, it is noteworthy that the party confronting the author is not the end user, but the "service provider" who enabled access to this virtual environment.¹³⁴

Infringements of the right of broadcasting and public transmission have a distinct problem with regard to the determination of the place of infringement and the exact law to be applied. There are various debates as to the determination of the place of

¹³³ Öngören, p. 28.

¹³⁴ Şebnem Akipek, and Esra Dardağan, "Sanal Ortamda Gerçekleşen Telif Hakkı İhlallerine Uygulanacak Hukuk," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 50, no. 3 (2001), p. 120.

violation. The important notion here is that of transmission; the country that makes the initial broadcast and those that receive the transmission can be different, so which country's law would be applied is a somewhat controversial issue. In terms of broadcasting through cable/wire, the principle of source country could be admissible, but for transmissions via satellite, the issue is debateable. The German courts accept the source country principle; on the other hand, for the supporters of Bogsch theory, the broadcasted countries' laws should be applicable.¹³⁵

The argument appears because of the difficulty in exercising this right. The violation may occur in different places because there might be several servers in different countries that violate the right of public transmission and broadcasting, and in order to terminate the violation, there should be initiations in each country that houses the services. For instance, there may be a work that is presented on a channel that has been broadcast via satellite, and there might be several servers that support the broadcast. If the principle of the source country is embraced, the author or the right holders should find out which server supports the channel for the broadcast and take legal action in the place in which the server is located. However, it may be extremely inconvenient to the author to prevent such infringements in a piecemeal manner, and hence the authors may need to take legal action in other countries to protect their copyrights, in other words, in locations where the author is unlikely to be aware of the particular legal system in question. Therefore, the adoption of these two approaches severely affects the ability to exercise the right.

Although Bogsch theory is more convenient for the author, in compliance with the principle of territoriality, the place of infringement should be accepted as the competent court since the nature of the right of public transmission and broadcasting indicates that infringement occurs when the transmission takes place, not when it is received, and hence the place of transmission should be accepted as the place of infringement. Furthermore, in terms of the law that will be applied to the infringements, this is determined by the rules of International Private Law in the place of infringement.

The right of public transmission, which provides access to real persons to reach the work at any time or place they wish, belongs exclusively to the author. Being able to

¹³⁵ Cahit Suluk, Rauf Karasu, and Nal, p. 98.

reach a book, music, or movies via radio and TV broadcasts or public transmission are within this scope¹³⁶

In terms of the transference of the right of public transmission and broadcasting, radio-television organisations can acquire the exclusive rights mentioned in Art. 80/C of LIAW about works, performances, and phonograms by signing a contract with the related collecting society.¹³⁷

In terms of the right of retransmission, the author has the exclusive right if it is not transferred to the broadcasting organisation together with the right of transmission. If the broadcasting organisation that made the first transmission took the right of retransmission in addition to the right of transmission via a contract with collecting societies that represent authors, performers, and phonogram artists, it has the exclusive right to decide any retransmission by other broadcasting organisations; there is no need for additional consent from the author or right holders.¹³⁸

Briefly, the author's rights of disclosure of the work and representation of substantial parts of the work via broadcasting and public transmission cannot be surpassed, and the right to reach the original works or copies thereof that are broadcast or transmitted cannot be neglected; also, the right of broadcasting and public transmission cannot violate the honour and reputation of the author through adaptation or presentation of the work. Violating the moral or economic rights of the author, as exemplified above, via transmission or retransmission of work constitutes infringement, and paves the way for the author to prevent such broadcasts and transmissions, and further claim for indemnity.

4.1.2.5.1. Online infringements

Modern technology has brought the concept of online infringements into the copyright system. Initially, this was not recognised as a form of infringement but as a platform that can house various forms of infringement. Online infringements take the form of retransmission of original works, their adaptations, or representations. It is pointed out that online infringements constitute the greatest danger to copyright for three reasons: simplicity of digital reproduction, ease and speed of digital

¹³⁶ Cahit Suluk, Rauf Karasu, and Nal, p. 97.

¹³⁷ Savaş Bozbel, *Fikir Ve Sanat Eserleri Hukuku* (İstanbul: XII Levha Yayıncılık, 2012), p. 114.

¹³⁸ Bozbel, p. 119.

transmission, and ease of the manipulation and modification of the work.¹³⁹ These features allow for widespread and extensive infringements; thus, examining the features of online infringements can be regarded as beneficial in terms of providing a comprehensive understanding of such infringements. In this respect, the main features of online infringements in terms of websites and social media will be explained. Then, online infringements of the rights of reproduction and representation will be examined.

It should first be pointed out that whether the first transmission is made by the consent of the author or not is not important because either way it is an infringement of the right of public transmission. The simplicity of transmission is pointed out by Reid as, in online platforms via the help of modern technology, nearly all people can become publishers. In this way, copyrighted works are created and infringed with equal ease.¹⁴⁰ Everyone, in essence, has the opportunity to publish their copyrighted works online, and this convenience also shows itself in the associated infringements; in the digital age, every individual can be regarded as potential server, and so a potential infringer. In this sense, the system enables individuals to exercise infringements for commercial or personal purposes and in some rare cases like instances of hacking for no other purpose but to challenge authority and show their expertise. Thus, traditional criminal and private copyrights are unable to protect works in online platforms since the premise of the copyright system is that a substantial infringer copies for financial gain.¹⁴¹ In this respect, suing actual infringers is becoming rare in digital copyright law; usually the ones that facilitate infringement by others are sued, not those who trade software, video, or music files over the Internet. Copyright owners sue direct facilitators:

makers of software that can be share files; those who provide tools to crack encryption that copyrighted works, providers of search engines that help people infringing material; "quasi-internet service providers" such as universities, eBay, and Yahoo! and even credit card companies that individuals pay for infringing activity. Most of these suits rely on theories of secondary liability,

¹³⁹ M. Jansen, "The Protection of Copyright Works on the Internet — an Overview," *The Comparative and International Law Journal of Southern Africa* 38, no. 3 (2005), p. 346-347.

¹⁴⁰ Amanda Reid, "Claiming the Copyright," *Yale L. & Pol'y Rev.* 34 (2015), p. 444-445.

¹⁴¹ Harvard Law Review Association, "The Criminalization of Copyright Infringement in the Digital Era," *Harvard Law Review* 112, no. 7 (1999), p. 1712.

focusing those who provide services or write software that can be used in an act of infringement.¹⁴²

Online infringements can appear as a violation of the rights of reproduction, performance, and publication. In terms of online infringements on the right of reproduction, it should be stated that archiving electronic publications is acknowledged to constitute reproduction because the archiving of these publications is based on copying.¹⁴³ This means that reproduction of works online occurs when the individuals save the work to the hard discs of their computers. For instance, downloading a copy of a musical work constitutes infringement on the right of reproduction. On the other hand, if the music is recited, rendered, or played when it is recorded for delivery to potential listeners, this constitutes infringement of the right of representation/public performance.¹⁴⁴

“The right to distribute can be infringed through the usual dissemination or making available of content on social media.”¹⁴⁵ However, dissemination of works on social media has some distinct features that need to be examined. The shares on social media can be protected if the share carries the characteristic of work and author. The shares on social media can be photographs, videos, thoughts, ideas, etc. Whether these shares can be classified within work groups shall be examined further. Personal photographs and videos, as mentioned before, are usually protected by the general provisions of the tortious act, but if they have aesthetic value and character of work in terms of contents or technics, they can be protected by copyright. However, in terms of phrases like in ‘tweets’ the quality of the work is even more debatable.

‘tweet’ – limited to a maximum of 140 characters on Twitter – may not be copyright protected because of either or all of the following reasons: the ‘tweet’ consists of facts or ideas; the ‘tweet’ is insufficiently original; or the ‘tweet’ fails to meet the basic quantitative requirement.¹⁴⁶

¹⁴² Mark A Lemley, and R Anthony Reese, "Reducing Digital Copyright Infringement without Restricting Innovation," *Stan. L. Rev.* 56 (2003), p. 1346-1347.

¹⁴³ Ayten Arıkan, "Türkiye’de Elektronik Yayıncılık Ve Telif Hakları" (Ankara Üniversitesi, 2017), p. 181.

¹⁴⁴ Melvyn J Simburg et al., "International Intellectual Property Law," *Int'l Law.* 47 (2013), p. 217.

¹⁴⁵ Tan, p. 44-45.

¹⁴⁶ Tan, p. 46.

In all, as for other online infringements, the dissemination of content on social media can infringe the rights of representation, reproduction, publication, and essentially public transmission.

Although ‘tweets’ are not protected by copyright, shares in Facebook, Instagram, blogs, and websites can be protected if they are of the standard of work. Therefore, reproduction or retransmission of these works without the author’s consent constitutes copyright infringement. However, the main problem with online infringements appears in the prevention and prohibition of infringements. The simplicity of transmission is the main obstacle to the prevention of online infringements because the prevention and prohibition of the works depend on a legal claim by the authors, and authors are not able to take a legal action against every infringer since there are as many infringers as servers, and every individual acts like a server in online infringements. Thus, pursuing every infringer is not practically possible for the author. Also, prohibiting one infringing server would not even prevent the same person to make the same infringement via another server. Most of the readers of this thesis will likely have experienced this kind of infringement at some point; for instance, one movie is presented unlawfully on a website, and in the event that website is prohibited due to copyright action, the movie could still be presented on the same website by changing a letter in the link or the name. Therefore, the current system is unable to protect copyright against online infringement.

3.2. The Finitudes of the Author’s Rights: In Terms of Time, Place, Public Order, and Public Interest

Intellectual property rights are accounted as real rights, and protected by internal regulations and international agreements. However, there are certain restrictions that are provided by Turkish Constitution purely for reasons of public order and public interest. Restrictions on place emerge from the nature of the right, so are not actually accepted as government actions. Moreover, although administrative restrictions are allowed by the Constitution, they have some limitations, which correspond to the three-step test provided by international regulations. The three-step test first appeared in the 1967 Stockholm text of the Bern Convention (Bern Convention Article 9 / f. 2) regarding the limitation of the copyright only, and later international agreements

(TRIPS article 13; Wipo Copyright Convention article 10 / f). 1), and the Information Society Directive 2001/29 (Article 5 / f.5), where it was regulated not only according to the right of reproduction, but also with regard to the restrictions imposed on the other rights of the owner of the work. Accordingly, the restrictions imposed on the rights of the owner of the work and other right owners are that: a) restrictions should pertain to a certain and special case (first step); b) should not harm normal use of the work or other protection matters (second level); and c) should not cause unexpected damage to the rightful benefits of the right holder (third level).¹⁴⁷ These three steps are the standards provided for the government and administrators to consider when they make regulations that restrict the rights of the author in terms of public order and public interest so as to protect the benefits to the public and the author. The limitation of the author's rights will be examined herein in terms of time, place, public order, and public interest, respectively.

4.2.1. In Terms of Time

Copyright protection cannot continue forever. The regulations about time limits differ according to the country in question. The countries that are signatory to international agreements like the Bern Convention have to follow the associated basic standards in terms of the protection period, which is taken to be the lifetime of the author and a further 50 years after their death, as stated in Art. 7/1 of the Bern Convention. Turkey, as a part of the convention, follows these basic standards, specifically allowing for the author's lifetime and a further 70 years after their death. If the author is legal person, the term protection would be 70 years, starting from the date of publication; this is stated in Art. 27 of LIAW as follows:

The term of protection shall last for the lifetime of the author and for 70 years after his death. If there is more than one author, this period shall end upon the expiry of 70 years after the death of the last remaining author. The term of protection for works that have been first made public after the death of the author shall be 70 years after the date of death. The term of protection in the cases determined in the first paragraph of Article 12 shall be 70 years from the date on which the work was made public, unless the author reveals his name before expiry of such term. If the first author is a legal person, the term of protection shall be 70 years from the date on which the work was made public.

¹⁴⁷ Serap Helvacı, and Eray Aksın Atar, "Fikir Ve Sanat Eserleri Hukukunda Üç Aşamalı Test," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 22, no. 3 (2016), p. 1290-1294.

Although there are limitations to the protection of economic rights in terms of time, there are some discussions about moral rights not to be subjected to such limitations. The clause within Art. 26 remarks that “the economic rights granted to the author are limited in time”, which is interpreted as a time limitation for the protection of works, is only applied to economic rights. However, another article raises questions about this view which expresses that the right owners who, as stated in Art. 19 of LIAW, can exercise their moral rights for 70 years starting from the death of the author.¹⁴⁸ Since there is a 70 years limitation for the right owners to exercise moral and economic rights stated in the article, this can cause confusion. Ateş expresses that moral rights can be exercised by author as long as he lives yet after his death inheritors can exercise these rights for 70 years as for economic rights. However, if the persons mentioned in art. 19 of LIAW die before 70 years period; moral rights cannot be used after the last person’s death. Thus, it would be appropriate to say that moral rights are subject to time limitation.¹⁴⁹ Besides, in the last paragraph of Art. 19 of LIAW, it is stated that the Ministry of Culture and Tourism may exercise, in its own name, the rights granted to the author under the third paragraphs of Articles 14, 15 and 16 if the work is deemed to be important for national culture. Thus, Tosun points out that the works that seem important with regard to national culture are protected without time limitation. Although there is no clause that specifies moral rights are protected without time limitation, for the reasons mentioned above it may be inferred that some works’ protection are not subject to time limitation.¹⁵⁰ As Tosun stated there is no specific clause mentions time limitation about moral rights yet otherwise is not stated either. Saying that moral rights protection is not subject to time limitation would be extravagant interpretation; also, as Ateş pointed out above the time limitation for inheritors mentioned in art. 19 of LIAW should be taken account as time limitation of moral rights as well since it refers moral rights and 70 years time limitation clearly. In brief, the protection of the economic and moral rights of the author is subject to time limitations, whilst the moral rights on some works which are regarded as national treasures are protected without time limitation.

¹⁴⁸ Ahmet M. Kılıçoğlu, *Sinai : Haklarla Karşılaştırmalı Fikri Haklar* (Ankara: Turhan Kitapevi, 2013), p. 409.

¹⁴⁹ Ateş, 2003, p. 259-260.

¹⁵⁰ Yalçın Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar* (İstanbul: XII Levha Yayıncılık, 2016), p. 88-89.

4.2.2. In Terms of Place

Except for the regulations in International Private Law, Turkish laws can only be applied to instances that occur in Turkey according to the principle of territoriality. In the case of copyrights, additional Art. 2 of Art. 88 of LIAW predicates two conditions for the application of LIAW, as follows:

The protection granted by this Law shall apply to;

- 1- All works, fixed performances and phonograms existing in Turkey at the moment of entering into force of the amendment of this Article, which have been produced by authors and related rights holders who are nationals of the Republic of Turkey,
- 2- Foreign works, fixed performances and phonograms, which have been produced in other countries that are party to international conventions and agreements to which Turkey is also a party and which have not fallen into the public domain since the term of protection has not expired at the moment of entering into force of the amendment of this Article.

As it seems from the article, the law indicates two standards for the protection under Turkish law that are either related to nationality, or association with conventions. Turkish law can be applied to works that exist in Turkey and are produced by Turkish citizens. Works that are released abroad can only be protected if both countries are parties to common international conventions or bilateral agreements. For instance, if a literary work is published in Turkey by a Turkish citizen, any infringement within the authority of Turkey can be restrained. Therefore, the protection of works are limited by a country's borders, and thus by place.

Furthermore, the rights are limited by place because if the work is released with the consent of the author, his exclusive right over the work ends, and except for the moral rights he cannot intervene in its circulation. However, in one case, the Court of Justice of European Union decided that the rights of the author over the work would end if the work were released anywhere within Union with the consent of author; thus, the author cannot prohibit parallel export. Through this decision, the principle of exhaustion was extended to the borders of the Union.¹⁵¹

Another limitation to the rights of the author by place appears in implementation of law. Infringements that occur in many places at the same time could cause implementation problems such as infringements on social media, broadcasting, and

¹⁵¹ Ayşe Saadet Arıkan, "Avrupa Topluluğu'nda Fikri-Sınai Mülkiyet Hakları Ve Son Gelişmeler," *Ankara Avrupa Çalışmaları Dergisi* 7, no. 1 (2007), p. 162.

public transmission, etc. These kinds of infringements create problems with regard to the exercise of rights in two respects: first, in determining the applicable law, and second in determining the place of infringement.

