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TRADEMARK REPUTATIONAL COMPENSATION UNDER TURKISH LAW

Abstract

This article examines the concept of infringement and compensation for reputation damage under Article 150/2 of the Turkish Industrial Property Law (SMK). It discusses the misuse or improper use of a trademark and how it may lead to compensation claims if it results in damage to the brand's reputation. It emphasizes that infringement of trademark rights alone is insufficient for claiming compensation for reputational damage; there must also be misleading or improper use of the trademark. The article highlights that mere likelihood of confusion is not enough; there must be misuse that directly impacts the trademark's reputation with an economic purpose. Examples such as the sale of counterfeit products of globally recognized brands illustrate scenarios that could warrant reputational compensation. The discussion extends to the value of a brand's reputation and how it is built over time through significant investments. It acknowledges that reputational damage can cause both material and immaterial losses to trademark owners. Judicial decisions, particularly from the Court of Cassation, suggest that reputational compensation encompasses elements of both material and immaterial damage but should be treated as a distinct category. In conclusion, the article asserts that reputational compensation can be sought when infringement involves improper or misleading use, highlighting the necessity to rebuild the brand's positive image and trust.

Keywords: *trademark infringement, reputation compensation, brand reputation, positive image, trademark protection*

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Türkiyə hüququna əsasən marka (əmtəə nişanı) hüququnda reputasiya təzminatı

Xülasə

Bu məqalədə Türkiyə Sənaye Mülkiyyəti Qanununun (SMK) 150.2-ci maddəsinə əsasən, hüquq pozuntusu və nüfuza vurulan zərərin ödənilməsi anlayışı araşdırılır. Burada əmtəə nişanından sui-istifadə və ya qeyri-qanuni istifadəni və bunun brendin reputasiyasına xələl gətirdiyi təqdirdə bunun necə kompensasiya iddialarına səbəb ola biləcəyi müzakirə edilir. Vurğulanır ki, təkcə əmtəə nişanı hüquqlarının pozulması reputasiyaya dəyən zərərin ödənilməsini tələb etmək üçün kifayət deyil, əmtəə nişanından aldadıcı və ya qeyri-düzgün istifadə də olmalıdır. Məqalədə vurğulanır ki, sadəcə qarışıqlıq ehtimalı kifayət deyil, iqtisadi məqsədlə əmtəə nişanının nüfuzuna birbaşa təsir edən sui-istifadə halları olmalıdır. Qlobal miqyasda tanınan brendlərin saxta məhsullarının satışı kimi misallar reputasiya üçün təzminat tələb edə biləcək ssenarilər göstərilir. Müzakirə brendin nüfuzunun dəyərinə və onun əhəmiyyətli investisiyalar vasitəsilə zamanla necə qurulduğuna qədər uzanır. Həmçinin reputasiyaya vurulan zərər əmtəə nişanı sahiblərinə həm maddi, həm də qeyri-maddi itkilərə səbəb ola bilər. Məhkəmə qərarları, xüsusən də Kassasiya Məhkəməsinin qərarları təklif edir ki, reputasiya üçün təzminat həm maddi, həm də qeyri-maddi ziyanın elementlərini əhatə edir, lakin ayrı bir kateqoriya kimi qəbul edilməlidir. Nəticə olaraq, məqalədə qeyd edilir ki, pozulma düzgün olmayan və ya aldadıcı istifadə ilə bağlı olduqda, brendin müsbət imicini və reputasiyasını bərpa etmək zərurətini vurğulayaraq, reputasiya üçün kompensasiya tələb oluna bilər.

