



February 14, 2003

Mr. Steven Falken
Executive Director for GSP
Chairman, GSP Subcommittee
Office of the U.S. Trade Representative
1724 F Street NW, Room F-220
Washington, DC 20508

Re: Turkey GSP IPR Review
Case: 028-CP-93

To the GSP Subcommittee:

We take this opportunity to update and supplement the public file with respect to the ongoing GSP review of the intellectual property rights practices of Turkey. This GSP IPR investigation was instituted in 1993.

Attached please find IIPA's 2003 Special 301 report on Turkey which we filed with USTR today. This report is also available online at the IIPA website, www.iipa.com.

We recommend that the Subcommittee keep this petition opened, in recognition of growing pirate optical disc production and imports, book piracy, and some continued shortcomings in the enforcement system.

Sincerely,

Eric H. Smith
President
International Intellectual Property Alliance

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY¹

Turkey should remain on the Watch List. Two positive developments occurred early in 2002: the de-registration of licenses granted to a company importing DVDs without authorization; and suspending the application of a broadcast compulsory license that was in conflict with the amended copyright law and was extremely detrimental to right holders. At the same time, Turkey remains a book piracy haven, optical disc piracy has increased, and Turkish courts fail to mete out deterrent sentences and are marred by delays and procedural hurdles.

Turkey was on the Priority Watch List from 1997 until mid-2001 for failure to meet certain benchmarks mutually agreed-upon by Turkey and the U.S. In 2001, Turkey was lowered to the Watch List in recognition of passage of its copyright amendments and was kept there in 2002. The U.S. government continues to investigate Turkey's enforcement practices under the Generalized System of Preferences (GSP) trade benefits program, based on a 1993 review.

Some positive developments in Turkey in 2002 improved the landscape for copyright owners. In March 2002, the Ministry of Culture decided not to appeal the Planet case (meaning Planet, which had obtained "false registrations" to import DVDs from the MOC, would have its registrations revoked). IIPA also learned that the Council of State had issued an intermediate decision suspending the application of a problematic compulsory license with respect to broadcasts. Problems remain in the country, as: U.S. book publishers suffer terribly from piracy of their works; optical disc piracy increased with little reaction by enforcement authorities; and right holders continue to face delays and some procedural hurdles in the courts.

Required actions for 2003:

- Implement activity among the Enforcement Committees under the Ministry of Culture to take swift and deterrent actions against piracy, including a campaign against pirate photocopying of and offsetting (counterfeiting) of published materials, and enforcement against sources and distribution channels of pirate optical discs (eventually under the auspices of a new optical disc law which should be drafted and considered in 2003).
- Enforce the copyright law through the courts by: imposing deterrent sentences on pirates, including jail time (actually served) and significant fines; decreasing delays, burdens, and costs placed on right holders, and awarding increased civil damages, including costs.
- Improve the banderole system so that it decreases fraud and ensures that right holders are not increasingly burdened by such a system.
- Enforce copyright at the borders through customs' efforts to stop pirate imports and exports at the borders.
- Implement provisions allowing for civil *ex parte* orders.

TURKEY

¹ For further details on Turkey's history under Special 301 and GSP, see the "History" Appendix of IIPA's 2002 Special 301 submission.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	50.0	45%	50.0	40%	50.0	50%	50.0	85%	59.0	95%
Records & Music ³	18.0	75%	3.5	35%	4.0	40%	4.0	30%	4.0	30%
Business Software Applications ⁴	NA	50%	22.4	58%	78.6	63%	78.2	74%	44.5	87%
Entertainment Software	NA	NA	23.7	90%	116.2	96%	95.1	82%	92.3	80%
Books ⁵	25.0	NA	27.0	NA	28.0	NA	32.0	NA	28.0	NA
TOTALS⁶	93.0		126.6		276.8		259.3		227.8	

COPYRIGHT PIRACY IN TURKEY

Turkey Remains the Region's Worst Book Pirate

The book piracy situation in Turkey is the worst in the region, and indeed has deteriorated further during the past year. Piracy levels as to academic materials remain high, including illegal photocopying and unauthorized translations of science, technical and medical texts. Unauthorized ESL (English as a Second Language) materials continue to flood the markets in Turkey. Industry estimates that up to 90% of the English-language textbook market is decimated by high quality, four-color pirate editions. Copy shops near the universities (and bookstores) thrive in the pirate trade.⁷ There has been a noticeable increase of reprints in

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ Loss figures for the record industry in 2002 in Turkey reflect an in-depth examination of the market, rather than a rapid surge in piracy compared with previous years.

⁴ BSA's estimated piracy loss for 2002 is not available, and the estimated levels for 2002 are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$58.9 million at 64% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ The publishing industry reports that over 50% of all published materials purchased in Turkey are pirated. This figure is considered conservative. Also, the value of the Turkish lira declined at least 35% from spring 2002 to January 2003. Thus, loss numbers have diminished slightly due to the shrinking overall market in Turkey, but the number of pirated copies has increased.

⁶ In IIPA's 2002 Special 301 submission, IIPA estimated that total losses in 2001 to the U.S. copyright-based industries in Turkey were \$163.1 million. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Turkey in 2000 are adjusted to \$126.6 million.