With regard to determining the applicable law, this issue arises because it is not clear from international contracts whether the law of the place of infringement or the law of the place of origin will be applied to the incident. For example, if the work were published in one country and the infringement occurs in another, which country's law should be applied? It is pointed out that the "place of origin rule", which is advocated by relatively few authors and is only positively regulated in some contracts in America, stipulates that the copyright is subject to the law of the country in which the work gained legal existence. On the other hand, place of infringement is expressed as "*lex loci*" which is the law of the country where the infringements have occurred.¹⁵² In terms of Turkish International Private Law, the *lex loci* approach is embraced, which is compatible with the principle of territoriality. However, in order to apply *lex loci*, the place of infringement should be clear, and in some cases such as infringements that occur through unauthorised broadcasting and public transmission, the uncertainty of the 'violation place' results in problems with regard to the application of the law.¹⁵³

For infringements of the right of public transmission, the place of services is accepted as the violation place, since the public transmission is performed when the transmission happens, not when it is received. However, according to Akipek & Dardağan, every individual user who saves the ideas and works of art embodied in the text, images, and sounds on the website on his computer is also a potential service provider. Therefore, the infringement place is not limited to the first service provider, so rather than seeking the first infringement place, focusing on the place of the result may be more suitable in terms of the structure of online transmissions, putting practicality and simplicity principles aside.¹⁵⁴ In online infringements, every individual acts like a server in the retransmission of the work, but the location of the first servers to do so are accepted as the infringement place for practical reasons, such as it being easy to determine the violation place and, indeed, the infringing

¹⁵² Akipek, and Dardağan, p. 117.

¹⁵³ Akipek, and Dardağan, p. 119.

¹⁵⁴ Akipek, and Dardağan, p. 126.

person. Moreover, according to Turkish International Private Law Art. 25, infringements are subject to law in *forum delicti*, which is the place of the violation, and if the infringement and damage occurred in different places, the place of the damage is also authorised.¹⁵⁵ Therefore, it can be said that the place of violation is where the first server made the transmission, and the law of the place of violation is applied to these cases of infringement rather than the place of origin. Briefly, every country regulates how copyrights are protected and to what extent, how they end, and what kinds of acts constitute infringements against these rights via internal laws that are independent of other countries. The protection of intellectual rights are limited by the borders of the relevant country, and thus by place.

4.2.3. In Terms of Public Order

Art. 30 of LIAW states the instances that constitute limitations to an author's rights over work as follows:

The rights granted to authors shall not prevent a work from being used as evidence in court or before other authorities or from being the subject matter of police or criminal proceedings. Photographs may be reproduced and distributed in any form by official authorities or on their instructions due to public security or for judicial reasons without the author's consent.

Reserved are the provisions of public law that prohibit putting a work into commercial circulation by any means, its performance or exploitation in any other form or that make them subject to permission or control.

Public order is considered a high principle such that it can be a reference to certain restrictions to the rights of the author. As stated in the article, in order to use as evidence in criminal cases, the author's economic rights can be restrained. Also, there is a reference to public law that indicates forbidding, restricting, and supervising of works that are against law, morals, and ethics on trade, representation, or otherwise by reference to public order. For example, some contents of intellectual and artistic works can be considered obscene, and be banned by the authorities.¹⁵⁶ However, the perception of public order, situations that seem to be against the requirements of public order, and restrictions regarded as necessary are determined by the administrators. The provisions taken by the administrators and courts need to be appropriate to the case in order to for legal restrictions to be imposed. For

¹⁵⁵ Akipek, and Dardağan, p. 132.

¹⁵⁶ Tekinalp, p. 185.

example, if a restriction on the right of broadcasting is sufficient in terms of public order, restriction of the right of reproduction would be violation of an author's rights. Moreover, Tekinalp points out that to speak of restrictions within the scope of public order, the used or reproduced item should be a work and should have been disclosed to the public. By the reason of public order, works that are not disclosed to public cannot be benefited from.¹⁵⁷

4.2.4. In Terms of Public Interest

Author's copyrights on works can be restricted for the sake of public interest. The terms of public interest are mentioned by the law in several places, and can be exemplified as follows. The law permits utilisation, from legislation and precedents, without any limitation since it serves the public interest in terms of the right to know about their rights. Discourses and speeches within parliament, congresses, and courts can be reproduced, represented, or publicised in order to be reported as news. Benefiting from any published work for the purposes of education by stating the name of author and the work is legitimate. Compilations of works for educational, scientific, or cultural purposes are possible, but should not exceed the intended purpose. Benefitting from press and radio content which are publicly available is unconstrained. News and journal articles can be extracted if the right of extraction is not preserved; and even if it is preserved, taking such for press reviews is permissible. On the condition of being news and with the intention of providing information, extraction of parts of intellectual and artistic works is not subject to permission. Further, literary and scientific works can be adapted for disabled people without permission on the condition of not having the purpose of commercial gain which is provided in additional art. 11 of LIAW.¹⁵⁸ In addition, expropriation of intellectual and artistic works is permissible if it serves the general public interest and does not harm the author's rights severely. Personal utilisations means of reproduction of all kinds of intellectual and artistic works without the intention of gain is also permitted with respect to personal interest. In this sense, personal utilisation in the field of education is not a violation of copyright. However, reproduction of textbooks by photocopy, even in the name of education, is accepted as an infringement. Also, in a verdict of the Civil Court of Cassation, 1995, it was

¹⁵⁷ Tekinalp, p. 185.

¹⁵⁸ Bozbel, p. 172-211.

established that the utilisation of cinematographic works, even for personal use, constitutes infringement.¹⁵⁹ Art. 31-38 of LIAW specifies the limits of the author's rights in terms of public interest.

3.3. Transference of the Rights on Intellectual and Artistic Works

The transference of the economic rights on works is exercised via transference contract or licence contract. In terms of the contracts that transfer the ownership of economic rights, the author or inheritors can transfer their economic rights on their works with a limitation of time, place and contents. These contracts have the characteristics of legal acts. After the establishment of the contract, the economic rights transfer from the transferor's assets to the transferee's. In principle, the moral rights do not transfer to other parties, yet can be transferred to the extent that this enables the use of economic rights.¹⁶⁰ Through transference contracts, the economic rights pass to the beneficiary; however, contracts that include clauses like 'all rights are transferred' are not valid, the rights that are going to be transferred have to be listed explicitly. Transference contracts have to be written otherwise they are not considered legally valid. This issue is stated in Art. 52 of LIAW as, "Contracts and disposals concerning economic rights shall be in writing and the rights constituting their subject matter shall be specified individually."

In case of the transference of the right without time limitation, the relation between the right and the author terminates. The transferee alone benefits from the right until the end of the protection period; they can use all the rights that arise from the transferral of economic rights, including the right of lawsuit.¹⁶¹ The transference may be limited by time or place. If the transference is made without any time limit, the relation between the work and the author ends; otherwise, the rights return to the author when the time stipulated within contract comes to an end. If rights on the work are partially transferred, those that are not transferred are still under the control of the author. Moreover, Gökyayla expresses that the person who takes over the economic rights has the right and liability to use and benefit from these rights.¹⁶²

¹⁵⁹ Sengel, p. 71.

¹⁶⁰ Mustafa Tüysüz, *Fikir Ve Sanat Eserleri Kanunu Çerçevesinde Fikri Haklar Üzerindeki Sözleşmeler* (Ankara: Yetkin Yayınları, 2007), p. 69.

¹⁶¹ Hamdi Yasaman, *Fikri Ve Sınai Mülkiyet Hukuku* (İstanbul: Vedat Kitapçılık, 2012), p. 318.

¹⁶² Gökyayla, p. 234.

In terms of licence contracts, the subject of transference the usufruct of the economic rights not the right itself. In the license agreement, the licensee undertakes to pay a license fee (fee) while the licensor undertakes to benefit from any of their intangible goods. The subject of the licence contract only includes economic rights; however, via the licence contract, only the *use* of the right is transferred to others, not the right itself.¹⁶³ Therefore, through the licence contract, the licensee gains the rights of usufruct and benefits from the works, but the ownership of the right remains that of the author. This issue is divided into two categories by Art. 56 of LIAW, namely a full licence and a simple licence:

A license is non-exclusive, if it does not prohibit the holder of economic rights to grant the same license to others, and is exclusive, if it is granted only to one person.

Unless the contrary may be deduced from law or contract, all licenses shall be deemed to be non-exclusive.

The provisions on usufructuary leases shall apply to non-exclusive licenses and those on usufruct shall apply to exclusive licenses.

As it seems from the article, a full (exclusive) licence does not allow the transference of the rights to other persons than the licensee; on the other hand, a simple licence enables the author to give more than one licence at the same time. It is pointed out that in a full licence the author stipulates that he will not grant this right to other persons but this also includes the author, who thus cannot use the rights that are given in the licence. If the author wants to use the rights in spite of the licence contract, then these must not be given away in the contract. Moreover, the subject of an exclusive licence contract can extend from one to all economic rights by specifying them individually.¹⁶⁴

The subject whether the licence holder acquires the right to file a lawsuit against infringements, or not is a widely debated subject. There is no clause about the licence holder's right to file a lawsuit within LIAW, but IPL art. 158 regulates this issue for industrial property rights which can be illustrative in terms of intellectual property rights. It is stated that full licence holder can file a legal action against infringements to their industrial property rights unless otherwise is provided within contract. As for

¹⁶³ Tüysüz, p. 70.

¹⁶⁴ Ahmet Fevzi Kibar, "Fikir Ve Sanat Eserleri Kanunu Açısından Lisans Sözleşmesi," *Tekirdağ Namık Kemal Üniversitesi Hukuk Fakültesi Dergisi* 1, no. 2 (2020), p. 99.

the simple licence, if the right to file a lawsuit is not clearly limited within contract, can ask from the right holder with a notice to file an action against infringement. If the right holder does not file a lawsuit within three months starting from notice date, the simple licence holder can file a lawsuit in his name to protect his interests.

In the doctrine there are several views about this issue; some are compatible with art. 158 of IPL, and some are not. In one view, without making any distinction, it is suggested that both full and simple licence holders have the right to file a lawsuit against infringements. Another view, without making a distinction, suggests that the licence holders do not have the right to file a lawsuit. On the other hand, a more plausible view, which is suitable for some Civil Court of Cassation decisions on this issue, supports the idea that only full licence holders have the right to file a lawsuit against infringements, whilst simple licence holders do not.¹⁶⁵ Karasioğlu Gürbüz expresses that the Supreme Court does not allow licence holders to take the action for cessation in the recent verdicts.¹⁶⁶ It is also noted by Alica that the recent verdicts of Civil Court of Cassation seems to embrace the view of Tekinalp, who suggests that the licence holders who have the right to use the economic rights can only claim for compensation for damages within the scope of Art. 70/2 of LIAW via action for compensation.¹⁶⁷ Further, Bozbel supports the view that the licence owner should be prohibited from taking action for cessation since this would be a discrepancy with regard to the contract.¹⁶⁸ Conversely, Merdivan proposes that a full licence holder has the right to file a case against infringements in any case, but a simple licence holder can only file a case against infringements on the part of the author or third persons if their actions harm the simple licence holder's interests.¹⁶⁹ As can be seen, there are various ideas about the right of licence holder, but the right of the licence holder in terms of filing lawsuit against infringements is debated, and since there is no concrete answer to the problem, the issue is determined individually by the courts. However, adapting the provisions about intellectual property rights on this issue

¹⁶⁵ Ali Demirbaş, *Fikir Ve Sanat Eserleri Kanunu'nda Eser Sahibinin Mali Haklarına Tecavüz Halinde Hak Sahibine Sağlanan Hukuki Koruma* (İstanbul: XII Levha Yayınları, 2015), p. 274-277.

¹⁶⁶ Ayşe Gökçen Karasioğlu Gürbüz, "Türk Hukukunda Telif Eserlerin Korunması" (Ankara Üniversitesi, 2020), p. 141.

¹⁶⁷ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2065 .

¹⁶⁸ Bozbel, 569.

¹⁶⁹ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 1500.

seems as a plausible way that suggests the right of filing suit case for full licence holder in all cases, and for simple licence holder in some cases due to the similarity and common features between IPL and LIAW.

3.4. Right of Withdrawal

The person who receives the transference of the economic rights has to exercise the rights within the period specified in the contract, or if the time is not decided in the contract, within a convenient timeframe. If the transferee does not benefit from the rights and authorities as he supposed to be and the transferor is damaged essentially because of non-usage of the rights, the author can withdraw the contract based on art. 58/I of LIAW since author have interests on the exercise of the rights over the work.¹⁷⁰

The author has the right to withdraw from any transference or licence contracts if there are conditions which are, first, if the transferee does not exercise the contract, or exercise it but not in accordance with the terms. Second, the author must be damaged due to disagreeable performance, or non-performance. Third, the determined or convenient time for the exercise of the contract has passed, and the author who wants to exercise the right of withdrawal must give some additional time to the transferee via notary to allow for contract to be exercised. After the notification has been given by the notary remains inconclusive by continuing unexercised of the rights, the author can exercise his right of withdrawal; by do so, the contract relation comes to an end, and the transferred rights return to the author. The transferee's right to object to the right of withdrawal being exercised within four weeks of notification is reserved.¹⁷¹

¹⁷⁰ Gökyayla, p. 304.

¹⁷¹ Erdil, *Fikri Mülkiyet Hukuku*, p. 82-83.

CHAPTER II

4. LEGAL ACTIONS AGAINST INFRINGEMENTS

Copyrights provide some opportunities for the author and right holders to protect their intellectual and artistic works against infringements. Intellectual and artistic works can be protected through legal and procedural actions that include applying lawsuits for the prevention of infringement, the prohibition of infringement, compensation, criminal suits, and notice and takedown procedures. These legal actions and procedures shall be explained individually to provide a comprehensive understanding about the matter. Moreover, the concept of compensation and compensation actions will be discussed and analysed in detail in Chapter III.

4.1. Action for Prevention of Infringement

Art. 69 of LIAW defines an action of prevention as “An author whose moral or economic rights are in threat of being infringed may bring an action to prevent the probable infringement. The same provision shall apply in cases where the infringement is likely to continue or recur.” To file this case, fault or loss of are not sought as conditions yet, as in all cases, a causal relation between a danger of infringement and the work is regarded as necessary to file suit for the prevention of infringement¹⁷². Such lawsuits should be filed in a particular, specialised court, which is the Intellectual and Industrial Property Rights Court. Since the Intellectual and Industrial Property Rights Courts are not yet fully in place countrywide, in

¹⁷² Karasioğlu Gürbüz, p. 146.

places where there is no specialised court, the Civil Courts of General Jurisdiction in that place are acknowledged to be the competent court. In terms of the authorised court, according to Art. 66 of LIAW, the author can file this case in his place of residence. It is stated that there is no time limitation to file this case since it can be filed as long as the presence of danger of infringement continues.¹⁷³ However, after law number 6100 of the Code of Civil Procedure (CCP)¹⁷⁴ come into force, this special jurisdiction rule lost its effect because of Art. CCP which establishes the legal procedure in the instance of tortious acts, which states that ‘In cases arising from tortious acts, the court of the place where the tortious act was committed or the place where the damage occurred or is likely to occur, or the place of residence of the victim is also authorized.’ This article foresees a broader scope for the authorised court by including the regulation in Art. 66 of LIAW. Additionally, action for prevention cases may arise from breach of contract; in this case, the case can be filed in the place of performance according to Art. 10 of CCP.¹⁷⁵

This case can be filed if there is a danger of infringement of the moral or economic rights of the author; there is no further condition that the danger must be open, close, or inevitable. In order to file this case, there should be certain conditions present, which are danger of infringement, illegal act on the part of the defendant, and a casual relation between danger of infringement danger and an act performed by the defendant.¹⁷⁶

4.2. Action for Declaration

Action for declaration can be filed on the purpose of determination and declaration of the real authorship of a work via positive or negative clearance of the name of the author. There can also be other kinds of declaratory lawsuits related to copyright infringements such as lawsuits on the declaration of infringements. There are some presumptions of law for determination of authorship in order to reduce controversies about this issue, yet authorship can be subjected to disputes despite of these presumptions because these presumptions are disputable presumptions that can be

¹⁷³ Karasioğlu Gürbüz, p. 152.

¹⁷⁴ Hukuk Muhakemeleri Kanunu (HMK), *Resmi Gazete* 27836 (4 Şubat 2011), Kanun No: 6100.

¹⁷⁵ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 1979-1980.