Açar sözlər: *əmtəə nişanının pozulması, reputasiya təzminatı, brendin reputasiyası, müsbət imic, əmtəə nişanının qorunması*

Introduction

Under Article 150/2 of the SMK (1), if the reputation of the relevant rights is damaged due to the misuse or improper use of the trademark by the infringing party, or due to the acquisition or offering for sale of such products, additional compensation may be claimed (Uzunalli, 2019: 216). The infringement of trademark rights must result in damage to the brand's reputation. However, merely violating the trademark right is not sufficient to claim reputational compensation; inappropriate or misleading use of the trademark is also required (Yasaman et al., 2004: 1183). Therefore, for reputational compensation to be awarded, it is not enough for there to be unfair use that may lead to confusion regarding the trademark.

The infringement of trademark rights must serve an economic purpose, so misuse or inappropriate use in the context of personal use will not lead to reputational compensation (Cholak, 2018: 821). For instance, situations such as the sale of counterfeit products of a globally recognized brand by street vendors or the sale of a famous and reputable automobile brand with an LPG system are detrimental to the brand's reputation (Kaya, 2006: 299). Since the infringement of trademark rights must be for economic purposes, misuse or inappropriate use within the scope of personal use does not result in reputational compensation. For example, a decision for reputational compensation cannot be made for a person who installs and uses an LPG system on a luxury car (Cholak, 2018: 739).

The reputation of the brand is the result of the positive image created by the brand owner among consumers and is typically obtained through various investments such as advertising and promotion over the years (Cholak, 2018: 820). While the accuracy of measuring the economic value of brand reputation may be debatable, the fact that it holds economic value remains unchanged. Moreover, the substantial expenditures by brand owners are intended to capitalize on their reputation, and any damage to this reputation will result in financial loss for them. However, brand reputation should not be solely measured by its monetary value. Ultimately, the reputation of a brand has a subjective impact on its relevant audience, leading some brands to achieve wider recognition compared to others (Cholak, 2018: 820-821). However, there are situations where the image of the brand and its creator become intertwined, making it difficult to distinguish between the damage to the brand's prestige and that of the brand owner. Indeed, concerns about double compensation may arise in such cases.

On the other hand, the right to compensation for reputation damage is not exclusive to owners of famous brands. Therefore, regardless of the degree of recognition of the brand, every brand owner can benefit from this opportunity (Tekinalp, 2012: 507). Providing conclusive evidence for the entirety of reputation damage may not always be feasible. In this regard, judges should consider clear facts indicating the possibility of damage. In this context, the poor quality or low prices of products associated with the infringed brand may lead to reputational compensation (Uzunalli, 2019: 218).

Reputational compensation aims to compensate for the damage incurred in the quality or reliability image of infringed brands due to misuse or improper use of the brands. (Cholak, 2018: 818-819) In other words, there is a cost to building brand image and trust, and reputational compensation can be sought to cover the loss of investment (Tekinalp, 2012: 506).

It has been stated that although the damage to reputation may appear to be like material harm, it is not actual harm, but rather a harm that needs to be remedied, and it cannot be mitigated simply as emotional compensation. The opinion suggests that the damage to reputation encompasses not only the loss of material value but also the discomfort and distress arising from this situation, which is not limited to the damage to the business (Tekinalp, 2012: 506). It has been argued that since reputational compensation includes elements of both material and immaterial damage, it is not accurate to categorize reputational compensation solely as material or immaterial.

Another viewpoint has stated that the damages arising from the reputation of the brand are of a material nature, but that there may also be emotional damages due to the impairment of the business's commercial reputation as a result of the infringement, hence reputational compensation

encompasses various components (Karan, Kilich, 2004: 550). The 11th Civil Chamber of the Court of Cassation, on the other hand, has recognized reputational compensation as a separate type of compensation distinct from material and emotional compensations, as evidenced by their decisions on this matter (8).

Reputational compensation is the cost of lost trust and image. This cost entails the necessity to rebuild trust and image rather than actual financial loss. In other words, the process of building trust and image associated with the brand in the eyes of consumers is a costly one, and reputational compensation seeks to reclaim the expenses lost in this process (Meran, 2015: 485).