⁷ Overall, public and private universities work in tandem with such photocopy shops, whereby a professor includes whole sections of books in the "bound notes" for a class.

bookstores, mixed with legitimate titles, of major U.S. publishers' books intended solely for the India market (so-called "India-only" reprints), and these are apparently being received from the main Indian distributor as well as from other sources. Certain local distributors have also been caught attempting the unauthorized sale of "India-only" reprints, much to the dismay of their foreign publisher suppliers. Some booksellers are fighting piracy by denouncing pirates and taking them to court,⁸ but fines are ridiculously low – the new, higher fines in the copyright law have not been implemented. Furthermore, procedural hurdles continue to plague publishers who wish to enforce their rights. For example, many judges are now demanding notarized translations of original contracts between author and publisher in order to prove copyright ownership for each title. Hurdles such as these have prevented the successful prosecution of a single case since the new intellectual property law came into effect.

In addition to working to curtail blatant photocopy and reprint piracy, Turkey's government must be more aggressive in stopping public universities from encouraging their students to buy illegal photocopies at shops (some of which have ties to the public institution). Increasingly, professors at public universities endorse the practice of having students purchase "bound notes" for their classes. These "bound notes" contain unauthorized copies of entire sections of books. This phenomenon demonstrates that the legitimate education market is growing in Turkey, and new private universities have also opened to serve the growing demand, but the photocopy-shop abuses cut at the heart of the market (note that these shops sit just outside the gates of the universities). Illegal photocopying and piracy in the higher education sector are evidenced by increased requests by teachers for access to free supplementary materials through electronic databases in areas where sales have plummeted. This problem is like to worsen as digital copying and print-on-demand technology become more common. Endorsement by the professors of the purchase of illegal photocopy course-packs, especially at public universities, amounts to tacit government approval of such piracy, and the government should work with the universities to fix this problem immediately.

Pirate Optical Discs Decimate Retail Markets in Turkey

Digitized forms of piracy of copyrighted works now dominate the scene in Turkey. Pirate optical discs (media read by a laser, such as CDs, VCDs, DVDs, CD-ROMs) with all kinds of copyright content (movies, music, business software, entertainment software, reference materials), many of which are imported into Turkey from Asia (primarily from Malaysia, Hong Kong, Thailand, Taiwan), Ukraine and Bulgaria, as well as some from Russia and Eastern Europe, are abundant. In 2002, sources indicate that Turkey now has eight optical disc plants in operation, with at least 18 production lines, for a total optical disc production capacity of at least 63 million discs. Of increasing significance in the market is the illegal "burning" of copyrighted content onto blank CD-Rs.⁹ This phenomenon can take place in a full-blown optical disc plant, or in as inconspicuous a locale as a residence. In addition, some optical disc piracy in Turkey has been smuggled in, as pirates often carry pirated materials in personal luggage on airplanes.

⁸ The bookstore at Koç University is a case in point. It was taken over by new management in 2001, and the new management would not copy books. A storm of protest by students and faculty led to discoveries that such photocopying services, plus Internet downloads of entire books, had been going on there for years.

⁹ The videogame industry reports increasing numbers of "burned" CD-Rs in 2002 with the latest games.

Some industry estimates indicate that as much as 70% of pirate product found in the retail markets is produced inside Turkey.¹⁰ Given such apparent massive increases in local production, Turkey needs to pass and implement an effective optical disc law to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production. The retail markets have been devastated by pirate optical discs. Pirate product is sold through highly organized and effective distribution networks. Obviously, all industry sectors are affected.¹¹

For the motion picture industry, the growing concern is DVD piracy, which appeared in the Turkish market at the beginning of 2002 and is on the increase. DVD copies of newly released titles can be found in retail stores with Turkish subtitles for about US\$8-10. These copies are mainly imported from Ukraine and Russia. Additionally, VCD piracy remains a significant form of piracy in Turkey.¹² Pirates duplicate VCD copies of movies not yet released in Turkey in theaters or on video (so-called “pre-release” titles) with Turkish subtitles, and also make back-to-back copies of legitimate VCD titles with Turkish dubbing. There is, however, no information or evidence regarding the existence of large-scale factories engaged in mass replication of Motion Picture Association member company titles. Instead, it appears that street vendors are directly supplied by local networks of varying sizes operating in complete secrecy. While the open sale of pirate VCDs in retail stores decreased following passage of the copyright law in March 2001, street trading in pirate VCDs, especially active in major cities and certain tourist locations, increased in 2002 due to the recent financial crisis, increasing unemployment and ongoing enforcement problems.