¹⁷⁶ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 2166-2178.

proven otherwise.¹⁷⁷ It is stated that to take declaratory action, the existence of infringement is sufficient; there is no need to seek fault on the part of the defendant.¹⁷⁸ Declaratory actions can only be filed if there is a legal benefit expected from the case. It is suggested that existence of certain conditions indicates the existence of legal benefit that are a current right or legal situation to be under threat, because of the threat the plaintiff's legal situation to be in hesitation and this situation is such as to harm the plaintiff, and only a declarative verdict, which has definitive judgement effect, can remove this danger.¹⁷⁹ These cases can be filed because of a continuing infringement, there are no time limitations on them, but if the infringement is over, declaratory action cannot be taken because there is an opportunity to take action for performance.¹⁸⁰

4.3. Action for Cessation of Infringement

An action for cessation of infringement is defined in Art. 66 of LIAW as:

Any person whose moral and economic rights have been infringed may bring an action against the infringer to cease the infringement. If the infringement has been committed by agents or employees of an enterprise in the execution of their duties, legal action may also be brought against the owner of such enterprise. It is not necessary that the infringer or the persons referred to in the second paragraph be at fault. The court shall order appropriate measures as required by the force of circumstances for the cessation of the infringement, by assessing the moral and economic rights of the author, the extent of the infringement, whether there is fault and if there is, degree of fault, and the damages likely to be suffered by the infringer in case of the cessation of infringement. The author may bring an action for cessation and prevention of infringement in place of his residence as well.

The action for cessation can be filed if there is an on-going infringement or the results of the infringement are ongoing.¹⁸¹ The action for cessation can be filed if an infringement happened or happening. It includes not only the removal of the infringement but also taking precautions to avoid a repetition of such and against indemnity claims.¹⁸² A cessation lawsuit is filed to avoid damages suffered and probable future damages.¹⁸³

¹⁷⁷ Ateş, M. (2012). *Fikri Hukukta Eser Sahipliği*. Ankara: Adalet Yayınevi, p. 472.

¹⁷⁸ Karasioğlu Gürbüz, p. 154.

¹⁷⁹ Ateş, 2012, p. 469.

¹⁸⁰ Karasioğlu Gürbüz, p. 157-158.

¹⁸¹ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 1970.

¹⁸² Tekinalp, p. 293.

¹⁸³ Bozbel, p. 552.

Such a case can be filed by the author and right holders, such as inheritors and transferees; however, it is not clear whether the licence contract enables the licence holder to file such a case or otherwise, so this is determined according to the individual cases in question.

As in the action for prevention of infringement, no such condition as being at fault or loss is required to file. Bozbel states this as there is no such condition that requires the person whose right are violated to have suffered a loss because of the infringement to file this action.¹⁸⁴ The degree of fault and loss are significant to the determination of indemnity, so will be explained under that title.

The action for cessation is usually filed against infringements that have the characteristics of tortious acts, so the provisions on the tortious act are applied to such cases in terms of time prescription, competent court, and damage and fault terms. However, it may also occasionally depend on breach of the terms of contract. . In this case, provisions about the breach of contract will be applied to these cases.

If the violation is continuing, there is no time prescription to file the case, but if the violation has ended and its results are continuing, there is a time prescription. The time prescription for the action of cessation is not stated in LIAW, so the general rules within TCO are applied with regard to the characteristics of the infringing action, that is, whether it is a tortious act or a breach of contract. If the infringement has the characteristics of a tortious act, Art. 72 of the TCO would be applied¹⁸⁵ which states that claims for compensation become time-barred after two years, starting from the date on which the injured person learned of the loss and the person liable for compensation, and in any case after ten years starting from the date of the act. However, if the compensation arises from an act necessitating a penalty for which the Criminal Codes prescribe a longer statute of limitations, this statute of limitations applies. Also, Karasioğlu Gürbüz points out that if the infringement of moral and economic rights occur from the violation of contractual obligations, filing the case will be subject to the time limitation in the TCO Art. 146 which foresees a ten-year time prescription with respect to the action of cessation.¹⁸⁶

¹⁸⁴ Bozbel, p. 550.

¹⁸⁵ Bozbel, p. 553.

¹⁸⁶ Karasioğlu Gürbüz, p. 144.

The competent court for the action for cessation is the same with the action for prevention, which is the Intellectual and Industrial Property Rights Court. Since the Intellectual and Industrial Property Rights Courts are not yet organised over the entirety of the country, in places where there is no specialised court the Civil Courts of General Jurisdiction in that place are acknowledged to be the competent court. In terms of the authorised court, this is also similar to the provisions of the action for prevention, which is if the violation arises from the tortious act Art. 16 of CCP; if it arises from breach of contract, Art. 10 of CCP will be applied.

4.3.1. Action for Cessation against Infringements on Moral Rights

Action for cessation against infringements on moral rights can be filed if the infringement appears in a way mentioned art 67 of LIAW and violates one or more moral rights. The action for cessation foresees various sanctions for different forms of infringement.

Where a work which has not yet been made public is disclosed to the public without the consent of the author or against his wishes, action for cessation of infringement may only be brought, if the reproduced copies have been disclosed to the public by way of publication. This provision shall also apply in cases where the author's name is shown on the work against his wishes.

If the author's name has not been shown on the work or has been shown wrongly or in such a way giving rise to confusion, and if the author has claimed the cessation of infringement in addition to the action for declaratory relief referred to in Art. 15, the infringer shall be obliged to show the author's name on the original work and on the reproduced copies already in circulation. The publication of the judgment in not more than three newspapers may be requested at the expense of the infringer.

The provision of the second paragraph shall apply in the cases set out in Articles 32, 33, 34, 35, 36, 39 and 40, if the source has been wrongly or incompletely designated or no source is given.

If the work has been unlawfully modified, the right holder may claim the following:

1. The author may claim that reproduction, publication, performance and broadcasting by radio of the modified work be prohibited and that the modifications in the reproduced copies already in circulation be corrected by the infringer or restored to their original form. If the modification is made by publication in a newspaper or journal or by radio broadcasting, the author may claim the administrations of such newspapers, journals or broadcasting organizations that have published the modified work to correct the modification at the expense of the infringer.

2. In the case of works of fine art the author may claim an announcement be made declaring that the modification in the original work has not been made by him, or may claim that his name be removed or changed on the original. If it is possible to restore the work to its original form and if removal of the modification does not significantly prejudice the interests of the owner or of the public, the author may restore the work to its original form.

As it can be seen from the article, infringements of moral rights can appear in different ways, and the sanctions vary according to the form of infringement. For infringements of the right of disclosure and in cases where the author's name is shown on the work against his wishes the prohibition of the publication can be demanded via action for cessation. Infringements of the right to be known as the author can be prohibited by action for cessation but also if there are claims for the declaration of authorship up to three newspapers, the correction of the name in the original and copies of the work can be requested as part of an action of cessation. Infringements of the right to prevent changes to the work can be prohibited via action for cessation; also, correction of any modifications in any reproduced copies that are already in circulation or restoration to their original form can be demanded as part of the action of cessation. For infringements of the right to prevent changes to works of fine art, one of the measures available is to require a declaration that the modifications were not made by the author, the removal or a change of the name of the author, or removal of the modifications if possible, and that the interests of the owner or the public are not harmed. Briefly, the author or the right holders can make certain claims, as mentioned above, against infringements of their moral rights that the courts can direct be carried out as a part of the action of cessation; however, moral indemnity claims for the infringements on the moral rights of the author must be directed via action for indemnity. Also, if the moral infringements also violate the economic rights of the author or the right holders, demands that one must depend on Art. 68 of LIAW via action for cessation and material indemnity claims via action for indemnity are preserved.

4.3.2. Action for Cessation against Infringements of Economic Rights

As mentioned previously, there are several economic rights of the author that may be infringed, namely the right of reproduction, publication, adaptation, representation, public transmission, and broadcasting. Through action for cessation, the author can choose from among a number of enforcements as foreseen in Art. 68 of LIAW and that vary according to the form of infringement.

Destroying the copies and means of production is one measure; taking over the copies and means of production is another. Also, claiming three times amount of the

suppositional contract can be considered the main measure prescribed by an action for cessation.

Art. 68 of LIAW expresses the measures to be taken against infringements of the right of reproduction as follows:

The right holders whose permission was not obtained may claim the payment of compensation of up to three times the amount that could have been demanded if the right had been granted by contract, or up to three times the current value which shall be determined under the provisions of this Law, from persons who adapt, reproduce, perform or communicate to the public by devices enabling the transmission of signs, sounds and/or images the work, performance, phonogram or productions or who distribute reproduced copies thereof without written permission of the author pursuant to this Law.

If the reproduced copies have not been put up for sale, the right holder may claim that the reproduced copies, films, moulds and similar devices enabling the reproduction be destroyed or be surrendered to him in return for equitable remuneration not exceeding their production cost price or may claim the payment of three times of the amount he would have demanded, if a contract had been concluded. These claims shall not remove the civil liability of the person who has undertaken the reproduction without permission.

If copies of a work reproduced without permission have been put up for sale, the right holder may use one of the alternatives mentioned in the second paragraph, as regards the copies in the possession of the infringer. ...

As can be seen, there are three options that can be taken by author and/or the right holders against infringements, namely destruction of production means and reproduced copies, etc., taking over the means of production and reproduced copies from an average price, and payment of three times of the amount of the suppositional contract.¹⁸⁷

In terms of destruction of the production means and reproduced copies, this can only be executed if the copies are not put up for sale. Bozbel states that if the reproduced copies have been put up for sale without the author's permission, the copies in the hands of third persons cannot be destroyed, taken over, or confiscated. In this case, the right holder can only demand the demolition of means of production or their transference, or three times the amount gained in sales.¹⁸⁸ By demolition of the production means, the article suggests the reproduced copies, films, moulds, and similar devices that enable the reproduction should be destroyed. Alica points out that the expression 'devices enabling the reproduction' is not quite clear. The phrase

¹⁸⁷ Tekinalp, p. 301.

¹⁸⁸ Bozbel, p. 564.

means that the reproduction devices that can be used to reproduce only the subject of the case; the devices that are peculiar to this purpose should be destroyed because considering every kind of digital and physical devices as a part of infringing activity, and not considering the purpose of the assignment of the devices, would exceed the purpose of the cessation claim.¹⁸⁹

In terms of taking over/buying the reproduction means and reproduced copies, the reproduction means and reproduced copies should be taken over with a reasonable price since it is not a way of enrichment, so the price should not exceed the average costs of reproduction means and reproduced copies. Also, taking over the reproduction means and reproduced copies can be the case only if the reproduced copies are in the hand of the infringer, if they are in the hand of third persons, they cannot be taken over by author or right holders. The right holders may demand taking over the reproduced copies only and destruction of reproduction means.¹⁹⁰

In terms of the payment of three times of the amount of the suppositional contract, three times amount is foreseen for the unauthorised reproduction mentioned above, but also unauthorised adaptation, representation, broadcast, and public transmission; briefly, in case of infringement of economic rights three times amount can be demanded. The nature of the three times amount is debated, and the application of the three times amount and other measurements including indemnity claims is complicated, so needs further explanation. In this respect, firstly, the nature of the three times amount and current value concepts should be explained. Secondly, application of three times the amount on unauthorised reproduction in terms of publicised and not publicised copies shall be examined.

Firstly, three times the amount is a kind of legal penalty which is calculated as if there had been a contract between parties, and the three times the amount of the basic amount is considered.¹⁹¹ Although the Civil Court of Cassation name the claims based on Art. 68 of LIAW “copyright indemnity”, three times the amount is not considered an indemnity in terms of legal verdicts and doctrine since it does not seek

¹⁸⁹ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2101.

¹⁹⁰ Küçükali, C. (2017). *Fikri Hakların İhlalinden Kaynaklanan Tazminat Davası*: Seçkin Yayıncılık, p. 39.

¹⁹¹ Tekinalp, p. 301.

fault or damage conditions, it is regarded as a “penalty” that has arisen from law, a civil penalty in a sense.¹⁹² ¹⁹³According to the Civil Court of Cassation and much of the doctrine, in the case of claiming three times the average amount, a suppositional (*farazi*) contract relation between the author and/or the right holder and infringer is constituted.¹⁹⁴ The Eleventh Civil Court of Cassation HD., 21.10.2019 T., 2018/4872E., 2019/6467K. verdict illustrates the suppositional contract view adopted by the court. Alica suggests that the three times amount, which is inferred to be a suppositional contract or hypothetical contract, should be called a royalty (*telif tazminatı*) to differentiate the three times amount from the concept of indemnity.¹⁹⁵

With respect to the “current value” mentioned in the article as “up to three times the current value which shall be determined under the provisions of this Law”, although there are discussions as to what provisions are mentioned here; it is suggested that this refers to the tariff mentioned in Arts. 41 and 43 to be current value. The plaintiff does not have the right to choose between suppositional contract and current value. Therefore, in the determination of the amount, if there was no previous contract, similar contracts should be considered; in other cases, current value should be taken into account.¹⁹⁶ A suppositional contract has more potential for the author and right holders since it protects authors rights more properly. It is stated that in the instance of claiming the amount of a suppositional contract, the wages of the author, which means how much he takes or is taking for other works, is accepted as a basic amount, and the determination is made accordingly (subjective wages). The amount shall be determined firstly considering the author whose rights were violated subjectively, since objective determination is not essentially possible unless, the author’s wages for copyrights can be easily determined. In real cases, in the determination of subjective wages, the author’s other contracts and past bills are considered. If there is no previous contract or transfer from the author, transfer amounts, or amounts from copyright contracts that can be considered representative of current value in that area, should be taken into account in the determination of the basic amount of the

¹⁹² Bozbel, p. 555.

¹⁹³ Demirbaş, p. 83.

¹⁹⁴ Bozbel, p. 557.

¹⁹⁵ Levent Yavuz, Trkay Alıca, and Fethi Merdivan, p. 2071.

¹⁹⁶ Demirbaş, p. 110.

suppositional contract.¹⁹⁷ Kılıçoğlu suggests that the number of violations, their extent, expansion, and the fame of the work, print run and commerce value should be considered in the determination of the amount of the suppositional contract.¹⁹⁸

Another issue that has been heavily debated is the three times the amount on the question how much the total amount actually is, and whether it should be three times the basic amount or the basic amount plus three times this amount. The expression in law is “*en çok üç kat fazlası*” which is translated as “up to three times” within the article, but it is not quite the equivalence of the term, “at most three times plus” may be used for this discussion. Kılıçoğlu states that although the phrase “at most three times plus” indicates that the amount consists of the basic amount and three times that, but in practice it is understood to mean that three times the basic amount can be claimed. The Eleventh Civil Court of Cassation (E: 1999/9978. K:2000/1893, T:6.3.2000) numbered verdict also supports this view by stating that the amount cannot surpass the three times of the amount that can be claimed with a contract.¹⁹⁹

It is also debated as to whether the court can decide on less than three times amount or not. The article expresses that the plaintiff may claim up to three times, so if the plaintiff asks to settle for less than three times, the court cannot decide to award more or change the chosen claim. Likewise, if the plaintiff asks for three times the amount, the court cannot decide on two times, for instance, without good reason. The Eleventh Civil Court of Cassation HD, T. 25.01.2010, E.2008/8996, K.2010/757 numbered verdict also suggests this view. Civil Court of Cassation approach about three times amount is highly criticised in the doctrine. Also, the approach of Court of Cassation contradicts with Constitutional Court verdict. (T. 28.2.2013, E. 2012/133, K. 2013/33). The case Constitutional Court examines is about unconstitutionality of the expression in art. 68 of LIAW ‘up to three times can be demanded’ due to the reasons of contradiction to principle of proportionality, positive discrimination in favour of right holders and contradictions with the articles 2, 10, 13 and 36 of Constitution. Constitutional Court expresses in the justification that the relevant article does not suggest that the Court is limited by claims and does not have

¹⁹⁷ Ahmet Fatih Özkan, and Aytül Özkan, "Fikir Ve Sanat Eserleri Bağlamında Tecavüzün Ref'i Davası Ve Üç Kat Bedel Sorunu," *Hacettepe Hukuk Fakültesi Dergisi* 6, no. 1 (2016), p. 114-115.

¹⁹⁸ Kılıçoğlu, p. 451.

