



## **The High Court of Appeals Recognizes Potential Damage as a Basis for Pecuniary Compensation in Trademark Disputes**

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### **1. Introduction**

Trademarks have an important role in protecting the identity, reputation, and commercial value of goods and services. In Türkiye, a trademark registration grants the owner exclusive and comprehensive rights. Any use of the trademark without legal authorization is a direct violation on these rights, leaving the door open for claims stemming from infringement and unfair competition.

This article examines the decision by the 11th Civil Chamber of the High Court of Appeals numbered 2021/7260 E., 2023/1728 K. and dated March 21, 2023 (“**Decision**”) acknowledging that the trademark owner has suffered pecuniary loss on the ground that their economic interests have been subjected to the risk of potential harm. This decision shifts the perspective on damages by affirming that pecuniary damage may be recognized even where the economic harm remains merely potential.

### **2. Legal Framework for the Pecuniary Damages in Trademark Infringement Under Turkish Law**

Under the Intellectual and Industrial Property Law (“**Law**”), the rights granted by trademark registration belong exclusively to the trademark owner. If an infringement occurs, the owner is entitled to pursue a claim in the competent courts, utilizing the remedies listed in Article 149. According to Article 150/1, the trademark owner whose rights have been violated has the right to demand compensation for the losses resulting from the infringing actions. Further, as

explained in Article 151/1, pecuniary damages include (i) the actual damage suffered due to the infringement and (ii) loss of profit.

Actual damage refers to the direct decrease in the trademark owner's assets through a decrease in assets or an increase in liabilities. The general provisions of the Turkish Code of Obligations apply when determining actual damage. In cases of trademark infringement, additional expenses such as the costs of collecting evidence to identify and prove the infringement or advertising expenses incurred to mitigate the negative effects of the infringement may also be considered part of the actual damage.

The calculation of lost profits arising from infringement is explicitly governed by Article 151 of the Law. The trademark owner has the right to choose one of the methods listed in the article, and loss of profits cannot be determined by any other calculation method. This means that a case-by-case evaluation is necessary to select the most relevant and beneficial approach to calculate the loss. The available methods include (i) potential income that the right holder could have earned if there had been no competition from the infringer of the intellectual property right, (ii) net profit obtained by the infringer of the industrial property right, or (iii) the license fee that the infringer would have been required to pay had it used the industrial property right lawfully under a license agreement.

### **3. Analysis of the Decision of the 11th Civil Chamber of the High Court of Appeals**

In the Decision, the dispute mainly focuses on whether the defendant's use of the "VOLAGRO KTS" mark on its website constituted trademark infringement and unfair competition against the plaintiff, who owned the registered "KTS" trademarks.

The plaintiff simply alleges that the defendant infringes its earlier trademarks and gains unfair benefit through these infringing uses. Accordingly, the plaintiff seeks both pecuniary and non-pecuniary compensation. In response, the defendant argued that "KTS" is an abbreviation for potassium thiosulfate, and therefore lacks distinctive character, and that such use cannot constitute trademark infringement. Furthermore, the defendant claimed that the product in question had not been manufactured or sold for five years, that its appearance on the website was an oversight, and that therefore it was not possible for the plaintiff to have suffered any pecuniary damages. The court of first instance partially accepted the case and ruled for both

pecuniary and non-pecuniary compensation based on the determination of trademark infringement and unfair competition.

Upon the objection, the Regional Court of Appeals stated that, despite the defendant's arguments, the defendant's use on its website constituted trademark infringement, and that the defense arguments claiming the product had merely been "forgotten" on the website could not be accepted. While rejecting, the court emphasized an important point: even if the product has not been put on the market, where trademark infringement and unfair competition are present, it must be deemed that the right holder has incurred pecuniary loss on the ground that their economic interests have been subjected to the risk of potential harm.

The defendant appealed this decision before the High Court of Appeals, and the High Court simply upheld the decision of the Regional Court of Appeals and simply confirmed the approach adopted therein.

The decisive element in the High Court's rationale is the acceptance that the rights holder's economic interests were put at risk of potential harm and that this risk alone is enough to establish the presence of pecuniary damage. Consistent with its established precedents, the courts concluded that the plaintiff must therefore be considered to have suffered material loss. Consequently, the lower court's damage assessment was affirmed, and the High Court of Appeals unanimously upheld the Regional Court's decision, confirming both the finding of infringement and the award of pecuniary and non-pecuniary damages.

#### **4. Conclusion**

The ruling by the 11th Civil Chamber of the High Court of Appeals solidifies an important principle in Turkish trademark law: material damages can be recognized if the trademark owner's economic interests are subjected to a potential risk of harm, even in the absence of proven actual sales or concretely demonstrated direct economic loss.

This approach demonstrates a highly protective stance toward trademark right holders, confirming that the mere risk created by using an infringing trademark is sufficient to establish damage. The High Court's affirmation of the provisions on pecuniary and non-pecuniary

damages also reveals that Turkish courts take into account both actual and potential damages that may affect the economic and reputational interests of the trademark owner.

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