Other Piracy Phenomena in Turkey

- **Internet Piracy:** The Internet is becoming an important distribution means for pirate VCDs in Turkey (through online ordering of pirate copies). In 2002, a new form of Internet piracy, namely, the downloading of movies in “DivX” format (an increasingly popular decompression technology that facilitates the downloading of a movie from the Internet), is causing damage to the legitimate retail market in Turkey.
- **Unauthorized Public Performances of Audiovisual Works:** Unauthorized public performances of new and popular films using DVDs and VCDs on wide-screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters have grown in Turkey, such that the piracy level was roughly 25% in 2002. Certain inter-city coach services

¹⁰ A large entertainment software company indicates that 70% of its pirate console games are locally produced, while 30% are smuggled into the country. The motion picture industry reports that pirate VCDs are now mostly produced locally in small-to-medium size facilities and in private residences. Imported pirate CDs from Eastern Europe (mainly Ukraine) still pose problems, and sell on the streets in Turkey for about US\$1, while the cost for a pirated CD-ROM containing a videogame is less than \$1. According to the recording industry, most pirate audio CDs are locally produced illegal CD-R compilations.

¹¹ For example, numerous pirate videogame titles in all formats, including PC (personal computer) and console-based games, are available in Turkey at retail stores, through street vendors and by ordering them over the Internet. Pirate cartridge-based videogames manufactured in Asia and shipped through Hong Kong also flood the Turkish market.

¹² Turkish viewers generally prefer to play VCDs on personal computers as well as on VCD players. Sales of VCD players are on the rise, selling for as little as US\$50-75, and are also advertised to the public via newspaper publicity campaigns. The number of VCD players is now estimated at 1.2 to 1.5 million players, with an additional 600,000 to 900,000 CD-ROM drives on personal computers. Audio CD players and PlayStation consoles are also modified for multi-purpose use to include VCD playback.

also show films during journeys without authorization. The local enforcement organization working on behalf of the motion picture industry (AMPEC) identified and investigated 9 public performance cases in 1999, 25 cases in 2000, 22 cases in 2001, and 21 cases in 2002. Pirate VCDs and DVDs are used as masters for unauthorized public performances.

- **Corporate End-User Piracy of Business Software and Hard-Disk Loading Piracy:** Business software piracy continues to be a significant problem in Turkey. Both the unlicensed use of software in a business setting (corporate “end-user” piracy of business software),¹³ and the loading of many programs onto the hard drive of a computer prior to its sale (so-called “hard-disk loading”) are found in Turkey.
- **Videocassette Piracy:** With the introduction of pirated audiovisual works in digital formats (mainly VCDs and less DVDs) to the Turkish market, the traditional videocassette has lost much of its popularity, and VHS video piracy has become of marginal significance since 2001. There remain approximately 100 video rental outlets in Turkey, with an average pirate copy stock of between 20 and 50. Pirate copies are generally produced by the shops themselves. Copies are generally poor quality, with typewritten or handwritten labels. Pirates use legitimate videocassettes, imported cassettes, imported DVDs, and pirate VCDs as masters. Occasionally, pay-TV broadcasts are also used to produce pirate copies.
- **Unauthorized Parallel Imports:** Unauthorized parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) continue to present a problem for legitimate DVD distributors. However, the contentious issue regarding the systematic registration of Zone 1 DVDs by the Ministry of Culture has finally been resolved.¹⁴
- **Broadcast Piracy:** Broadcast television piracy has been a serious but declining problem in Turkey. It is now estimated that approximately 10-15% of the 230 local broadcast stations continue to engage in broadcast piracy, transmitting domestic and foreign films, including MPA members’ titles, using videocassettes and pirate VCDs as masters. Broadcasting music without a license from the relevant right holders is a criminal act under the Turkish Copyright Act. Nevertheless, despite frequent warnings, hundreds of radio broadcasters around the country play music round-the-clock without any permission from the copyright owners.

COPYRIGHT ENFORCEMENT IN TURKEY

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	109	35	69

¹³ In 2002, the Turkish government reportedly embarked on a program with the local Business Software Alliance and other private sector organizations on a campaign (commercials on television/radio as well as posters in metro stations) encouraging use of authorized business software. The government was also reportedly preparing to issue a circular in mid-2002 on the importance of the use of licensed software in government agencies, but did not do so following national elections.

¹⁴ An action was filed in June 2000 against Planet, an illegal importer, and against the Ministry of Culture for allowing Zone 1 DVDs to be registered. After losing this case, the Ministry of Culture appealed the decision. Subsequent cases were then filed by other Turkish distributors. The Ministry finally decided to withdraw its appeal against the first case and not to appeal against the others, and to finally discontinue its practice of registering Zone 1 DVDs.

Number of cases commenced	93	26	58
Number of defendants convicted (including guilty pleas)	93	5	58
Acquittals and dismissals	1	2	
Number of cases pending ¹⁵	130	19	103
Total number of cases resulting in jail time	1		4
Suspended Prison Terms			1
Maximum 6 months			1
Over 6 months			
Over 1 year			
Total Suspended Prison Terms		15 months	1
Prison Terms Served (not suspended)			3
Maximum 6 months	1		2
Over 6 months			
Over 1 year			1
Total Prison Terms Served (not suspended)	1		3
Number of cases resulting in criminal fines	10		10
Up to \$1,000	2		8
\$1,000 to \$5,000	8		2
Over \$5,000			
Total amount of fines levied ¹⁶	4	\$600	3

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	160	50	70
Number of cases commenced	133	26	65
Number of defendants convicted (including guilty pleas)	133	6	65
Acquittals and dismissals	2	7	
Number of cases pending ¹⁷	235	21	151
Total number of cases resulting in jail time	1	3	6
Suspended Prison Terms			3
Maximum 6 months			
Over 6 months		9 months	
Over 1 year			3
Total Suspended Prison Terms			6
Prison Terms Served (not suspended)	1		3
Maximum 6 months			
Over 6 months			
Over 1 year	1		3
Total Prison Terms Served (not suspended)			3
Number of cases resulting in criminal fines	25	3	9
Up to \$1,000	4	3	1
\$1,000 to \$5,000	20		8
Over \$5,000	1		
Total amount of fines levied ¹⁸	5	\$1000	2

¹⁵ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2000.