¹⁹⁹ Kılıçoğlu, p. 451.

discretion. It is obvious that on the condition to stay within the limits the court can use discretion by considering the case and claims. Also, the discretion of the Court in the determination of basic amount goes without discussion. Therefore, the expression in the article is not against art. 2 and 138 of constitution and there is no relation of art. 10, 13 and 36. As it can be seen from the verdict of Constitutional Court, the article does not restrict discretion of the Court from making reductions on the final amount or determination of basic amount. However, even after this verdict, the Court of Cassation has been continuing on insisting the adopted interpretation, and disregards the discretion of Court on determination or reduction of three times amount. It is seen that, generally, the Civil Court of Cassation undid the verdicts of the first-degree courts, which decided one or two times the amount when the plaintiff claims for three times amount. However, in the calculation of the basic amount, the Civil Court of Cassation considers joint fault to be a reason for a reduction in the basic amount, even though the law does not seek fault as a condition, the Civil Court of Cassation undoes the verdicts of the first-degree Courts that do not allow for reduction in the instance of joint fault.²⁰⁰

In the discussion of the nature of the three times the amount concept, the term “royalty”, as suggested above by Alica, will be used instead of the three times the amount. It is stated that for the royalty claims based on Art. 68, the fault or damage conditions are not foreseen since it is a claim demanded via action for cessation, and as mentioned before action for cessation does not seek fault or damage conditions for this case.²⁰¹ To speak of the nature of the royalty, it should be pointed out that the royalty does not make legitimate the infringements. The General Civil Court of Cassation expresses this as “the royalty except for the paid economic rights does not completely turn the infringement into legal usage; besides, violations that are not included by royalty, continue or probably will continue after the action date shall not turn into legal acts” (7.2.2019 T.,2017/11-6E., 2019/85K.).²⁰² The usage of economic rights, which are used within the sphere of suppositional contract and royalty, turn into legal usage; thus, the author or right holders cannot ask for cessation of the

²⁰⁰ Ahmet Fatih Özkan, and Aytül Özkan, "Fikir Ve Sanat Eserleri Bağlamında Tecavüzün Ref'i Davası Ve Üç Kat Bedel Sorunu," *Hacettepe Hukuk Fakültesi Dergisi* 6, no. 1 (2016), p. 118.

²⁰¹ Demirbaş, p. 120.

²⁰² Karasioğlu Gürbüz, p. 131.

usage. However, the suppositional contract does not completely turn the violation into legal usage. For instance, if the infringement arises from exceeding the limits of a contract between parties, in addition to the royalty claim, the plaintiff also can ask for a penalty if so decided in the contract. Furthermore, the violations against moral rights do not become legal via royalty, so as the law states that these claims “shall not remove the civil liability of the person who has undertaken the reproduction without permission”, and they can be claimed in addition to royalties.²⁰³ In addition to a royalty claim, the author or right holders can demand material and moral compensation and the return of the gains if certain conditions are present.²⁰⁴ For example, if royalty is demanded in accord with Art. 68/1, additional material indemnity based on Art. 70/2 cannot be demanded. However, if the author or rights holder’s damage clearly exceeds this amount and the infringer is at fault, by proving the extent of the damage they may also demand material compensation as well. The royalty claim is not an obstacle to using the rights arising from a contract such as penalty, annulment, withdrawal, etc.²⁰⁵²⁰⁶

Secondly, the application of three times the amount on unauthorised reproduction in terms of publicised and unpublicised copies shall be examined. The article clearly expresses that in terms of the unauthorised reproductions which are not put on sale, or those in the possession of the infringer, the author or right holders have three measures they can take: destruction of the production means and the reproduced copies, taking over the copies and the production means, or royalties. However, there are some ambiguous aspects that have been heavily debated, for instance whether the royalties would cover the production means, or the author and the right holders can demand their destruction in addition to royalty claim. Alica suggests that the right holders can demand destruction of some of the reproduced copies, and production means, taking over some of them, and royalties for other parts.²⁰⁷ For instance, the author may claim royalties for reproduced copies, but also demand the destruction of or taking over the reproduction means at the same time. Since the basic amount of the suppositional contract is determined by considering the quantity of the copies and

²⁰³ Levent Yavuz, Trkay Alica, and Fethi Merdivan, p. 2081-2082.

²⁰⁴ Levent Yavuz, Trkay Alica, and Fethi Merdivan, p. 2101.

²⁰⁵ Bozbel, p. 557.

²⁰⁶ Levent Yavuz, Trkay Alica, and Fethi Merdivan, p. 2083-2084.

²⁰⁷ Levent Yavuz, Trkay Alica, and Fethi Merdivan, p. 2100.

worth of the right of reproduction, the determination of basic amount of suppositional contract would not harm the interests of the right holder and infringer, but still three times amount would only benefit to right holder. Similarly, taking over the reproduction means and reproduced copies would be advantageous for infringer and right holder because the infringer saves the average price of the reproduced copies and reproduction means, and the right holder can make use of these products with a reasonable price.

With respect to unauthorised copies that are put on sale, if the person selling them knows that they are unauthorised and is effectively party to the infringement, the copies on sale also constitute an infringement, and the author or rights holders can use one of the selective rights mentioned in Art. 68 against the person holding the copies.²⁰⁸ On the other hand, in terms of reproduced copies without the consent of the author within the hands of third persons who are not aware or part of the infringement, selective rights such as the destruction or taking over of the copies are not available options. The plaintiff can only demand royalties from the initial infringer for the copies sold.²⁰⁹

In terms of the time limitation for royalty claims, the Civil Court of Cassation accepts a ten-year limitation for royalty claims based on Art. 146 of TCO by assuming a suppositional contract relationship between the parties. (Yarg. 11. HD. T. 24.10.2014 E. 2013/12170 K. 2014/16477; Yarg. 11. HD. T. 10.02.2014 E. 2013/12913 K. 2014/2228; Yarg. 11. HD. T. 05.12.2013 E. 2012/6301 K. 2013/22126; Yarg. 11. HD. T. 26.02.2004 E. 2003/7070 K. 2004/1799). However, the reason for the ten-year limitation should not be suppositional contract since royalty based on a suppositional contract does not really convert the claim into a contractual one. Art. 146 of TCO is a general article about time limitations that can be applied to all receivables unless other time limitations are foreseen within the law. Therefore, a ten-year limitation is applied to royalty claims since there is no special article that foresees otherwise.²¹⁰

²⁰⁸ Kılıçoğlu, p. 450.

²⁰⁹ Levent Yavuz, Türkiye Alıca, and Fethi Merdivan, p. 2015.

²¹⁰ Murat Sarıkaya, "Fikir Ve Sanat Eserleri Kanunu'nda Düzenlenen Tazminat Talepleri Üzerine İnceleme," *Türk-Alman Üniversitesi Hukuk Fakültesi Dergisi* 1, no. 2 (2019), p. 74-77.

4.4. Criminal Actions

International agreements, which Turkey is a party to, foresee certain criminal sanctions against infringements. For instance, the Bern Convention art. 16/1 points out that (1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection. In addition, TRIPS agreement III part Art. 61 suggests that at least at the commercial level and in terms of malicious piracy of copyrights, countries that are party to the Convention should foresee criminal sanctions which act as strong disincentives and include imprisonment, penalty, and seizure and destruction of merchandise.

As a party to such international conventions, Turkey has to have compatible regulations with international agreements. Therefore, the criminal sanctions against infringements are regulated in LIAW in Art. 71, 72, 75, 76, 81, 86, additional Art. 4, 8, and 10 of LIAW. The provisions are compatible with the various international agreements to which Turkey is party. Since criminal sanctions are not the focus of this thesis, only some of the sanctions will be mentioned in a general sense.

The author or right holders may take criminal action against an infringer in addition to or separate from civil action. Art. 71 of LIAW indicates various criminal sanctions in accordance with the forms of infringement. To provide a clear understanding of the issue, criminal sanctions against infringements shall be examined with respect to infringements of economic rights and moral rights.

Any person who, by infringing the moral, economic and related rights regarding intellectual and artistic works protected under this Law;

1. adapts, performs, reproduces, changes, distributes, communicates to the public by devices enabling the transmission of signs, sounds or images or publishes a work, performance, phonogram or production without written permission of right holders or puts up for sale, sells, distributes by renting or lending or in any other way, buys for commercial purposes, imports or exports, possesses or stores for non-private use any works adapted or reproduced unlawfully, shall be sentenced to imprisonment from one year to five years or a judicial fine.

2. gives a title to another person's work as his own work shall be sentenced to imprisonment from six months to two years or a judicial fine. Where the offence is committed by distributing or publishing, the upper limit of the penalty of imprisonment shall be five years and no judicial fine may be imposed.

3. cites from a work without referring to the source shall be sentenced to imprisonment from six months to two years or a judicial fine.

4. makes a declaration to the public without permission of the right holders concerning the content of a work which has not yet been made public shall be sentenced to imprisonment up to six months.

5. gives a reference regarding a work in a wrong, incomplete or misleading way shall be sentenced to imprisonment up to six months.

6. reproduces, distributes, publishes or broadcasts a work, performance, phonogram or a production by using the name of a well-known other person shall be sentenced to imprisonment from three months to one year or a judicial fine.

Persons who commit the offences mentioned in the first paragraph of the additional article 4 of this Law and content providers who continue to infringe the rights recognised under this Law shall be sentenced to imprisonment from three months to two years unless this act constitutes another crime requiring a greater penalty.

Where any person who puts up for sale, sells or buys a work, performance, phonogram or production which was produced, adapted, reproduced, distributed or broadcasted illegally provides information as to from whom he obtained such item and enables them to be captured before the prosecution process, the penalty to be imposed may be omitted or reduced.

The regulation in LIAW has caused confusion about the determination of offence and penalty in instances of violation of several moral and economic rights at the same time. Therefore, designating whether these crimes should be punished separately, or be subject to aggregation of offences is crucial to the determination of the punishment. In terms of the aggregation of offences, there are various views about the establishment of punishment according to the violation of moral and economic rights, but three of such will be examined here.

Yazıcıoğlu asserts that the aggregation of offences can only be the case if the act violates the same kind of judicial interest. For example, since violations of only economic rights, whether one or many and even if there is more than one act, are mentioned in the same clause of Art. 71/1 of LIAW, they should be regarded as selective acts of a single crime; thus, they should be accounted as only one act and punished as a single crime. On the other hand, if violations, whether through one act or many, harm different judicial interests, aggregation of offences would not be appropriate and each violation would then be punished separately. For instance, if the infringer adapts and reproduces a song which belongs to a composer, who is also a performer of the work, without permission, their economic, moral, and related rights have been violated and the actions thus accounted to be three infringements since

they violate three different judicial interests, each of which should be punished separately.^{211 212}

Alica suggests a different view on the subject of aggregation of offences by considering the regulation of the law not in terms of violated judicial interest but the number of acts and victims. He asserts that since the violations of economic rights and moral rights are regulated within the same article, if the violation of more than one of these rights, which belong to one person, are executed by performing at least one of the selective acts stated in the article, this constitutes only one crime and deserves one punishment. He asserts that there is no doubt that the forms of infringement of economic and moral rights mentioned in the article are accounted as selective acts of one crime, so performing one or many infringements of economic or moral rights altogether does not matter in terms of the constitution of the crime if perpetrated against the same victim.²¹³ However, the problematic issue here is the number of victims when one infringing act harms economic, moral, and related rights at the same time. By the regulation of TCC, he suggests that if a phonogram is reproduced and disseminated there is only one crime, if the offence is performed against one victim at different times, then Art. 43/1 of TCC, which regulates successive offences, will be applied; if there is more than one victim, Art. 43/2 of TCC will be applied.

Where a person commits the same act, more than once, against a person, at different times in the course of carrying out a decision to commit an offence, a single penalty shall be given. However, the penalty to be imposed in respect of that offence shall be increased by one quarter to three quarters. The basic versions, which require higher or lesser penalties, of an offence shall be deemed to be one offence. The provisions of this paragraph shall also apply to offences where the victim is not a specifically identifiable person.

The provisions of the paragraph one shall apply where an offence has been committed against more than one person through a single act.

The provisions of this article shall not apply to international homicide, international wounding, torture and robbery.²¹⁴

²¹¹ Yılmaz Yazıcıoğlu, *Fikri Mülkiyet Hukukundan Kaynaklanan Suçlar* (İstanbul: XII Levha Yayıncılık, 2009), p. 359-360.

²¹² Yusuf Başlar, "Fikir Ve Sanat Eserleri Üzerindeki Haklara Yönelik İhlaller," *Legal Fikri ve Sınai Haklar Dergisi*, C 7 (2011), p. 682-683.

²¹³ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2271-2272.

²¹⁴ Turkish Criminal Code, translated by European Commission for Democracy Through Law (Venice commission)

Turan, on the other hand, supports a different and more plausible view of the matter. He considers the acts mentioned in Art. 71/1-1 of LIAW not to be selective acts of the same offence but separate offences.²¹⁵ (Erem-Danışman-Artuk, Humanist doctrine) So, unauthorised reproduction and publication of a work would constitute two separate offences. In addition, the infringer may violate more than one right, such as the right of disclosure, which is a moral right, and the right of publication, which is an economic right, at the same time through a single act. Also, in this case, there are two different offences, so Art. 44 of TCC, which regulates the conceptual aggravation, will be applied to the case that is “A person who commits more than one offence through a single act shall only be sentenced for the offence with the heaviest penalty.” Also, in case of single act harms more than one person’s rights, Art. 43/2 will be applied.²¹⁶ These three views each have their own justifications, but Turan’s view seems more reasonable since Art. 20 of LIAW states that “.... Economic rights are independent of one another. The disposal and exercise of one does not affect the other.” Economic rights are independent from one another and the infringement of one or many economic rights cannot constitute a single crime; merely mentioning them within the same article does not make them selective acts. Also, violations of moral and economic rights together have to be accepted as different offences since the protected juristic interests are different.

With respect to online infringements, it is stated in Art. 71 of LIAW that infringers who act against the procedure mentioned in additional Art. 4 of LIAW, which is the notice and takedown procedure, “shall be sentenced to imprisonment from three months to two years unless this act constitutes another crime requiring a greater penalty.” The procedure will be mentioned afterwards.

The obligation of banderol, and sanctions applied to infringements which occur by violating the obligation to such is designated in Art. 81 of LIAW as follows:

Any person who reproduces a work in contravention of the banderol requirements or without a banderol and puts it up for sale, sells, distributes or buys or accepts due to commercial purposes shall be sentenced to imprisonment from one year to five years or a judicial fine up to five thousand days.

²¹⁵ H. Selcen Turan, *Fikir Ve Sanat Eserlerinin Cezai Himayesi*, 1. Baskı ed. (Ankara: Seçkin Yayıncılık, 2012), p. 256.

²¹⁶ Turan, p. 211-213.

Any person who produces, puts up for sale, sells, distributes, buys, accepts or uses counterfeit banderols shall be sentenced to imprisonment from three years to seven years and a judicial fine up to five thousand days.

Any person who uses duly obtained banderols on another work shall be sentenced to imprisonment from one year to five years and a judicial fine up to one thousand and five hundred days.

Any person who obtains banderols by collusive behaviours and without authority shall be sentenced to imprisonment from one year to three years.

Any person who provides banderols to unauthorized persons shall be sentenced to imprisonment from two years to five years and a judicial fine up to five thousand days.

In order to commit the crime of banderol, intention is sought as a moral element; in terms of the reproduction, dissemination, and selling of a work against the obligation of banderol, general intention is sought, and in terms of buying or accepting works against the obligation of banderol for commercial purposes, special intention is sought.²¹⁷ According to Turan and Yılmaz, it has been found that most of the offences within the sphere of LIAW were about the violation of banderol liability, especially for pirate CD, DVD, films, etc.²¹⁸

In terms of the joinder of offences, this is designated in Art. 44 of the TCC as, the person, who commits more than one different crime with a single act, is punished from the crime that requires the most punishment among others.” However, with respect to the crimes committed by the violation of the obligation of banderol, Art. 81 of LIAW foresees an exception to the provisions on the joinder offences, that is,

Where the offence of violation of the banderol requirements is committed concurrently with the offence which has been determined in the first paragraph of Article 71, the offender shall be punished only according to Article 71. However, the penalty shall be increased by one-third.

4.5. Notice and Takedown Procedure

Infringements of intellectual and artistic works may appear on online platforms. For such infringements, the author or right holders must take another approach to protecting their copyrights. This approach is described within the additional Art. 4 of LIAW as follows:

In case where rights of authors and related rights holders granted by this Law have been violated by providers of service and content through the transmission

²¹⁷ Yazıcıoğlu, p. 464.

²¹⁸ Metin Turan, and Bülent Yılmaz, "Türkiye’de Telif Hakları İhlalleri: Yargıtay Kararları Çerçevesinde Bir Değerlendirme," *Bilgi Dünyası* 15 (2014), p. 69.

of signs, sounds, and/or images including digital transmission, the works which are subject of the violation shall, upon the application of the right holders, be removed from the content. Natural or legal persons whose rights have been violated shall to this end initially contact with the content provider and request that the violation be ceased within three days. Should the violation continue, a request shall next be made to the public prosecutor requiring that the service being provided to the content provider persisting in the violation be suspended within three days by the relevant service provider. The service being provided to the content provider shall be restored, if the violation is ceased.

