New Turkish Construction Regulations Impair the Copyright Protection on Architectural Works

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A brief outline of the copyright protection granted for architectural designs

In Article 2/1, the Berne Convention counts architectural works, together with plans, sketches and three-dimensional works relative to architecture, as copyrightable subject matter.

Turkish law treats architectural creations in two different categories: as "literary works" and "works of fine art". Accordingly, under Law No 5846 on Artistic and Intellectual Works, the architectural work itself and the plans, sketches and three-dimensional works relative to architecture are classed as two different types of work.

Article 4 of Law No 5846 titled "Works of Fine Art" grants copyright protection to architectural works in a similar way to other species of fine art such as pictorial, graphical, or sculptural works, provided that they reflect a minimum level of original expression. What is protected here is the abstract creative expression of the designer embodied in the architectural structure. It should also be mentioned that even in the absence of specific provisions, it would still be possible to protect architectural works for their monumental and aesthetic features. Indeed in a broad interpretation, aesthetic elements of an architectural design may be compared to pictorial, graphic, or sculptural works as having a similar artistic expression.

By virtue of Article 2/3 of Law No 5846, under Turkish law the graphical representations of the architectural work in the form of plans, drawings and designs are regarded as literary works, together with technical and scientific photography, maps, plans, projects, sketches, drawings, geographical and topographical models which are devoid of aesthetic character. Unlike the architectural work itself, Art. 2/3 treats all architectural plans, drawings, and designs as literary property irrespective of originality or aesthetic features. However protection of such plans which are devoid of original expression or aesthetic quality may not amount to an exclusivity on the utilitarian and functional features of the plan, drawing etc. The same result may also be derived from the idea / expression dichotomy of the copyright theory.

Therefore it would not be wrong to conclude that the protection of architectural designs that are devoid of aesthetic quality is of limited nature and mostly confined to cases of verbatim copying or duplication of the architectural plan. Such specific protection for drawings, plans and three dimensional representations reflects a certain utilitarian inclination aiming to prevent the misappropriation of the labour of the designer, regardless of its originality. To sum up, under Turkish law, even the plans, drawings and models of purely utilitarian and functional buildings are protected irrespective of the fact that the actual embodiment of the plan does not give rise to a building with aesthetic or original design features.

In line with the Berne Convention, under Turkish law authors of both the architectural work and the plans, drawings etc. relative to architecture enjoy the exclusive economic right to reproduce, distribute, publicly perform and make the work available to the public either via broadcast or dissemination over the Internet. The author also has the exclusive economic right to adapt or modify a former architectural work. Furthermore authors of architectural designs also enjoy moral rights of attribution, integrity and the right of first disclosure of the work.

In case of infringement, in addition to monetary and criminal sanctions, the author may bring an action to prevent or restrain the infringement of both the economic and the moral rights. However architectural works which are devoid of aesthetic quality may not benefit from the full protection of moral rights, as the right of attribution is not recognised for purely utilitarian designs and the right of integrity will be limited to non-functional aesthetic features, if applicable.

On the other hand, architectural works with aesthetic quality that qualify as works of fine art enjoy additional remedies. Under Article 67 of Law No 5846, where there is infringement of the moral right of integrity, the authors of works of fine art may apply to the courts either for the removal of their name from the work or for the restoration of the work to its original form. Nevertheless, in the event that restoration is found to be too burdensome on the owners, the court may decide on the removal of the author's name in addition to monetary compensation. The question of which structures qualify as an architectural work is answered according to professional and scientific principles.

Architectural design in construction laws

According to Turkish construction laws, in order to obtain a construction licence, an architectural plan of the building which is designed by an authorised architect and which complies with the rules provided in several statutes and ministerial regulations should be submitted to the licensing authority.

In line with this, any subsequent alteration or modification of the building will also require the permission of the architect who prepared the initial plan at the time of application for the construction licence. Without such permission, the responsible public authority will not issue the licence necessary for any modification of the building.

Although the subsequent alteration of buildings which are devoid of aesthetic quality still requires the consent of the architect, on the grounds that such buildings have no aesthetic or original value which requires the protection of their integrity, the law precludes the architect from refusing consent without reasonable grounds. Moreover, even in the case of a building that does have aesthetic qualities, the architect's dissent originating from the moral right of integrity may be overridden by the courts if it is proved that the alteration was necessary for the intended purpose of use, or stemmed from legal or technical prerequisites. Since architectural works are also functional structures, the legal doctrine maintains a more flexible approach with regard to the modification of architectural works. The author of an architectural work does not have the same liberty as painters or sculptors in opposing the modification of her work on the grounds of moral rights.