¹⁶ For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended. The amount shown was current as of February 2001.

¹⁷ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2001.

TURKEY CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE (PLAYSTATION)
Number of raids conducted	216	106
Number of cases commenced	199	105
Number of defendants convicted (including guilty pleas)	199	105
Acquittals and dismissals	7	
Number of cases pending ¹⁹	407	223
Total number of cases resulting in jail time	8	22
Suspended prison terms		
Maximum 6 months	4	3
Over 6 months		
Over 1 year	3	19
Total suspended prison terms	7	22
Prison terms served (not suspended) (appealed)	1	
Maximum 6 months		
Over 6 months		
Over 1 year	1	
Total prison terms served (not suspended)	1	
Number of cases resulting in criminal fines	12	10
Up to \$1,000	7	6
\$1,000 to \$5,000	5	4
Over \$5,000		
Total amount of fines levied (in US\$)	15,000	10,600

Some Enforcement Results in 2002

The copyright industries were generally pleased to see continued raiding in Turkey of various targets of piracy. The Turkish Ministry of Culture confirmed that 81 Enforcement Committees, once for each province in Turkey, were established in 2002, although only one (in Istanbul) is known to have started to take some concrete actions.²⁰ In Istanbul, for example, an investigator of AMPEC (the private anti-piracy organization that acts on behalf of the motion picture industry) was appointed to represent the film industry on this "Inspection Committee." The Inspection Committee ran its first raids in August 2002.²¹ The strength in theory of these committees is that they can act *ex officio*.²² This means groups like AMPEC can file their

¹⁸ For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended. The amount shown was accurate as of currency exchange rates in February 2002.

¹⁹ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2002.

²⁰ Each Committee is to be made up of Ministry representatives (from the Ministries of Culture, Finance, and Interior), representatives of local law enforcement (Police and Municipality), and representatives of right holder associations.

²¹ On August 15, 2002, the Inspection Committee ran its first raid against nine street vendors in the Sirinevler district of Istanbul, resulting in the seizure of 2,243 pirate VCDs, 2,131 pirate music CDs and 640 pirate Sony PlayStation videogames. A few days later, a second raid was run against a pirate shop and small duplication facility located in the Sinanpasa Business Centre, resulting in the seizure of 23 CD-R burners and 120 pirate VCDs.

²² Before the revision of the Copyright Law, the initiation of criminal actions could often be cumbersome as *ex-officio* actions were not normally possible for copyright offenses.

complaints directly with the Inspection Committees instead of having to obtain a search warrant from the Public Prosecutor. IIPA hopes this will enable law enforcement authorities to substantially increase the number of raids against street vendors, pirate producers, and distributors/warehouses in 2003. With a view to developing public/private cooperation in anti-piracy actions, education, and training, there should be an executive contact point/lead in each Committee, with an accepted/appointed lead body at the central government level.

Even prior to the formation of the Enforcement Committees, AMPEC was able to carry out raids with local law enforcement, although, unfortunately, in one instance, an AMPEC lawyer was physically attacked.²³ In one raid in June 2002, AMPEC and members of law enforcement took a raid on a known Internet pirate who was selling CD-ROMs with movies in DivX format via two websites (a decompression technology that facilitates the downloading of a movie from the Internet), seizing 1,192 pirate discs, and causing a minor uproar in the Internet pirate community.²⁴ As of the end of 2002, AMPEC cooperated with the police to seize a total of 642,000 pirate VCDs in numerous raids against retail stores, street vendors and wholesale distributors. The Financial Police are also estimated to have seized an additional 500,000 VCDs through *ex-officio* actions under the smuggling law. The growing appearance of pirate DVDs in the market has also been recently noted by AMPEC. AMPEC seized a total of 8,301 pirate and parallel imported DVDs in 2002. AMPEC also worked largely on its own to weed out 26 broadcasters during 2002 that were engaged in the illegal broadcast of Motion Picture Association content, and the stations concerned ceased their pirate broadcasts following written warnings.