This procedure is called notice and takedown in the literature. Substantially, it is not a legal action, yet it is performed by the public prosecutor if the content provider ignores the request. In order to provide a better understanding of the issue, terms such as service provider and content provider should be explained. Law number 5651 the Law on the Regulation of Public Transmission and Fighting Crimes Committed through these Transmissions (Internet Law)²¹⁹ Art. 2/m defines service providers (*yer sağlayıcı*) and 2/f defines content provider (*içerik sağlayıcı*) as follows:

Service provider: real or legal persons that house the systems which provide or operate service and contents.

Content provider: real or legal persons who produce, change and provide all kinds of information or data offered to users over the internet.

To illustrate, internet sites, which have various forms of content, are service providers that enable users to access this content. On the other hand, content within internet sites may be provided by various sources; these sources are called content providers. Using content that constitutes copyright infringement is initially a violation performed by content providers since the content provider is responsible for every kind of content provided in the internet environment according to Art. 4 of Internet Law, yet is not responsible for content that belongs to someone else but is linked by the content provider.

On the other hand, the service provider is not liable for control of the contents in terms of seeking any illegal activity, but if the service provider is informed about illegal transmission, they are liable to ensure this content is omitted; if not, a fine of

²¹⁹ İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun (İnternet Kanunu), *Resmi Gazete* 26530 (23 Mayıs 2007), Kanun No: 5651.

one hundred thousand to one million Turkish liras is foreseen in Art. 5 of Internet Law. Although the law is not about copyright infringements except for the violations of personal rights and the privacy of one's private life, the law indicates the role of the content provider and service provider, and guides with regard to copyright infringements in this respect. Further, additional Art. 4 of LIAW also mentions the responsibility of the service provider to omit the infringing content when informed of such as mentioned above.

The content provider has to omit the infringing content within three days on request of the author or right holders. If not, the author or the right holder can apply to the service provider about the violation and request the omission of the infringement. When the service provider has been informed, they are obliged to prevent further infringement; otherwise, they, as the content provider, will be held responsible for this content. The author or right holders can appeal to public prosecutor before or after applying to content and service providers.²²⁰ The public prosecutor can block off the service provider, and ask for the removal of the infringing content from the service within three days; if service provider removes the infringing content, the service is allowed access again. Memiş²²¹ remarks that this procedure does not restrain the author or right holders from taking civil or criminal action against the infringers for the infringements that have already occurred. The service provider who is informed about the infringement but does not remove the infringing content, so as to enable the continuity of the infringement, would also be held responsible as an accessory after the notice with respect to TCO Art. 61 for being an accessory to a tortious act. Therefore, the service provider is jointly responsible with the content server.²²² The joint responsibility of the service provider for infringing contents is also supported in American doctrine and the US Courts:

Copies made, distributed, and displayed by users as having been made, distributed, and displayed by the service provider as well, thus leading to strict liability for direct infringement by user and service provider alike. To avoid liability for user-generated content, then, service providers would have to

²²⁰ Mustafa Ateş, "Sosyal Medya Aktörlerinin Hukuki Sorumluluğu Ve Bilhassa Telif Haklarının İhlalinden Doğan Sorumlulukları," *Fikri Mülkiyet Hukuku Yıllığı* (2013), p. 74-76.

²²¹ Tekin Memiş, *Fikir Hukuku Bakımından İnternet Ortamında Müzik Sunumu*, 1. Baskı ed. (Ankara: Seçkin Yayıncılık, 2002), p. 151.

²²² Bozbel, p. 505.

affirmatively monitor all such content and pre-emptively remove anything that might be infringing.²²³

In the literature of the Court of Cassation, joint responsibility is defined as the responsibility of more than one person for a common issue. Therefore, the service provider's inaction as not ceasing the infringing content happens if it is not intentional (*dolus*) it should be done with gross negligence (*culpa lata*). Besides, the content provider using infringing content is an intentional (*dolus*) act; thus, the acts of service provider and content provider compose a combination of negligence and intention; thus, cause the liability of both of them from indemnity with joint fault.²²⁴ In terms of the joint liability of third person (such as a service provider in tortious act in copyright infringement), Heymann states that 'one is subject to liability for harm resulting to a third person from another's tort if that person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."²²⁵ This means that knowing about infringement on the part of a content provider and not removing access to the infringing content can be accepted as substantial assistance and encouragement to the tortious act, and makes the service provider jointly liable for the infringement. In case of infringements by violation of additional art. 4 of LIAW, action for declaration, prevention, cessation, and indemnity can be taken against the infringer. If the infringements also constitute an offence, criminal actions can be filed²²⁶ The entities who can commit these offences, as defined in additional Art. 4, can only be real persons, and if they are committed within the framework of a legal person's activity, the security measures specific to legal persons in TCC shall be ordered.

²²³ Cotropia Christopher A, and Gibson James, "Convergence and Conflation in Online Copyright," *Iowa L. Rev.* 105 (2019), p. 1039.

²²⁴ Özlem Tüzüner, "Haksız Fiil Ekseninde Gittigidiyor İctihadı," in *Fikri Mülkiyet Hukuku Yıllığı*, ed. Tekin Memiş (Ankara: Yetkin Yayınevi, 2013), p. 476.

²²⁵ Laura A Heymann, "Knowing How to Know: Secondary Liability for Speech in Copyright Law," *Wake Forest L. Rev.* 55 (2020), p. 340-341.

²²⁶ Yusuf Başlar, "Fikir Ve Sanat Eserleri Kanunu'nun Ek Madde 4 Hükmünün İhlali Suçları," *Ankara Barosu Dergisi* 77, no. 4 (2019), p. 49.

CHAPTER III

5. INDEMNITY

Indemnity is a very broad concept that has different grounds and different appearances. The indemnity mentioned in the TCO and LIAW is similar and different in many ways. The aim of this chapter is to provide a profound understanding of the concept of indemnity, and describe its appearance in copyright infringement cases. In this respect, firstly, the concept of indemnity in TCO will be examined. Secondly, indemnity in the LIAW will be analysed. Finally, a comparison and discussion about the concept of indemnity with respect to both laws will be given.

5.1. Indemnity with Respect to General Principles of Turkish Code of Obligation

The concept of indemnity in terms of TCO can be examined according to two titles: indemnity based on breach of obligation, and indemnity based on tortious act. In both cases, indemnity can consist of material and/or moral compensation. In order to provide a profound understanding about this concept, it first seems necessary to explain breach of obligation, and examine the concept in terms of obligation, damage, and fault. Secondly, the term ‘tortious act’ will be defined, and material and moral compensation based on tortious act will be explained.

5.1.1. Breach of Obligation

Breach of obligation, as can be inferred from the name, acts in a way that does not suit obligation; to elaborate, the term obligation shall be defined. Obligation (obligatio) is the relationship that gives the creditor the authority to ask a debtor to do or abstain from an act, and emburdens the debtor to behave in the way the creditor demands.²²⁷ Breach of obligation, on the other hand, can arise from not performing contractual liabilities, unjust enrichment, and tortious act. For instance, if a debt arises from a tortious act and is not performed, this constitutes a breach of debt.²²⁸ Breach of debt can arise from the debtor's delinquent behaviour against the debt in two ways, non-performance and improper performance, which can be manifest as poor performance and failing to perform on time and place.²²⁹ Performance means that accomplishing the act required by the obligation.²³⁰ The sanction for breach of obligation is established in Art. 112 of the TCO as, "If the debt is not performed at all or properly, the debtor is obliged to compensate the damage of the creditor, unless he/she proves that no fault can be imposed on her/him."

The aspects of breach of obligation shall first be examined in terms of non-performance of the obligation; secondly, in terms of improper performance of the obligation, which can be seen as poor performance and failing to perform on time and place; and thirdly, the terms fault and damage will be discussed to clarify the issue of compensation.

Firstly: 'Non-performance of obligation' is interpreted as 'the impossibility of performance' because if the performance is possible, the claimant has to accept the late performance in principle, so the continuation of the debt is an impediment to a compensation claim.²³¹ If the debt is not performed at all, there are two options: either the performance is possible, yet has not performed, or the performance of the debt has become impossible. For the former, the subject of the debt is not impossible, so the debt continues to exist even if the performance is late. As far as performance is

²²⁷ Şahin Akıncı, *Roma Borçlar Hukuku: 818 Sayılı Bk Ve 6098 Sayılı Tbk Ile Mukayeseli* (Konya: Sayram Yayınları, 2021), p. 1.

²²⁸ Ahmet M. Kılıçoğlu, *Borçlar Hukuku*, 20. Baskı ed. (20. Baskı: repr., Ankara: Turhan Kitapevi, 2016), p. 662.

²²⁹ Kılıçoğlu, *Borçlar Hukuku*, p. 667.

²³⁰ Kemal Oğuzman, and Turgut Öz, *Borçlar Hukuku*, 12. Baskı ed. (İstanbul: Vedat Kitapçılık, 2014), p. 257.

²³¹ Oğuzman, and Öz, p. 390-391.

possible, the debtor is obliged to perform, and the creditor is obliged to accept the performance. The creditor's ability to renounce the performance and ask for indemnity is only possible if the law has an exceptional clause to deal with this matter²³² such as Art. 125/2-3 of TCO;

The creditor may also request the compensation of the loss arising from the non-performance of the debt or withdraw from the contract by immediately notifying that he/she has waived the performance of the debt and the right to demand compensation for delay.

In case of rescission of agreement, the parties are mutually relieved of their obligation to perform and may demand back their previous performances. In this case, if the debtor cannot prove that he is not at fault in default, the creditor may request compensation for the loss incurred due to the invalidity of the contract.

As can be seen, in contracts which emburden both sides with mutual debts, the law enables the creditor to claim the performance and damages for delay in performance or renounce the agreement and claim for damages due to the invalidity of the contract. Furthermore, even though the performance is possible, if the creditor would not gain any benefit from the performance anymore, which may be the case in fixed dates; it would be plausible to accept that the creditor has a justifiable reason to renounce the performance and claim for compensation for invalidity of contract.

The second option is the impossibility of the debt, which can appear before or after the constitution of the contract. Oğuzman & Öz argue that even though the responsibility for non-performance arises from the subsequent impossibility of performance, in the process of constituting the contract, if one side's misconduct (*culpa in contrahendo*) damages the other side, the party at fault will be held responsible within the scope of contractual liability. In this way, the scope of contractual liability is expanded. For instance, if the debtor is informed about the impossibility of the debt before the contract has been conducted, he/she will be responsible for any loss caused by the non-performance of the debt.

The non-performance of debt due to subsequent impossibility of performance shall be examined in terms of the debtor being at fault and being impeccable. If the subject of the debt is destroyed, or the performance of the debt becomes impossible somehow, the debtor is no longer liable to perform the debt. The extent of the fault is

²³² Oğuzman, and Öz, p. 379-380.

important in the determination of the amount of indemnity, which takes the place of the debt.

Secondly: ‘Improper performance’ may mean either of two things, namely late performance or poor performance. In the case of late performance, to claim damages for a delay in performance, the debtor needs to be at fault for the late performance and notice about late performance should be given. With respect to poor performance, on the other hand, an indemnity claim does not require such condition as being defaulted.²³³ To speak of poor performance, if the debtor exercises liability, yet the performance is not appropriate to the obligation, or does not include required elements, this is referred to as defective/poor performance such as constructing a building that is not compatible with the project.²³⁴ Also, failing to perform in place is accepted as poor performance since full performance of the debt requires performing the debt according to the contract in terms of time, place, and features.

Poor performance is regulated according to different special laws, and also varies according to case, but if poor performance is not otherwise mentioned in one of the special law clauses, the general law TCO Art. 112 will be applied, which suggests two options: either refusing the performance and demanding compensation, or accepting the poor performance and claiming compensation for the damages caused by such.²³⁵

Thirdly: the terms fault and damage should be examined to clarify the issue of compensation. Fault concept differs according to breach of obligation and tortious act. Art. 112 and 114 of TCO regulate fault in breach of obligation. Art. 112 of TCO clearly expresses that “If the debt is not performed at all or properly, the debtor is obliged to compensate the damage of the creditor, unless the debtor proves that no fault can be imposed on her/him”; thus, it is obvious that the consequences of a breach of obligation are based on the fault of the debtor, so fault to any degree results in compensation for the damage caused by the breach of obligation. However, the characteristic of fault is not specified in the law. Eren defines fault in contractual liability as an act which deviates from behaviour of a standard and normal debtor type of debtor who belongs to a social and professional circle; behaviour that the

²³³ Oğuzman, and Öz, p. 381.

²³⁴ Kılıçoğlu, *Borçlar Hukuku*, p.695-696 .

²³⁵ Kılıçoğlu, *Borçlar Hukuku*, p. 695.

legal order does not approve and condemn; specifically, the character of behaviour. In this sense, the debtor's lack of the duty of care in comparison to an ideal debtor. Fault in contractual liability divides into two categories which are intention and negligence. Intentional fault means that the debtor knowingly and willingly behaves improperly to the liabilities arisen from contract. Intention, on the other hand, even though the debtor does not intend to any breach of contract, does not act according to the standard and show necessary attention and care.²³⁶

The fault of the debtor is defined as follows: if the debtor behaves as if he plans and desires the result of the breach of obligation, or acts as though he envisages the result, or he did not give necessary care and attention to prevent the result of a breach of contract, the debtor is at fault.²³⁷ The responsibility of the debtor when his/her fault is established in Art. 114 of TCO is as follows:

The debtor is generally responsible for all his faults. The extent of the debtor's liability is determined by the specific nature of the business. Liability is considered softer if the work is not particularly beneficial to the debtor.

Provisions regarding tortious act liability are also applied to cases of breach of contract by analogy.

As can be seen from the article, the debtor is responsible for each of their faults unless they can prove that no fault can be laid on them.

“Damage means material or immaterial harm to a legally protected interest and includes pecuniary and non-pecuniary damage.”²³⁸ “Damages are generally classified in two categories; material damages and moral damages. Damage is the decrease of one's property. By property, we mean everything that a person could have maintained with a legal right”²³⁹ The term ‘damage’ refers to material damage when used alone. Material damage is damage to someone's wealth without his/her consent. For any legal claim to take place with regard to compensation, there must be a resulting injury/damage²⁴⁰ “Pecuniary damage corresponds to the difference between

²³⁶ Eren, F. (2012). *6098 Sayılı Türk Borçlar Kanununa Göre Hazırlanmış Borçlar Hukuku: Genel Hükümler*: Yetkin Yayınları, p. 1060-1061.

²³⁷ Oğuzman, and Öz, p. 416.

²³⁸ Erdem Büyüksagis, "The New Turkish Tort Law," (2012), p. 53.

²³⁹ E. Adal, *Fundamentals of Turkish Private Law, Hukuk Kitapları Serisi:194* (İstanbul: Legal Yayıncılık, 2012), p. 288.

²⁴⁰ Oğuzman, and Öz, p. 395.

the actual state of the victim's patrimony and the state it would have been in if the tort had not occurred"²⁴¹

Breach of debt also may cause moral damage. Moral damage, which is also called 'non-pecuniary damage', relates to the pain and suffering or other mental distress that arises as a result of the injury suffered.²⁴² Oğuzman & Öz point out that moral damage does not mean a decrease in assets, but the physical and moral pain and suffering of a person due to the violation of their personal rights, and thereby a decrease in their pleasure of living. So, a breach of debt may cause such a loss by violating the personal rights of a creditor.²⁴³ Art. 58 of TCO mentions moral damage as "The person who morally suffers from the harm to his/her personal rights can demand some money to be paid for the moral damages he/she suffered under the name of moral indemnity..." As can be seen from this article, moral indemnity can be asked for any moral damage suffered. Moral damage in breach of obligation is not a common occurrence. For instance, if a man dealt with a pastry chef to make his wedding cake, and the cake was not delivered on time, in place, improperly, or not delivered at all; besides the material damage it caused, the groom also suffers morally due to the importance of the event. In this kind of case, the creditor can ask for material and moral indemnity for the damages they have suffered.