In the event of a deadlock between the owners of a building and its architect in relation to any modification, in addition to the courts, the owners could also apply to the professional union of architects[1] for mediation. If the union agrees with the owners, the architect is advised whether to prepare the modification plan in return for the minimum fees set by the Union or to give consent to modification by another architect. Although only a court order may replace the consent of the architect, the Union may also apply disciplinary sanctions where such conduct becomes persistent and arbitrary on the part of a member architect.

Furthermore, as explained above, where the building does not qualify as a work of fine art due to having no aesthetic or original qualities, any modification of the building without consent will not give rise to the additional protection confined to works of fine art. In such a case the author will be entitled only to monetary damages and will not benefit from the additional remedy of restoration.

Ministerial Regulation of 2013

This system, along with the above mentioned legal regime worked fairly well until a 2013 alteration to the Ministerial Regulation[2] on construction in planned urban areas. Accordingly, municipalities and other responsible public authorities may decide on the establishment of a new body called an Architectural Aesthetics Committee and, among other things, it is the duty of these committees to decide whether buildings or architectural plans are original in nature. Where the Committee decides there is a lack of originality, any modification or alteration will not require the consent of the architect. Furthermore, buildings that the committee has decided are original may still be modified without the consent of the architect if the Committee decides that the proposed alteration does not jeopardise the integrity and aesthetic outlook of the architectural work, provided that the alteration was necessary due to technical and managerial reasons or for the intended purpose of use. Potential conflicts between the building owners and the architects, which were formerly resolved through a judicial process and by the mediation of the professional unions, will now be decided by the committees. In other words, architects may be stripped of their statutory copyright by an administrative act. The Ministerial Regulation does not provide further details as to the composition of the committees but solely states that it will comprise of experts and that the chairman of the committee will be appointed by the relevant public authority. Most importantly, the Regulation provides that the agenda of the committee meetings should be determined by the authorising public body and thus eliminates any possible autonomous decision or action by the committee members.

The Regulation was met with criticism and opposition on two legal grounds. First, for the fact that a statutory right may not be reduced in scope through a ministerial regulation, which is an administrative act. Pursuant to the constitutional principle of hierarchy of legal norms, administrative acts rank lower than legislative instruments (statutes) and therefore a ministerial regulation may not annul or diminish authors' rights enacted by Parliament. The Ministerial Regulation which entrusts Architectural Aesthetics Committees with the authority to decide on the originality of the work and whether any proposed alteration jeopardises the integrity of the design, is in conflict with Law No 5846 on Artistic and Intellectual Works.

Secondly, even if established by statute rather than an administrative act, such authorisation of the Architectural Aesthetics Committees would still be unconstitutional since an administrative unit other than an independent judicial authority may not annul or diminish a property right, except in those circumstances and procedures expressly provided in the Constitution, such as expropriation of land due to public interest. Any decision as to the originality of a work requires a judicial process and may only be taken by independent courts after consulting with experts consisting of university scholars and professional experts. Thus the Ministerial Regulation lacks legal grounds on both the procedural and the substantive levels.

Under the new regime, architects whose rights are denied by the Committees will have to apply to Administrative courts, first to obtain an order for the stay of execution of the administrative process and then finally to annul the decision.

Reasons behind and the conclusion

Starting from the 1950s, the spoils of the increased value of the urban land created by ill-motivated urban planning and construction permits have been an important mechanism for the accumulation and redistribution of wealth by the ruling political groups.

As observed in other spheres of urban and industrial planning, the new Regulation reflects the general attitude of the public authorities who perceive architectural, environmental and aesthetic concerns as a hindrance to development and economic progress. Many architects and scholars have expressed their opposition to the amendment as being a political move to eliminate delays arising due to the legal actions brought by the architects and thus to fully clear the way for the swift realisation of controversial urban renovation projects which require a great deal of demolition and restoration.

While the Ministerial Regulation can be said to be directed at creating a balance between protecting copyright in architectural works and optimising the process of urban transformation, the aforementioned legal concerns regarding the amended provisions, as well as concerns over the motivation behind the Regulation seem to hint at a failure to strike that balance, and a tendency to disregard copyright protection in favour of perceived economic progress.

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[1] "*Mimarlar Odası*", a professional union with statutory recognition responsible for the organisation and

audit of the architects.

[2]*Planlı Alanlar Tip İmar Yönetmeliği*, 02.11.1985 Off. Gazz.: 18916*bis*.