The business software industry experienced some support from the government in 2002. Five criminal “end-user” raids were conducted upon complaints made by members of the Business Software Alliance: two in Istanbul, two in Izmir, one in Bursa, and one in Ankara.²⁵ In three of the raids, evidence was properly seized, including all the computers and hard drives used by the companies were seized. In the Ankara raid, unfortunately, those raiding the premise seized only one sample hard drive from the target company raided, which may have allowed the offending company to continue to pirate software.²⁶ Prosecutors in Ankara also delayed conducting the search until receiving an order from the court. The Business Software Alliance has also found that police have not wanted to intervene to stop retail sales of pirated materials unless the relevant right holder files a complaint. IIPA hopes that the establishment of

²³ In May 2002, a motion picture industry representative (from AMPEC) and Turkish police officers raided a warehouse suspecting that the owner was using the facility as a VCD manufacturing plant. The owner barricaded the door and attempted to destroy the pirate material. After the police gained entrance, the man attacked AMPEC's attorney and had to be physically restrained. The raid netted over 1,400 pirate VCDs, and the man was arrested and charged for violating the copyright law and for assault. After the attack, AMPEC's attorney received threats from the defendant's family in an attempt to dissuade AMPEC from pressing charges. AMPEC has noticed a general increase in the amount of violence during raids following the enactment of tougher penalties in the 2001 copyright law.

²⁴ Apparently, after the raid, the perpetrator took down the website on his own, and sent out communications to many other websites engaging in similar activities to warn them about impending raids.

²⁵ One company which had branches in both Bursa and Izmir was raided in both locations.

²⁶ The BSA reports that prosecutors in Ankara usually order the seizure of only one personal computer during a raid and leave the rest with the raided company. Prosecutors in other areas of the country usually order the seizure of all PCs of a raided company that are found to have unlicensed software. The differing practice in Ankara often prevents the quick settlement of legal disputes between the raided company and the right holder and leads to protracted and expensive legal proceedings.

Enforcement Committees will allow for more *ex officio* raiding on behalf of all affected industries in the copyright community.

Establishment of Specialized IPR Courts

The establishment of Specialized Intellectual Property Courts, as required by the amended Copyright Law, is a positive sign, although their effectiveness still must be demonstrated.²⁷ The establishment of one Specialized IP Court per province is a requirement imposed by amended Article 76 of the Law, but to date, only one court was established in Istanbul. In the meantime, existing criminal courts of first instance have been assigned by the Ministry of Justice to function as the Specialized IP Courts for all other provinces in Turkey. All intellectual property cases were filed before these courts in 2002; however, only two first-instance court decisions were issued under the 2001 copyright law. The first was issued on October 3, 2001 against a video retail outlet located in the Sinanpasa Business Center, Besiktas/Istanbul, in which the defendant was sentenced to four years in prison and to a fine of US\$30,000;²⁸ and the second was issued on July 17, 2002 against five video shop owners in Antakya, in which Hatay Province's Criminal Court of First Instance sentenced each defendant to the minimum penalty under the amended law, a two-year prison term, and a US\$6,000 fine. In both cases, the defendants have appealed the cases to the Supreme Court, which is expected to issue final decisions for each case sometime in 2003.

The Business Software Alliance achieved successes in some of the cases brought in 2001 (under the old law). Of 50 pirate resellers and end-users raided in 2001, six people were convicted in the criminal courts in 2002. Defendants were sentenced to jail terms of nine months each in three cases; however, all were suspended sentences. The sum of criminal fines meted out by the courts in the cases brought in 2001 totaled US\$1,000, far below the deterrent levels which TRIPS requires. These figures were affected to some extent by the general amnesty proclaimed in Turkey in 2001,²⁹ which decreased the total amount of criminal punishment ordered by Turkish courts in cases involving piracy of business software. On the civil side, the business software industry indicates that decisions reflected more familiarity with the concepts and need for adequate compensatory damages, awarding three times the retail market value, indicative of progress toward deterrence (note that these cases too were decided under the old law). There was no improvement in 2002, however, in moving courts to award costs and reasonable attorney's fees.

Viewing these results, it is clear that the situation has evolved somewhat from 2001, when most raids that led to criminal actions resulted in non-deterrent penalties, or, in cases where sentences were meted out, in suspended sentences.³⁰ IIPA hopes to see the evolution of

²⁷ A recurring problem in Turkey has been the judiciary's general lack of expertise and knowledge with respect to copyright cases. Therefore, IIPA was pleased that Article 76 of the amended copyright law calls for the establishment of specialized intellectual property courts to handle cases involving copyright law. On March 26, 2001, the Ministry of Justice issued the Resolution of Supreme Board of Judges and Prosecutors (Resolution No. 335), establishing the Civil Court on Intellectual and Industrial Rights within the Province of Istanbul for civil lawsuits and the Criminal Court on Intellectual and Industrial Rights for criminal lawsuits, and other specialized courts outside of the jurisdiction of Istanbul Province.

²⁸ Due to mitigating circumstances (the pirate's respectful attitude toward the court), the Court later reduced his sentence to a 3 year and 4 month prison term and to a US\$28,000 fine.

²⁹ The Amnesty of 2001 was a general amnesty program covering a broad range of crimes.