The term damage can be divided into two forms: positive damage and negative damage. Positive damage corresponds to the damage which the creditor would not have suffered if the debt had been performed as it should have been. In other words, the difference between the status of the creditor's wealth if the debt is performed and when the debt is not performed is positive damage. This includes actual damage and loss of profit. Actual damage (*damnum emergens*) means an actual diminishment in wealth, and it may occur in two ways: decreasing actives in assets, or increasing the passives in assets. Moreover, loss of profit (*lucrum cessans*) refers to the loss of the possibility of increasing the asset. In respect to indemnity claims for material damages, positive damage is considered especially loss of profit is taken into account in the determination of compensation amount.²⁴⁴ Negative damage, on the other

²⁴¹ Büyüksagis, p. 53.

²⁴² Büyüksagis, p. 53.

²⁴³ Oğuzman, and Öz, p. 402.

²⁴⁴ Ayiter, p. 262.

hand, is the damage that arises because the contract, which is signed or trusted to be signed, is not performed, and their reliance on the unperformed contract causes damage to the creditor's wealth. Thus, the creditor may demand compensation for the damage suffered due to his/her reliance on the contract.²⁴⁵ Positive damage and negative damage distinction is only important for contractual liabilities; non-contractual liabilities do not embrace such a distinction.²⁴⁶

There are some debates as to the determination of damage that needs to be explained. According to Art. 112 of TCO, if the debtor cannot prove that he does not have any fault in the non-performance of the debt, he is liable for the losses incurred by the creditor in accordance with the extent of the fault. In case of unilateral contracts, the indemnity for the damage caused by the non-performance of the debt is paid to the creditor, and the debt relationship comes to an end. However, in the case of synallagmatic (rights and debts arise mutually for creditor and debtor) contracts, the situation is a bit more complicated. Even though there is debate as to the determination of the damage in synallagmatic contracts, exchange and variation theories provide genuine ideas on the matter.

According to exchange theory, the damage should be calculated only by considering the unperformed debt, and by exchanging the indemnity and other party's debt, the relationship ends. On the other hand, variation theory suggests that the creditor's damage should be calculated by taking the difference between the value of the unperformed debt and the other party's debt, and paying the variation to the creditor. Oğuzman supports variation theory, Öz promotes variation theory for the impossibility of performance cases, but he suggests exchange theory for cases of default by the debtor when the creditor renounces the performance and claims for positive damage.²⁴⁷ By agreeing the general view of the doctrine Eren also supports variation theory due to modern society and market organisation and the practical needs in implementation of synallagmatic contracts.²⁴⁸

Compensation arising from the breach of obligation requires an obligation, which is not performed at all, or properly, material or moral damage, the causal relation

²⁴⁵ Oğuzman, and Öz, p. 395-396.

²⁴⁶ Eren, p. 530.

²⁴⁷ Oğuzman, and Öz, p. 400-401.

²⁴⁸ Eren, p. 1068.

between the breach of obligation and damage, and fault of the debtor. Further, claims for breach of contract have to be made within the appropriate time limitation stated in Art. 146 of TCO as: “Unless otherwise provided by law, each receivable is subject to a ten-year statute of limitations.” Therefore, receivables arising from moral and material damages are subject to a ten-year limitation with respect to indemnity claims. In all, the forms of compensation that arise from breach of contract are moral and material in nature. In cases of breach of obligation, if the debtor is at fault and the creditor suffers from damages, the damages shall be compensated via indemnity claims.

5.1.2. Tortious Act

The tortious act is mentioned within Art. 49 of TCO as

The person who harms someone with an act, which is faulty and unlawful, has to compensate this damage. Even if there is no legal rule to prohibit the damaging action, the person who intentionally harms someone with an act that is immoral, has to compensate this damage.

As can be seen from the article, a tortious act does not rely on the obligational relation but depends on the unlawful act alone. “To condemn a tortfeasor with compensation, it is essential to have the existence of an act causing an injury to someone. This might be, due to perform an action or also due to a negligence (*unterlassung*)”.²⁴⁹ The liability for a tortious act complies with the negative obligation, which is acting in a way that does not cause any injury to the plaintiff’s body, property, reputation, or other interests. To compensate a tortious act involves compensating damages as if the tortious act never had occurred.²⁵⁰

Fault in tortious act mainly similar to fault in contractual liabilities. According to Eren, fault is a course of action which the legal order condemns and does not approve. In the determination of fault mainly two theories are suggested that are subjective fault theory and objective fault theory. Subjective fault theory evaluates the behaviour according to psychological and moral conditions of offender. On the other hand, objective fault theory suggests an ideal type for the evaluation of fault in certain behaviour.²⁵¹

A tortious act may also constitute an offense in some cases. In terms of time limitation to claim compensation for a tortious act, according to Art. 72 of TCO

²⁴⁹ Adal, p. 288.

²⁵⁰ Adal, p. 288.

²⁵¹ Eren, p. 569-570.

The claim for compensation expires at the end of two years starting from the date the injured learns about the damage and the person liable for compensation, and in any case, ten years from the date of the act. However, if the compensation has arisen from an act requiring a penalty by Criminal Codes for which a longer statute of limitation is stipulated, this statute of limitation shall be applied.

If a debt has arisen in terms of the injured party due to the tortious act, the injured party can always avoid performing this debt, even if the claim for compensation arising from the tortious act is time-barred.

As can be seen from the article, for cases in which a tortious act also constitutes an offence in terms of the TCC, the time limitation for indemnity claims is designated according to the limits for that offence if the time limitation of the offence is longer than that of a tortious act.

Moreover, in terms of burden of proof, Art. 50 of TCO states that “the sufferer is under the burden of proof in terms of damage and the fault of the maleficent.” A tortious act depends on the fault and damage conditions for a breach of obligation.

The damage caused by a tortious act can emerge in two ways: material damage and moral damage. Material damage, as mentioned before, is the damage to wealth and on the unity of the body. Material damage to wealth is the kind of damage that can be classified as actual damages, and can be demanded via a material compensation claim with regard to the degree of fault and damage. However, determination of the material damage caused by death and bodily injuries is a somewhat complicated and varies according to case. In the case of bodily injury, treatment expenses, loss of earnings, loss caused by the incapacity to work, the losses arises from the change in economic future, etc.; in case of death, funeral expenses, treatment expenses until death, the loss of the people who are deprived of the support of the dead, etc., can be demanded as material damage via material indemnity claims. Briefly, material indemnity claims based on tortious act require damage and fault as preconditions to filing actions for indemnity, where the amount of indemnity is determined according to degree of fault and damage.

Moral damage caused by a tortious act, on the other hand, can emerge as damage to the unity of the body and damage to personal rights. The moral damages caused by damage to the unity of body can be demanded via a moral indemnity claim, which is established in Art. 56 of TCO. In addition, the moral damages caused by the damage

to personal rights can be demanded via a moral indemnity claim, which is established in Art. 58 of TCO.

Damage caused by tortious act can also be classified as direct damage and indirect damage. Direct damage appears immediately after the tortious act, and can harm property rights and personal rights which can cause material and moral damages. Also, indirect damage appears because of the direct damages or loss of profit due to incapacity to work. Funeral expenses, repair and treatment expenses and other expenses due to bodily injury are within the category of indirect damages made because of direct damages. For direct damages material and moral indemnity can be claimed, and for indirect damages only material damages can be claimed because mentioned damages are within the sphere of material damage only.²⁵² Briefly, moral indemnity claims based on the tortious act requires moral damage as a necessary condition; the damage may have been caused by injury of body, property or dignitary interest such as violation of personal rights or property rights.

5.2. Indemnity with Respect to the Intellectual and Artistic Works

Indemnity claims with respect to LIAW can be examined under the two titles of moral indemnity and material indemnity. Indemnity claims cannot be directed in the action for cessation or prevention but should rather be directed via action for indemnity separately, though the court may subsequently decide to unite the cases. Indemnity claims are based on Art. 70 of LIAW, which states:

Any person whose moral rights have been infringed may bring an action for moral damages for the moral injury he has suffered. In place of or in addition to such pecuniary compensation the court may order another sort of compensation for moral damages.

Any person whose economic rights have been infringed may claim compensation under the provisions governing torts, if the infringer is at fault.

In the cases set out in the first and second paragraphs, the infringed person may, apart from the damages, also claim the profits gained by the infringing party. In such case, any sum demanded in accordance with Article 68 shall be deducted from this amount.

The article, as can be seen, indicates that indemnity actions consist of three types of claim, namely moral indemnity for moral damages, material indemnity for material

²⁵² Hatemi, H., & Gökyayla, E. (2012). *Borçlar Hukuku: Genel Bölüm; 6098 Sayılı Tbk. Esas Alınarak Hazırlanan*: Vedat Yayıncılık, p. 124.

damages, and return of the profits gained by the infringing party. It is stated that because of the writing style of the article, it is mistakenly understood that material indemnity can only be asked if the economic rights of the author have been infringed, and moral indemnity can be asked if the moral rights of the author have been infringed. However, if infringement of economic rights causes moral damage to the author or right holder as well, moral damage, in addition to material damage, can be claimed. Similarly, in case of the infringement of the moral rights of author or right holder, if the action has also harmed the economic rights of author, in addition to moral indemnity, material indemnity can also be claimed.^{253 254 255}

“Copying a work without the owner's permission is tortious”.²⁵⁶ In other words, infringements of copyrights have the characteristic of tortious act, and due to the direct reference of LIAW to the provisions of tortious act of TCO fault and damage conditions is required.²⁵⁷ Thus, the determination of the indemnity is a somewhat complicated process since it is directly related to the fault and damage elements due to the tortious character of copyright infringements, and any reduction of the amount designated based on Art. 68 needs further clarification.

In the determination of moral and material indemnity, some features have to be considered and if there are reasons for reduction or increasing, they shall be implemented. For instance, if the sufferer complies with the violating action, or be effective in arise or increase of damage, or aggravates the circumstances of the person who is liable with indemnity the Court may reduce or remove the indemnity according to art. 52 of TCO. Also, if the liable persons’ fault is mere negligence and he would suffer from poverty when he pays the indemnity, and the fairness principle suggests the Court may reduce the indemnity.²⁵⁸ Besides, the Court of Cassation requires reduction in case of joint fault especially in the determination of basic amount of royalty; it could also be a reference to the approach of the Court of Cassation in terms of reduction of indemnity amounts. It is suggested by Küçükali

²⁵³ Kılıçoğlu, *Sınai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 464,471.

²⁵⁴ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 2203.

²⁵⁵ Öztan, F. (2008). *Fikir ve Sanat Eserleri Hukuku*. Ankara, Turhan Kitabevi, p. 673.

²⁵⁶ Goold, p. 1835.

²⁵⁷ Küçükali, p. 213.

²⁵⁸ Küçükali, p. 291.

that when the joint fault of the sufferer is determined, as for the fault of infringer objective fault criterion should be taken into account.²⁵⁹

In this respect, moral indemnity will be explained first, and the place of fault and damage within moral indemnity claims will be clarified. Secondly, the concept of material indemnity and its relationship with the tortious act should be explained, and the place of the fault and damage elements will be clarified. Thirdly, claims for the return of the profits gained by the infringer and their place within indemnity claims shall be analysed. Lastly, the reduction of royalties and gained profits from material indemnity shall be explained and analysed thoroughly.

5.2.1. Moral Indemnity

Moral indemnity is defined by the Eleventh Civil Court of Cassation as a type of compensation foreseen in case the social, physical, and emotional personal values of the person are attacked. Its purpose is to meet circumstances such as restoring the moral balance of the person that has been disturbed due to an unlawful act, satisfying the person emotionally, and preventing the individual who caused them harm from repeating such an act (T. 18.09.2008, E. 2007/7817, K. 2008/10176). Action for moral indemnity is a kind of case that is based on a tortious act; thus; if there is not any different regulation in Art. 70 of LIAW, articles about tortious acts in TCO are applied to indemnity cases to the extent appropriate.²⁶⁰ Although moral indemnity claims in LIAW and TCO have similar characters, a distinction should be made. Moral indemnity claims are based on the violation of copyrights; this violation may or may not harm personal rights of an author. Violation of personal rights is not required to file a suit case based on LIAW, violation of moral right is enough to file this case.²⁶¹

In order to file an action for moral indemnity claims, there are certain conditions that need to be considered due to their character being similar to a tortious act, such as violation of moral rights, damage, and fault. In terms of violation of moral rights, it has been pointed out that moral indemnity can be claimed if one or more moral rights of the author have been infringed; violation of personal rights is not a condition for

²⁵⁹ Küçükali, p. 293.

²⁶⁰ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 2192.

²⁶¹ Öztan, 2008, p. 670-671.

this claim, yet if there is such violation, moral indemnity, as based on TCO Arts. 49 and 58, can also be claimed.^{262 263 264} Besides, according to a verdict of the Eleventh Civil Court of Cassation (T. 29.03.2001, K. 493/2537) the moral rights that have been infringed should be specified for moral indemnity claims.²⁶⁵ According to a verdict of General Court of Cassation, in determination of moral indemnity, how moral rights are violated should be discussed individually and the essentials of moral indemnity shall be considered (T. 18.12.1981, E. 1980/1, K. 1981/2).

In terms of damage and fault conditions, although they are necessary conditions for indemnity claims based on a tortious act, the role of indemnity claims based on Art. 70 of LIAW has been heavily debated, so in order to clarify the necessary conditions to file an indemnity action, these elements will be further discussed and analysed.

In terms of damage, there are two views suggested by doctrine: one is regarding moral damage as an additional factor that is not considered necessary for indemnity claims, whilst the other is regarding moral damage as a necessary element for an indemnity claim. The first view is suggested by several writers, and there are verdicts from the Civil Court of Cassation that favour this view. For instance, in a verdict of the Eleventh Civil Court of Cassation, it is stated that according to Art. 70/1 of LIAW, the author whose any moral rights have been infringed acquires the right to claim moral indemnity, and does not necessarily need to be morally damaged by the infringement. Moral damage appears by the infringement of moral rights; there is a legal causal relation, which does not require further demonstration, between the infringement and damage (T. 14.09.2009, E. 2009/790; K. 2009/9383). In the doctrine, Tekinalp suggests that violation of moral rights is sufficient grounds to file a moral indemnity case; moral damage to the author is not additionally required. This view is also accepted in the Eleventh Civil Court of Cassation's 04.06.2001 dated and 2687/5080 numbered verdict.^{266 267}

²⁶² Ramazan Durgut, "Fikir Ve Sanat Eserleri Kanunu Kapsamında Tazminat Davaları," *Prof Dr. Hüseyin Ülgen'e Armağan* (2007), p. 1080.

²⁶³ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 2194.

²⁶⁴ Erel, p. 347.

²⁶⁵ Tekinalp, p. 308.

²⁶⁶ Tekinalp, p. 308.

²⁶⁷ Öztan, 2008, p. 671-672.

On the other hand, another view suggests that the moral indemnity claims do require damage as a condition since damage is explicitly expressed in Art. 70, though is not expressed in either Arts. 66 or 69, which are applied to actions for prevention and cessation.²⁶⁸ The expression of the law cannot be disregarded; mentioning the damage element in one clause and not mentioning it in another should nominally be intentional; thus, Kılıçoğlu's approach seems plausible.

In addition, as many suggest and the law indicates, infringement of moral rights carries the characteristic of a tortious act. Thus, the elements of the tortious act should be applied to moral indemnity claims to the extent appropriate. For this reason, it is not sufficient to only show which moral rights have been infringed, but also that the right holder has been morally damaged by the infringement.²⁶⁹ It has been pointed out that from the way LIAW expresses it, and Art. 49 of 818 numbered TCO, which was on force when the LIAW came on to force and taken into account, there should not be any hesitation in looking for moral damage in cases of moral infringement.²⁷⁰ Art. 49 of 818 numbered TCO corresponds to Art. 58 of 6098 numbered new TCO. Tosun and Alica also agree with the arguments on the clear expression of the LIAW with regard to damage, and due to the similar character of the tortious act and Art. 58 of TCO it is suggested that moral indemnity claims can be directed if there is moral damage caused by the infringement.^{271 272} However, accepting damage as a condition for moral indemnity claims raises the question as to whether legal persons can claim moral indemnity or not. In several decisions of the Civil Court of Cassation and in doctrine it is stated that legal persons can suffer from moral damages, so the moral indemnity rights of legal persons are accepted.^{273 274} This is expressed by Durgut as "The person whose moral right is infringed whether be legal or real person can claim moral indemnity. Restricting moral damage to only

²⁶⁸ Kılıçoğlu, *Sınai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 434.

²⁶⁹ Bozbel, p. 578-579.