In order to claim reputational compensation, not only cases of trademark infringement, but also instances of poor production, improper presentation in the market, and misuse of the brand are necessary. The concept of "misuse" should be interpreted broadly; in this context, the use of the brand in low-quality products, poor packaging, or unfavorable sales conditions should be considered as "misuse" (Tekinalp, 2012: 498).

In this regard, it is not necessary for the person causing the infringement of trademark rights to be the same person who conducts the poor production or presents the product in unsuitable conditions to the market; reputational compensation can be claimed for these actions carried out by different individuals, but these individuals are held jointly liable. If the imitated brand is sold in high-quality and appropriate markets, such compensation cannot be claimed. For instance, the use of a counterfeit brand in low-quality products, such as using a perfume brand in detergent or insecticide brands, should be considered within the scope of reputational compensation (Yasaman, 2008: 16).

In our opinion, since the concept of a "well-known trademark" is not explicitly mentioned in Article 150/2 of the Turkish Industrial Property Law (SMK) and since Article 150/2 is regulated under the general provisions section, the application should not be limited only to well-known trademarks, but should be applied to all brands that are recognized in their own market and trusted by their target audience.

In a case subject to the decision of the Court of Cassation, the plaintiff claimed for the determination and prevention of trademark infringement and unfair competition, as well as for material and moral compensation, alleging that counterfeit products bearing the "SONY" and "SONY ERICSSON" brands were imported by the defendant company. The Court of Cassation made a distinction between moral compensation and reputational compensation, stating that the plaintiff failed to prove that the reputation of the brand was damaged due to improper or inappropriate use of the trademark. Therefore, the conditions for reputational compensation specified in Article 68 of the Decree-Law No. 556 on the Protection of Trademarks, but the conditions for moral compensation under Article 62 of the Decree-Law No. 556 on the Protection of Trademarks, and the prevention of the entry of counterfeit branded products into the domestic market would not lead to the rejection of the moral compensation claim (Uzunalli, 2019: 436-437).

Therefore, the main focus in reputational compensation is considered to be the positive image acquired by the brand. However, material and moral compensations encompass the damage suffered by the trademark owner's business. Additionally, in order to claim reputational compensation, the infringement must have occurred through improper or inappropriate use. Since the reputation of the brand requires labor and financial resources, reputational compensation can be seen as a type of compensation separate from material and moral compensations, with an emphasis on its material dimension. However, it should be noted that in practice, distinguishing between the damage to the reputation of the brand and the damage suffered by the trademark owner's business due to infringement can be quite challenging (Buyukkilich, 2019: 550).

Conclusion

This article provides a comprehensive examination of trademark infringement and the concept of reputation compensation under Article 150/2 of the Turkish Industrial Property Law (SMK). The analysis reveals that trademark infringement is not merely a legal violation but also has significant adverse effects on the reputation that a brand has built through years of investment and effort. It

emphasizes the necessity for misleading or improper use of the trademark for claims of reputational compensation, beyond mere infringement.

The findings underscore the multifaceted nature of brand reputation, encompassing both economic and intangible dimensions. Brand reputation is closely tied to the perception of quality and trust among consumers, and any damage to this reputation can result in substantial financial losses for the brand owner. Instances such as the market introduction of counterfeit products of globally recognized brands illustrate scenarios where the brand's reputation and consequently its economic value can be severely impacted. Therefore, reputation compensation plays a critical role in safeguarding the market value and reliability of the brand.

Judicial decisions, particularly from the Turkish Court of Cassation, support the legal nature and applicability of reputation compensation. These decisions highlight that reputation compensation includes elements of both material and immaterial damage but should be considered a distinct category separate from these two types of compensation.

In conclusion, it has been determined that reputation compensation can be sought when trademark infringement involves economic-purpose misuse or improper use, as these actions necessitate the rebuilding of the brand's positive image and trust. Article 150/2 of the SMK provides a crucial legal framework for protecting the reputation of trademarks and compensating for the damages incurred. This provision ensures the effective protection of trademark owners' rights and contributes to the sustainability of the economic value of trademarks.

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