³⁰ Indeed, under the old law, non-deterrence was codified, since according to Law No. 647 for the implementation of criminal sentences, judges are required to commute automatically sentences of one year (or less) into a fine. Fines

the IP courts around the country into well-functioning bodies regularly meting out deterrence where commercial piracy is found. However, copyright infringement is still not viewed as a serious crime by some judges and prosecutors, and traders, especially street vendors, are seen as poor people who are victims of the economic and political situation.³¹ Such attitudes have lead some prosecutors to refuse to take criminal actions following raids and to reject applications for criminal raids, referring complainants to the Enforcement Committees.

Procedural Hurdles Still Hinder Judicial Enforcement

Notwithstanding the promising outcomes of several cases in 2002, the establishment of the Specialized IP Courts does not, unfortunately, seem to have shortened the prosecution timeline. Many cases brought under the amended law in 2001 and 2002 cannot expect to reach verdicts until late 2003. Because copyright infringement cases have traditionally been given extremely low priority by the prosecutors and courts, the copyright industries remain skeptical that the courts will begin to mete out justice more expeditiously.³² Most cases in the courts for all the industries remain in court to this day.³³

Another abiding problem involves the Attorneyship Law's prohibition on private entities such as AMPEC from protecting third parties without having a local lawyer acting on behalf of the right holder as an intermediary for every case.³⁴ This Law unduly adds an additional burden and substantial costs to the bringing of cases in Turkey.

Another procedural problem has involved the use of experts by courts to address specific issues in copyright cases, and defendants' use of objections to force other experts to opine on the same issues, leading to excessive delays, and even wrongful acquittals. IIPA is very hopeful that the newly established Specialized IP Courts will not rely on outside experts in cases involving copyright so readily, especially on basic questions of law.³⁵ A further concern

can even be paid in installments. Since the two convictions under the amended law brought minimum jail sentences of two years, those sentences, unless overturned on appeal, cannot be commuted.

³¹ In some adverse decisions obtained from the Istanbul and Ankara Courts, judges have dismissed cases, giving dubious reasons, like: the case should have been heard under the Cinema Law (Law no: 3257) because there is no evidence that the CDs were copied by the pirate himself; or, the case should be heard under the Cinema Law (Law no: 3257) as per Turkish Criminal Code, Article 2 "the law which is in the defendant's favor is/should be applied"; or other technical reasons.

³² Courts have generally taken one to two years to decide such cases, and an additional eight months to a year to decide appeals.

³³ For example, there are at least 500 music piracy cases still languishing in the courts.

³⁴ As a result of the Attorneyship Law, organizations like AMPEC must hire regional attorneys to seek raid approval from Public Prosecutors. Following a raid where suspect material is seized, the Public Prosecutor then presses criminal charges, and the organization's lawyer immediately submits a petition of intervention to become a party to the case. Without such intervention, cases that lose in court cannot be appealed, and are unlikely to lead to successful results. For example, without the presence of an organization attorney, the accused can challenge the right holder's rights, and Prosecutors are likely to find it difficult to prove their cases because of a lack of access to right holder documentation. As a result, lawyers must be hired for three key phases of any case: (1) filing the initial complaint with the public prosecutor and obtaining a search warrant; (2) conducting the raid with the police; and (3) having the Public Prosecutor press charges and providing assistance in the courtroom to obtain convictions.

³⁵ For example, in the past, courts were known to have called upon experts to answer questions on basic issues of law, such as whether unauthorized loading of software on the hard disk of a computer is a copyright infringement. In a past case, a court-appointed expert opined that such act was not an infringement, and the business software industry notes several cases over the past few years in which a defendant was acquitted on the basis of such an "expert's"

with outside experts is the lack of adequate technical expertise. There have been cases where court-appointed experts in intellectual property cases have been issuing reports that are not factually accurate and appear biased against right holders. For instance, the expert's reports in two of the cases were far from being objective, sound or technically acceptable, and led to unfavorable judgments, despite the defendants' clear unauthorized use of software. The issue appears to be particularly acute for non-Turkish right holders. The apparent selective enforcement of intellectual property rights depending on the nationality of the right holder is not conducive to an economic environment in Turkey that is open to foreign investment. Moreover, such actions could discourage non-Turkish right holders from introducing products based on intellectual property rights in Turkey.

IIPA understands that the new specialized IP courts have already begun taking steps to obtain evidence and appoint experts with more urgency and care than the regular courts had, a very hopeful sign. IIPA also encourages the government of Turkey to proceed with training in intellectual property law for all judges and other personnel who will participate in the specialized court system, and IIPA supports all current and future plans of the Ministry of Culture to train judges and other practitioners in the relevant intellectual property laws.³⁶

Difficulties in Obtaining *Ex Parte* Searches Curtail Effectiveness of Civil Enforcement

In the area of civil enforcement, two issues continue to plague right holders seeking effective enforcement: the difficulty of obtaining *ex parte* civil searches, a TRIPS requirement; and the unavailability of reasonable costs and fees in civil and administrative actions. The business software industry in particular relies on civil *ex parte* searches in order to carry out enforcement against unlicensed uses of software in a business setting (so-called "end-user" piracy of business software), and providing such searches is a TRIPS obligation. Local counsel has advised that the 2001 amendments to the Copyright Law would allow for *ex parte* civil searches, in addition to searches pursuant to the court's authority, for obtaining evidence of copyright infringements, and the Ministry of Justice has even stated that civil *ex parte* searches are available under Turkish law, but without citing any specific provisions.³⁷ However, it is not yet known whether in practice the courts will interpret these provisions in this manner, because practice and precedent with respect to *ex parte* civil searches have not yet been established.³⁸

report. The problem of over-reliance on court-appointed "experts" is exacerbated by under-staffing of the judiciary (up to 50% more judges are needed in some instances to take the pressure off judges, who are constantly reminded of the need to ease their dockets).