²⁷⁰ M. Murat İnceoğlu, and Yalçın Tosun, "Fikir Ve Sanat Eserleri Kanunu Uyarınca Manevi Tazminat Talepleri Ve Bunların Türk Borçlar Kanunu İle İlişkisi," *Banka ve Ticaret Hukuku Dergisi* 28, no. 3 (2012), p. 86-87.

²⁷¹ Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, p. 282.

²⁷² Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2196.

²⁷³ Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, p.287

²⁷⁴ Küçükali, p. 271.

real persons cannot be accepted due to the usage of moral rights by legal persons as well.”²⁷⁵

In terms of fault, there are two views suggested by doctrine: one considers fault on the part of the infringer to be an unnecessary condition for moral indemnity claims, whilst the other regards fault as the main condition for moral indemnity claims. The discussion about fault arises from the change to Art. 70 of LIAW and its relationship with the tortious act mentioned in Art. 49 of TCO. The first version of Art. 70/1 was “The infringer if he is at fault compensating the damage; if the severity of fault and infringement are necessitated additionally to be given some money with the name of moral damage can be decided” However, through the change made in 1995 with law number 4110, the expressions “severity of fault and infringement” are now omitted from the article. The justification for this is that law number 4110 clearly expresses that the change to Art. 70 has been made to render the LIAW in compliance with Art. 49 of TCO²⁷⁶ Some authors interpret this change differently; for example, Tekinalp asserts that although the severity of the fault condition is extracted from Art. 70/1 of LIAW in compliance with the tortious act terms mentioned in Art. 49 of TCO, in the LIAW system indemnity claims are not dependent on the presence of fault.²⁷⁷ There is a verdict rendered by the General Civil Court of Cassation which suggests that in order to file a suit for moral indemnity, only the infringement of moral rights is enough, the fault of the infringer is not required for moral indemnity claims (1.5.2002, E.2002/11-283, K.2002/340).²⁷⁸

On the other hand, the dominating view of the doctrine infers that the omission of “severity of fault” from Art. 49 of TCO does not indicate impeccable liability; what is intended to be omitted is not the fault itself but its severity. Asserting impeccable liability for moral indemnity claims clearly challenges the justification of law number 4110 and the character of indemnity actions; also, it disregards the difference between action regarding moral indemnity and action regarding prevention and cessation. Therefore, the infringer being at fault should first be sought for moral

²⁷⁵ Durgut, p. 1081.

²⁷⁶ Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, p. 288.

²⁷⁷ Tekinalp, p. 309.

²⁷⁸ Durgut, p. 1078.

indemnity claims, yet the fault does not have to be severe to file such a case. The degree of fault is considered in the determination of indemnity amount.²⁷⁹ In all, for the reasons mentioned above, action regarding moral indemnity depends on the fault condition, as for all indemnity claims.²⁸⁰ The burden of proof about the damage and fault of the infringer is incumbent on the plaintiff.²⁸¹ Moreover, in terms of time limitation for the actions about moral indemnity cases, the provisions on art. 72 of TCO shall be applied due to the similar character of moral indemnity with tortious act; thus, two years starting from learning the infringement and infringer, and ten years at most starting from the date of violation.²⁸²

In terms of moral indemnity claims based on the simultaneous violations of copyrights and personal rights, the legal actions that can actually be so filed are not particularly clear. For instance, if an infringing act violates both the moral and personal rights of an author, the author may claim moral compensation based on Art. 58 of TCO, or 70/1 of LIAW; the question is whether both can be demanded at the same time. The Civil Court of Cassation usually affirms this kind of claim if the infringement simultaneously violates both rights. For instance, in a verdict rendered by the General Civil Court of Cassation (2.4.2003, E.2003/4-260; K.2003/271) in a case about some passages of a literary work being read in a documentary film, which was shown as a television program, the court decided on moral indemnity based on Art. 70 of LIAW and Art. 58 of TCO. The doctrine also supports the approach adopted by the Civil Court of Cassation, for instance, Tekinalp and Erel, who suggest filing separate lawsuits based on different articles for the same violation. On the other hand, Tosun claims that demanding two indemnities for the same action does serve the purposes of moral indemnity since moral indemnity aims to remove the moral damage, pain, and suffering caused by infringement. The aim of moral indemnity in LIAW and TCO is the same, and one compensation should be enough to eliminate the consequences of infringement, so a second indemnity is pointless. Further, the relationship between LIAW and TCO is that of special law and general law, so if there is a specific clause in special law, general law would not in any case

²⁷⁹ Levent Yavuz, Trkay Alca, and Fethi Merdivan, p. 2198.

²⁸⁰ Tosun, *Medeni Hukuk, Szleme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Aısından Manevi Haklar*, p. 290.

²⁸¹ Levent Yavuz, Trkay Alca, and Fethi Merdivan, p. 2198.

²⁸² Bozbel, p. 581.

be applicable. Thus, there should be only one the indemnity claim and that should be based on LIAW, as special law.²⁸³ Unlike Tosun who focus on the compensation of moral damage Küçükali suggests that in case of violation of personal rights and moral rights at the same time shall be compensated separately since protected legal interests differ and there are two separate unlawfulness.²⁸⁴ In terms of claiming moral damages it has been suggested that damage is a required condition and the aim of moral indemnity is to compensate moral damage; thus, focusing on damage rather than protected interests might be more accurate in terms of moral rights and personal rights as well. In this sense, although Tosun has some points, his view does not seem totally plausible. His thoughts about claiming two sets of compensation for one instance damage not serving the aims of moral indemnity provisions seems right because the aim of indemnity is to remove the damages to the author, and if one indemnity claim can compensate all the damages, another indemnity claim cannot be directed since damage is a required condition for these cases. Sarıkaya also supports the view that depending on two articles to separate claim two sets of compensation for one instance of damage is not plausible. Violations of personal rights should be considered through the moral indemnity actions based on LIAW as a factor of fault and damage. However, the view about accepting the relation between LIAW and TCO as one of that between special law and general law is not possible since there is no acceptance or reference to TCO as being general law provisions; also, to suggest special law and general law are related in every situation seems implausible; there are material elements of a special law, so there should also be material elements of general law. However, Art. 58 can only cover the violation of personal rights, and if violations of moral rights do not violate personal rights, Art. 58 cannot be applied; therefore, the relationship between LIAW and TCO is not one of general law and special law.²⁸⁵

Moral indemnity claims can be used by the author or, if the rights are transferred, transferees, and inheritors after the author's death. The right to use the moral rights of the author by inheritors after the death of author based on Art. 19 of LIAW is

²⁸³ Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, p. 303.

²⁸⁴ Küçükali, p. 280.

²⁸⁵ Sarıkaya, p. 66-67.

called ‘usage of personal rights after death’ (*post mortem*).²⁸⁶ Copyrights can be exercised by inheritors after the death of author for seventy years. Although personal rights do not transfer inheritors, copyrights can pass to inheritors so to the rights of moral indemnity claims. In this respect, inheritors can file moral indemnity action against infringers.²⁸⁷ Unlike Tekinalp, who asserts that seventy years period applied for economic rights cannot be applied to moral rights, Küçükali also suggests that the period of seventy years shall be applied to the usage of moral rights by inheritors since there is no such regulation supports limitless protection for moral rights.^{288 289} The majority of doctrine supports seventy years period for protection of moral rights by inheritors, and this view seems more plausible since otherwise is not provided by law and there is no reason to extent the protection period for moral rights only.

5.2.2. Material Indemnity

Material indemnity is the material loss of the author or right holders whose economic rights have been infringed. In order to claim material indemnity, one or more economic rights should be infringed; there should be damage caused by the infringement, and the infringer of the economic rights should be at fault. The provisions of the tortious act mentioned in TCO shall be applied to material indemnity claims since Art. 70 of LIAW directs the material indemnity claims to the provisions of the tortious act.²⁹⁰ Since the provisions of the tortious act should be applied to material indemnity actions, in terms of fault, damage, and time limitation the terms of the tortious action in TCO should be repeated here. Damage and fault are essential elements of the tortious act, and certain conditions for material indemnity claims; the time limitation for a material claim is stated in Art. 72 of TCO, which is “The claim for compensation expires at the end of two years starting from the date the injured learns about the damage and the person liable for compensation, and in any case, ten years from the date of the act...”

²⁸⁶ Tosun, *Medeni Hukuk, Sözleşme Hukuku Ve Fikir Ve Sanat Eserleri Hukuku Açısından Manevi Haklar*, p. 322.

²⁸⁷ Öztan, 2008, p. 670.

²⁸⁸ Küçükali, p. 277.

²⁸⁹ Tekinalp, p. 168.

²⁹⁰ Kılıçoğlu, *Sınai : Haklarla Karşılaştırmalı Fikri Haklar*, p.472-473 .

Material indemnity consists of actual damage (*damnum emergens*) and loss of profit (*lucrum cessans*).²⁹¹ Loss of probable profit should not be confused with gained profit due to infringement. Loss of profit means the damage caused by the prevention of the probable increase in wealth, either partially or fully, that might occur according to one's daily life routine and experience. Material indemnity, in addition to damages, includes loss of profit.²⁹²

5.2.3. Claims for the Return of the Gained Profits

The nature of the return of profits is not specified in LIAW, yet TCL Art. 25/3 mentions it as "The claimant's right to claim for material and moral damages and the earnings obtained due to unlawful attack to be given to him in accordance with the provisions of acting without power of attorney is reserved." In this respect, it can be said that the legal character of the claims for the return of the gained profits is similar to "*negotiorum gestio*" acting without power/authority.²⁹³ Therefore, there is a unanimous opinion that the return of gained profits is a special case of insubstantial acting without authority, as mentioned in Art. 530 of TCO^{294 295 296 297} which states;

The owner of the work, even if the work is not done for the sake of him, has the right to obtain the goods arises from the work, but to the extent he enriches has to pay the cost of worker, and rescue him from the debts he is undertaken.

As can be inferred from the article, the amount that should be returned is the net gain of the infringer. The costs that arise during the work shall be reduced from the gained profits.²⁹⁸ Return of the gained profit based on Art. 70/3 is possible for both material and moral infringements²⁹⁹³⁰⁰³⁰¹ However, Kılıçoğlu, in spite of the expression of the clause asserts that in case of infringement of moral rights, the gained profits of the infringer cannot be demanded.³⁰² With respect to damage to the right holder and the fault of the infringer, in the claims for the return of the gained profit the above are not sought as conditions since neither Art. 70/3 of LIAW, nor Art. 530 of TCO

²⁹¹ Bozbel, p. 580.

²⁹² Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2214.

²⁹³ Kılıçoğlu, *Sinai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 458.

²⁹⁴ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2215.

²⁹⁵ Erel, p. 349.

²⁹⁶ Kılıçoğlu, *Sinai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 458.

²⁹⁷ Tekinalp, p. 334.

²⁹⁸ Sarıkaya, p. 83.

²⁹⁹ Sarıkaya, p. 79.

³⁰⁰ Tekinalp, p. 313.

³⁰¹ Erel, p. 349.

³⁰² Kılıçoğlu, *Sinai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 459.

mentions damage or fault as conditions for such a claim.^{303 304 305} Therefore, the right holder should prove that infringer has gains by infringement, and do not have to prove their damage has been caused by the infringement.^{306 307}

Art. 70/3 of LIAW states that “any sum demanded in accordance with Article 68 shall be deducted from this amount.” As mentioned before, Art. 68 presents three options for the right owner that are, briefly, destruction, taking over, and royalties. The amount that will be deducted is debated in the doctrine; one view asserts that it is the amount of the payment for taking over the production means and reproduced copies, or the amount of royalties is argued.^{308 309} Another view suggests that the amount deducted mentioned in the article only refers to the amount of royalties because the amount for the taking over is not a payment made to the right holder; on the contrary, it is the amount given by the right holder to the infringer, so the amount is not actually paid, as such. Therefore, the interpretation that the amount for taking over is subject to deduction is not suitable with the writing, form and essence of the law.^{310 311} The second view on this issue seems more plausible since the deduction is made on the credit that the right holders claim from the infringers.

5.2.4. The Application of Indemnity Claims, Return of Gained Profits, and Royalties

There are various claims in case of infringements, and how they will be applied together is a somewhat complicated. The relationships between indemnity claims and royalty, indemnity claims and return of gained profits, and royalty and return of gained profits will be examined individually to provide a detailed understanding of the application matter.

First of all, material indemnity claims and royalties shall be examined. Royalties and their application in material indemnity is briefly mentioned under the title of action

³⁰³ Demirbaş, p. 201.

³⁰⁴ Bozbel, p. 581.

³⁰⁵ Ayiter, p. 263.

³⁰⁶ Kılıçoğlu, *Sinai : Haklarla Karşılaştırmalı Fikri Haklar*, p. 458.

³⁰⁷ Levent Yavuz, Türkay Alıcı, and Fethi Merdivan, p. 2216.

³⁰⁸ Ayşenur Şahin, *Fikri Hukukta Eser Sahibinin Mali Haklarının Korunması* (1. Baskı: repr., İstanbul: Vedat Kitapçılık, 2010), p. 191.

³⁰⁹ Tekinalp, p. 314.

³¹⁰ Demirbaş, p. 212.

³¹¹ Levent Yavuz, Türkay Alıcı, and Fethi Merdivan, p. 2216-2217.

for cessation, yet should be explained in detail. As noted previously, royalties are based on Art. 68 of LIAW in case of infringement of economic rights, and calculated by taking three times the amount of the basic amount of a suppositional contract, and results in a suppositional relationship between infringer and right holder. In terms of material damages to right holders, according to the dominant view of the doctrine, as the law notes that royalty claims cannot remove civil liability, if the damages caused by infringement exceed the amount of royalty, for the excess amount material indemnity based on Art. 70 of LIAW can be claimed.^{312 313 314} Although a royalties claim can be directed without the need to consider damage and fault conditions, the material damages that exceed the amount of royalties can only be demanded if the infringer is at fault, since all indemnity claims seek fault as a condition.³¹⁵ Moreover, as it is mentioned before, the time limitation for royalty claims is ten years, but for the claims about exceeding material damage additional to royalty claims have different time limitation because exceeding material damage based on fault and damage conditions which are arisen from tortious act provisions. For this reason, the time limitation for tortious act, which is designated in art. 72 of TCO, should be applied to claims about exceeding material damage separate from royalty claims. The time limitation, then, would be two years starting from learning the infringement and the infringer, at most ten years starting from the date of violation.

Secondly, application of indemnity claims and return of gained profits shall be examined. As mentioned previously, a claim for the return of profit does not depend on damage and fault conditions, so in cases where indemnity cannot be claimed, the return of the gained profit can be. However, in cases where the infringer is at fault and there are additional moral and material damages, the application of indemnity claims, together with the claim for the return of the gained profit, becomes somewhat complicated and needs enlightenment.

Initially there is no confusion about the simultaneous application for moral indemnity claims and claims for the return of gained profits since their functions are different;

³¹² Sarıkaya, p. 73.

³¹³ Durgut, p. 1092-1093.

³¹⁴ Tekinalp, p. 300.

³¹⁵ Tekinalp, 300.

each can be claimed separately without any deduction.³¹⁶ ³¹⁷ However, the application of gained profits and material damage is complicated as the return of gained profit covers some of the associated material damage. As mentioned previously, material damage consists of actual damage and loss of profits. It is clear that the gained profits do not cover the actual damage; thus, actual damage and the return of the gained profit can be claimed at the same time.³¹⁸ There are two views as to instances where claims for material indemnity and gained profits are made at the same time; one suggests that without making any distinction (whether it is actual damage or loss of profit), material indemnity claims and claims for return of gained profit compete (not piled/not accumulated) with each other. It is stated that the starting point for this view is acting without power provides a relative right to its owner; also, liability that arises from contract or tortious act provides a relative right to its owner; thus, the claims based on relative rights do not accumulated but compete.³¹⁹ In this respect, Ayiter points out that the higher amount in claims for indemnity and gained profit shall be decided on; this way, if the gained profit is higher, all the material damage would thus be compensated, and if the material damage is higher, the excess amount would remain as material indemnity credit.³²⁰ ³²¹ In essence, if the right owner demands both compensation of the material damage and return of the gained profit, he has to settle with the one that provides higher amount.³²²

The second view on this issue makes a distinction according to material indemnity (actual damage and loss of profit) and suggests that an accumulation of claims is peculiar to actual damage. In this way, the actual damage and gained profits can be claimed together since the return of gained profits does not compensate actual damage, yet the loss of profit cannot be claimed together with the return of the gained profits since the claims compete each other.³²³ This view asserts that the loss of profit is the counterpart of gained profit because if the infringement had not

³¹⁶ Sarıkaya, p. 81-82.

³¹⁷ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2216.

³¹⁸ Levent Yavuz, Türkay Alica, and Fethi Merdivan, p. 2216.

³¹⁹ Hatemi, H. & Gökyayla, E. , 2012, p. 278-279.

³²⁰ Ayiter, p. 263.

³²¹ Demirbaş, p. 207.

³²² Kılıçoğlu, Sınai : *Haklarla Karşılaştırmalı Fikri Haklar*, p. 458.

³²³ Demirbaş, p. 208.

happened, it would instead represent gained profit. Therefore, one of the aims of Art. 68 is to compensate the loss of profit like the aim of the return of gained profit; since both aim to compensate the same damages, this would result in competing claims, so the amount determined in reference to Art. 68 shall be deduced from gained profit as it foreseen in Art. 70/3.³²⁴ Even if the infringer does not have a loss of profit, or the infringer's gained profit exceeds the loss of profit, the infringer nevertheless has to return the gained profit.³²⁵

Thirdly, application of the claims for royalties and return of gained profits shall be examined. According to art. 70/3, any sum demanded in accordance with Art. 68 is deducted from the amount of gained profit. In terms of royalties and gained profits, the right holder can get the higher payment of the two. After the deduction, if the determined payment compensates all the material damages of the right holder, there is no room for additional compensation claims; however, if it does not compensate the material damage, the excess damages can be claimed based on art. 70/2 additionally.³²⁶

6. DISCUSSION

Intellectual and artistic works are generally regulated within LIAW, yet TCO, TCC, and international agreements have had remarkable effects on copyright as well. The features of works, work types, the protection sphere, and author's rights on works are of crucial importance in the determination of infringement and indemnity. Since

³²⁴ Levent Yavuz, Türkay Alıca, and Fethi Merdivan, p. 2216-2217.

³²⁵ Sarıkaya, p. 79.

³²⁶ Sarıkaya, p. 81-82.

indemnities are dependent on the form of infringement, it is vital to determine the forms of infringement and which of the author's rights have been violated. In this respect, types of infringement and violated rights are examined and exemplified in detail within this thesis. To elaborate, generally, it can be said that copyrights are nowadays gained and infringed quite easily. There are groups of works mentioned in the law, and the work in question must be in at least one of these groups in order to be protected, but the work types are not mentioned in a limiting way, so there are various recognised work types in a list that continues to increase.

Infringements of copyright occur when works are used in such a way as to violate the author's rights. LIAW explains and regulates the work groups, author's rights and legal actions that can be taken in case of infringements, but how infringements might occur is not specified accurately within the law. Since claims based on copyrights are made against infringements, exemplifying the forms of infringement and clarifying the violated rights is regarded as being worthwhile. There have been various issues that have been the subjects of intensive debate and clarification while examining forms of infringement, so these will not be repeated here. However, it should be stated that for all the claims of author and/or right holders, including indemnity claims, detecting the form of infringement and violated rights is crucial because the focus of copyright law is that of protected rights rather than the tortious act. This means that the provisions against infringements are separately applied to each violated right, so even if the infringing act is only one, there are infringements and sanctions as many as violated rights.

This thesis aimed to examine and clarify the indemnity claims in LIAW by comparing them with the provisions of TCO. In this respect, it has been seen that in Turkish Law, the aim of indemnity claims is generally to separate material and moral damages resulting from unlawful acts according to the degree of fault. In this sense, indemnity claims arise from two types of offences, namely breach of obligation and the tortious act, which are regulated according to TCO. However, LIAW regulates indemnity claims, particularly due to the need for additional protection of works and

authors.³²⁷ The regulations in TCO and LIAW share many similarities in terms of indemnity claims but also a few differences. Examining these similarities and differences provides a profound understanding about the nature of indemnity claims. In this respect, the similarities and the differences between indemnity claims in LIAW and TCO will be analysed.

In terms of similarities between LIAW and TCO with respect to indemnity claims breach of obligation and the tortious act shall be examined. Copyright infringement can appear in two ways; first, by exceeding the limits of a copyright contract, and second by tortious act. The breach of obligation in TCO, as mentioned before, can arise in two ways from the debtor's delinquent behaviour against the debt, namely non-performance and improper performance, which can be manifested as poor performance and failing to perform on time and place.³²⁸ When exceeding the limits of a contract and breach of obligation are evaluated together, it can be seen that breach of contract does not always cause copyright infringement. To elaborate, non-performance of the obligations in the contract does not violate copyright since it does not lead to unauthorised usage of rights, but may nevertheless harm the author's other interests; thus, this would give the author the right to withdraw the contract and demand damages. However, inaction on the contract does not constitute infringement, or a tortious act, but merely breach of obligation, so does not give the right to claim indemnity based on a tortious act or copyright. On the other hand, improper performance of the contract may violate the economic and moral rights of the author. Disclosing a work on an inappropriate platform, or at an inappropriate time, or disclosing with modifications to the work are all examples of poor performance and infringement of the moral right of the author. In this case, the improper performance constitutes both breach of obligation and copyright infringement by tortious act. Indemnity claims can thus be made based on breach of obligation provisions in TCO, or copyright provisions in LIAW.

Another confusing issue appears when copyrights are infringed by the contracting party. The infringing act may not be related to the transferred right at all. For

³²⁷ Zeynep Özcan, and Türk Ali, "Fikir Ve Sanat Eserleri Kanunu M. 70 Hükmü Uyarınca Açılacak Tazminat Davalarının Şartları," *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi* 10, no. 2 (2020), p. 223.

³²⁸ Kılıçoğlu, *Borçlar Hukuku*, p. 667.

example, if the contract includes only the right of publication, public transmission of the work constitutes an infringement of economic rights. The economic rights of the author are independent from each other, so the transferee has no right over other rights of the author than those that have been transferred. Therefore, the infringement can be performed by anyone; the contracting party does not have a specific obligation arising from the contract, so it is in such a case that there has been no breach of contract. The instance described here is solely that of copyright infringement by tortious act.

In all, the contractual relationship burdens the contracting party to act in a way that does not harm the interests of the author. In this sense, non-performance of the contract is a breach of contract, and is subject to general provisions (TCO). Copyright infringements by improper performance are a breach of contract and a tortious act as well, and can be subject to both general provisions (TCO) or special provisions (LIAW) as per the choice of the author. The infringements exercised by the contracting party that are independent of the contract will be subject to special provisions (LIAW), as per other infringements.³²⁹ As can be seen, all infringements initially constitute tortious acts, but a contractual relationship offers additional rights by referring breach of contract.

The infringements of the economic and moral rights of the author or right holders by using or violating these rights without consent initially constitute tortious acts based on Art. 49 of TCO.^{330 331} Thus, all infringements would carry the characteristics of tortious acts, like being at fault and causing damage while claiming indemnity. Although there is some debate about fault and damage conditions due to the way in which the law is written, as explained previously they are accepted as necessary conditions for all indemnity claims. Besides, the terms of the tortious act shall be applied to copyright indemnity claims to the extent appropriate if there is no special clause dealing with the matter in questions in LIAW; in this sense, TCO completes LIAW, especially in terms of material indemnity claims since it directly refers to the

³²⁹ Gökyayla, K. Emre. "5728 Sayılı Kanunla Fikir ve Sanat Eserleri Kanunu'nun 68. Maddesinde Yapılan Değişikliklerin Değerlendirilmesi." *Fikri Mülkiyet Hukuku Yıllığı* (2010), p. 296.

³³⁰ Özcan, and Ali, p. 222.

³³¹ Bozbel, p. 549.

provisions of the tortious act. Furthermore, Art. 70 of LIAW directly refers to the provisions of the tortious act, and this alone demonstrates the natural connection between TCO and LIAW.

There are some differences between TCO and LIAW in terms of indemnity claims that needed to be examined. The first, the regulation style of the LIAW in terms of indemnity claims is different to that of TCO. LIAW regulates indemnity claims by placing the focus on violated rights rather than the violating act. Claims are foreseen according to infringed rights such as infringements of moral rights being claimed via moral indemnity, infringements of economic rights being claimed via material indemnity, and also infringements of the right of reproduction can be claimed via royalties. On the other hand, TCO divides the base of indemnity claims into two main groups, namely breach of obligation and tortious act, by focusing on the act rather than the violated right. The importance of these different approaches is apparent from the determination of sanctions against infringements, especially in indemnity claims. According to the LIAW regulation, all economic and moral rights are independent from each other. Therefore, as in the transference of these rights, which have to be specifically transferred, the individuality of the rights is essential; every infringement of a right constitutes an independent infringement. For instance, publication and public transmission of a book without the author's consent violates the right of publication and public transmission, so there are two infringements in this case, and all the associated claims shall be calculated for two infringements individually. On the other hand, TCO centres on the wrongful act for indemnity claims; in this respect, the rights that are violated by the wrongful act are disregarded, but they are considered in the determination of any damages and indemnity claims. For instance, in terms of TCO, if a book is translated and publicised, there is only one tortious act; infringement of the right of adaptation is considered in the evaluation of fault and damage. Therefore, by placing violated rights into focus for indemnity claims, LIAW differs from TCO.

Unlike the TCO provisions, there are various claims that the author and/or right holder can bring against infringements such as material indemnity, moral indemnity, royalties, return of gained profits, taking over, destruction, prevention of infringement, and cessation of infringement. Some of these claims can be directed

together, so application of these claims and the order of the application is important to determining the final amount that will be paid to the right owner. Action for prevention and action for cessation can be taken together with other claims without distinction.

In case of the destruction of the means of reproduction and reproduced copies, material and moral indemnity, and return of the gained profit, can be claimed. The calculation of the final amount is made by deduction of the material damage from the gained profit; and if the material damage exceeds the gained profit, the excess amount can be claimed through material indemnity. After that, moral indemnity adds to the final amount.

In the case of taking over the reproduction means and reproduced copies, this does not prevent the author from demanding indemnity for material and moral damages caused by the infringement and the return of gained profit. In this case, the amount of material damages should be deducted from the gained profit; if the material indemnity is greater than the gained profit, the remainder can be additionally demanded. The sum of gained profit, material indemnity for the excess amount, and moral indemnity is offset by the amount required for taking over, and the remainder shall be given to whomever has the appropriate right.

In case of royalty claims, a suppositional contract is initiated between the infringing party, and the author transfers the right of reproduction in the same way as if there was a transference contract for the right of reproduction, for that amount of reproduction. The suppositional contract does not transfer the right of reproduction for future reproductions, and does not compensate any moral damages or indeed material damages caused by the infringement. For this reason, damages that exceed the amount of royalty can be additionally claimed via material indemnity action. Also, moral damages, if there are any, will be compensated in addition to royalties regardless of the latter's amount. If also there is a claim for the return of gained profit, the final amount should be found first by deduction of the royalties from the gained profit and accepting the higher amount, second deduction of material damage from the remaining amount and adding the amount for exceeding material damage if it exceeds, third adding the amount calculated for moral indemnity; after these three

step the final amount would be found. Moreover, the infringement of the right of reproduction may compound with other infringements, such as the infringement of the right of broadcasting. In this case, the author can claim royalties and the other claims mentioned above for the infringement of the right of reproduction, and can claim moral and material indemnity and return of gained profit for other infringements.

To conclude, in terms of the protection of intellectual and artistic works and authors, the provisions in LIAW are more favourably than those in TCO. However, there is a profound relation between the LIAW and TCO since all infringements are initially considered tortious acts. Although there is no relation between LIAW and TCO as special law and general law, respectively, the provisions of TCO will be applied where LIAW refers to them; also, in the interpretation of the terms of LIAW, the provisions of TCO should be used as analogy. As applied in this thesis, the comparison and analysis of the terms of TCO provides a deeper understanding about infringements and indemnity claims.

7. SUGGESTIONS

The provisions of Turkish Law in terms of regulation and protection of intellectual and artistic works are in compliance with international standards and regulations. However, the development of technology has brought new problems, and most countries are behind in their adaptation to these improvements, which is certainly the case for Turkey. The number of work types have been increasing as, accordingly, have the number of forms of infringement, yet the law has not adapted to the speed of this increase in work types or forms of infringement. In particular, online infringements are easy to commit, and prevention is becoming increasingly difficult;

further, the law does not foresee any special provisions for the prevention or prohibition of online infringements. This matter represents a particular difficulty in terms of both copyright holders and users because copyright holders are unable to prevent infringements, especially on online platforms, since action can only be taken against individual infringers, and the broad range of possible infringements for online infringements alone make it is very difficult for the author to detect and take legal action against every one. Further, the notice and takedown procedure, even though its effects have been felt, does not prevent infringers from retransmitting the work from different sites. Also, leaving the protection of copyrights to author's claims and persistence is very frustrating to the author themselves. On the other hand, in terms of the users of copyrighted works via online platform, the lack of protection mechanisms also constitutes a significant inconvenience. Users who try to avoid infringement do not know what, exactly, they should do. In some cases, benefiting from works on online platform without violating copyright is easy, such as with e-books, musical works, and cinematographic works; however, these are legitimate only for personal usage; reproduction, adaptation, broadcast, and retransmission of these works through online platforms still needs the permission of the author, but actually reaching the author is a very hard task for individual users. Also, even though e-books, musical works, and cinematographic works are the most commonly used on online platforms, in terms of other types of works, there is still no easy way to use them. Besides, it is stated by Jensen that copyright infringements cannot be prevented because the social meaning of copyright infringement is resistant to change. Individuals are so used to benefitting from the materials provided on the internet for free they either not aware that their action constitutes an infringement, or are unwilling to respect copyright since it is inconvenient from the point of view of the user.³³² Because the protection of copyrights solely depends on the claims made the authors, and there is no automatic mechanism to prevent or prohibit the infringement of works on online platforms, and individuals are either unaware of, or are unwilling to abstain from infringements, and accordingly online infringements have been increasing uncontrollably. For these reasons, online infringements need to be considered specifically by law makers and social factors

³³² Christopher Jensen, "The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms," *Stan. L. Rev.* 56 (2003).

such as generality of some infringement forms among people and social acceptance of such infringing usages should not be disregarded. In this respect, society has to be informed and educated about online copyright infringement and the ethical responsibility to respect intellectual property rights. Also, providing a mechanism that enables authors to be reached and facilitates the legitimate use of copyrighted works so as to minimize online infringements is desperately needed, but is still waiting for appropriate legal regulation.

Furthermore, as previously mentioned, there are different approaches to infringements that are also criminal offences; in case of violations of more than one right, whether there is only one offence or more, and aggregation of offences is a matter of debate. The law makers should clarify this issue in order to give certainty to what is ultimately an important subject given that it concerns human freedom.

Another problem with LIAW with regard to copyrights is the confusion about the concept of indemnity. The nature of indemnity claims is one of being tortious acts, and for many ambiguous concept about indemnity, the provisions about tortious acts is applied if there is similarity and applicability. However, the application of the Civil Court of Cassation is different from the doctrine, especially with regard to moral indemnity and seeking fault and damage conditions for this kind of claim. Also, there are ambiguities about the application of claims for material indemnity and the return of gained profit. In order to provide a clear understanding and accurate application of indemnity claims, these ambiguities need to be clarified by law.

8. CONCLUSION

Copyright infringements can appear by way of violating the moral and/or economic rights of an author and/or right holders. LIAW regulation makes a distinction between violation of moral rights and material rights. Violation of moral rights signifies moral damage and moral indemnity claims; violation of economic rights signifies material damage and material indemnity claims, but does not limit the indemnity claims with those. The distinction in law is significant because it attaches importance to the form of infringement. How the infringements occurs, and which rights are infringed by the violation have to be clarified to determine the associated measures, sanctions, penalties, and indemnities. In this respect, this thesis focused on the rights of the author and forms of infringement to provide a profound understanding about indemnity claims. Indemnity claims are examined by comparison with the provisions of TCO due to the natural relation between LIAW and TCO. The nature of indemnity claims, and their application together with other claims provided in LIAW against infringements have been analysed thoroughly. Although there are still major discussions about the features of indemnity claims made by LIAW, it has been demonstrated that moral and material indemnity claims can be demanded in the case of infringement of the author's and/or right holders' moral or economic rights if there is damage and the infringer is at fault, in compliance with the provisions in TCO about material and moral indemnity claims. The novelty of LIAW shows itself in royalty claims that do not seek damage and fault conditions, cannot be considered indemnity, and are not similar to any of TCO's provisions. In all, by providing a profound understanding of infringements of copyrights and indemnity claims, this thesis would seem to have achieved its intended purpose; however, there is still the need for further clarification by law via additional regulations in order to remove the remaining ambiguities about the matters discussed within thesis.

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