³⁶ The private sector was active in training in 2002. For example, the Business Software Alliance supported a day-long judicial training seminar, under the auspices of the Ministry of Culture, to address software copyright in July 2002 in Ankara. In addition to Ministry officials, a number of judges also attended. Civil *ex parte* searches were one of the items discussed. Ministry officials have expressed an interest in similar training the future and IIPA members stand ready to assist.

³⁷ One possible interpretation is that Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL), which provide for the collection of evidence by a plaintiff (through a court order in the event that there is a risk that evidence may be damaged or destroyed, or that delays will result in difficulties in producing the evidence), read in conjunction with Article 372 of the TCPL, which provides that the court may dispense with the notification of the opposing party, could be applied in a TRIPS-compatible way. However, such an interpretation has not yet been accepted and acted upon by any court in Turkey.

³⁸ Although efforts to use certain sections of the Civil Procedure Law (e.g. current Articles 368, 369 and 372) have been ineffective in obtaining *ex parte* seizures, some reports indicate that judges can be convinced to issue reasonably prompt seizure orders (e.g., under Article 100 of the Civil Procedure Law). However, that provision, unless

Under the previous legal regime, once an alleged infringer refused to allow the search of its premises under a civil *ex parte* search order, neither the applicant nor the court was allowed to enter the premises under any circumstances. Although the 2001 copyright law fixed this problem as it appeared on the books, for example, specifying imprisonment for up to three months for a suspected infringer's refusal to allow its premises to be searched pursuant to a court order, the business software industry's experience is that courts have never indicated they would be more likely to grant applications for civil *ex parte* searches as a result of the stricter provisions. IIPA is unaware of a single instance in which the search and seizure provisions have been successfully used in Turkey. A positive step with respect to this problem would be for the Ministry of Justice to ensure that judges receive adequate training in this area regarding the recent changes in the law.

Banderole System Not Working to Curtail Piracy

The banderole (sticker) system has not worked as an anti-piracy tool in Turkey, and even though strengthened provisions were introduced in the 2001 copyright law (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), those provisions remained untested in 2001 and 2002.³⁹ IFPI (the International Federation of Phonographic Industries) reports that some plants hold unnecessarily large quantities of unused banderoles, which are not secured adequately. Additionally, where banderoles are applied to a jewel case (the case of an optical disc), this situation can easily be exploited for fraudulent purposes, as pirates will insert a pirate disc into the case of an original (making it look "legitimate"). Fraud and abuse marred the system in 2001, as over five million stickers were unaccounted for and probably made their way into unauthorized users' hands and onto unauthorized product, making them look "legal."⁴⁰ In addition, in 2001, proceeds from the banderole allocation were being collected but were not being used for anti-piracy purposes.⁴¹

IIPA has heard that the Ministry of Culture may be in the process of developing a computerized database to improve control over banderoles for all copyrighted products, starting in Ankara, with plans to extend it to Istanbul and around the country. Such a system could be a positive development, if the use of the banderoles is verifiable through audit procedures, including through contacting right holders or receiving right holders' correspondence to verify or deny that any particular applicant for the banderoles is authorized to distribute in Turkey (such denial might include a letter to the Minister indicating who the exclusive distributor is, thereby acting as a bar to anyone else receiving banderoles for that right holder's product in Turkey).

it is applied by the judiciary with regularity to permit surprise searches carried out swiftly, will not go to providing effective enforcement, and meeting Turkey's TRIPS obligation under TRIPS Article 50.

³⁹ Currently, Article 81 provides generally that infringement of banderole-regime products shall result in a prison sentence from (4) years to (6) years and a heavy fine from 50 to 150 billion Turkish Liras, and does not distinguish among street sellers, distributors and manufacturers of illegal products.

⁴⁰ IIPA understands that one civil servant of the Istanbul Copyright Office was tried in 2001, found guilty, and imprisoned for large-scale misappropriation of banderoles.

⁴¹ For example, the entertainment software industry reported in 2001 that banderoles for game software were being obtained falsely by pirates supplying false documentation to the Ministry of Culture, which did not take steps to ascertain whether documentation presented was legitimate, somewhat analogous to the false registration problem with respect to importation of DVDs of movies that was solved in 2002.

If the government decides to keep the banderole system, it must take immediate steps to ensure that those who are caught dealing in copyrighted works without banderoles, or using banderoles without authorization, are prosecuted to the full extent of the copyright law (Article 81 as amended provides for fines and imprisonments for such offences).⁴² Unfortunately, in 2002, IIPA understands there were cases in which prosecutions were not brought against those fraudulently using banderoles, and that there was even a directive in November 2002 to prosecute not under Article 81, but under the Cinema Law, which would bring with it much less deterrent penalties.⁴³ This would be a step in exactly the wrong direction, and IIPA seeks clarification from the government of Turkey that it will prosecute to the maximum extent of the law anyone who fraudulently uses banderoles. In addition, the government of Turkey must prosecute those found dealing in or otherwise illegally allocating banderoles (it is unclear that this activity is covered under the current statute, but the activity may already be covered under fraud or other statutes). Such a prohibition would deter those who have caused banderoles conveniently to “disappear.” The Ministry of Culture should, in a transparent and verifiable manner, use a substantial part of the banderole income to finance the further establishment and operations of the regional enforcement committees.

COPYRIGHT LAW AND RELATED ISSUES IN TURKEY

Amendments to the 1951 copyright law in Turkey (Law No. 5846) passed in March 2001 brought Turkey’s copyright regime considerably closer to international treaties standards and have led to some temporary gains in the fight against piracy.⁴⁴ Passage of the amended law must not, however, signal the end of Turkey’s efforts to modernize its copyright system, but rather, must lead to proper implementation through strict enforcement of the law. There are a few remaining ambiguities about which IIPA seeks clarification.

- **Availability of *Ex Parte* Civil Search Orders:** As discussed above, the amended copyright law does not include express provisions regarding civil *ex parte* search measures. *Ex parte* civil search orders are required by TRIPS Article 50. We are pleased to learn that an official from the Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law, but the official failed to cite specific provisions; IIPA seeks clarification from the Ministry as to the basis for stating such searches are available.
- **Importation Right for Producers of Sound Recordings:** Unlike works, there is no express exclusive importation right (including parallel import protection) for producers of sound recordings. This right should be provided.

⁴² The Ministry of Culture has reportedly issued a circular to activate “Provincial Inspection Committees” to fight piracy as per the amended Article 81 of the Copyright Law, and implementing the Procedures and Principles Concerning the Banderole Implementation of November 8, 2001. This circular was published on January 27, 2002 in the Official Gazette and took immediate effect. Proper and effective employment of these official task forces will be important to the overall success of the fight against piracy.

⁴³ IIPA understands that the Banderole Commission had, upon a seizure of goods without banderoles, or goods using fraudulent banderoles or fraudulently-obtained banderoles, usually initiated a legal action against the seller under Article 81 of the Copyright Law. However, IIPA has learned that the Banderole Commission and prosecutors in Istanbul have recently agreed on a procedure whereby street sellers would not be prosecuted under Article 81, but under Law 3257 Relating to Cinema, Video and Musical Works. As the penalties provided for illegal street sales under the Cinema Law are small when compared with Article 81, this change further weakens the banderole regime.

⁴⁴ For example, in 2001 and into 2002, the motion picture industry reports that the amended law had a substantial deterrent effect on pirate retailers and on the levels of television and public performance piracy.

- **Protections Against the Circumvention of Technological Protection Measures:** The amendments implemented many of the requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). However, one important area the law as amended does not provide for is protection against the circumvention of technical measures used by content owners to protect their property from theft (including civil, administrative and criminal penalties in cases of unlawful acts of circumvention or trafficking in circumvention devices).⁴⁵
- **Confirm No Formality Requirements:** An additional transition article to the 2001 amendments to the copyright law (Supplemental Article 5) indicated that there would be compulsory deposit of five copies of any copyrighted material. Such a requirement, if imposed in practice and if it limits the exercise of right, may constitute a formality that violates Article 5(2) of the Berne Convention (and therefore, TRIPS). IIPA notes that failure to deposit can result in a fine of TL5 billion (currently about US\$3,116). This provision should not be applicable to foreign right holders.

⁴⁵ One possible formulation of a prohibition on circumvention of technological protection measures that would satisfy the WIPO treaties is as follows:

1. Any person who
 - a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure; or
 - b) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products or components or offers to the public or provides services, which:
 - i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
 - ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;
 shall be guilty of an offense, and shall be liable, upon the suit of any injured party, to relief by way of damages, injunction, accounts or otherwise.
2. This section prohibits circumvention of technological measures, and does not require an affirmative response to such measures. This section does not require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological measure. This paragraph does not provide a defense to a claim of violation of paragraph 1(b).
3. “‘effective technological measure’ means any technology, device or component that, in the normal course of its operation, controls access to a protected work, sound recording, or other subject matter, or protects any copyright or any rights related to copyright as provided by this Act.
4. A violation of this section is independent of any infringement that might occur under this Law.

Turkey Needs Optical Disc Legislation

The strategic location of Turkey in a region where copyright protection and border enforcement are weak makes Turkey an appealing site for pirate optical media production. The relatively high number of CD manufacturing facilities calls for the early introduction of an effective optical disc plant law in Turkey.

The government of Turkey should, therefore, craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following points:

- 1) **Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and “production parts” (including “stampers” and “masters”), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained “manufacturer’s code” (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) **Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including “stampers” and “masters”), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) **Requirement to Apply Manufacturer’s Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer’s code, and to cause each optical disc and production part to be marked with manufacturer’s code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer’s codes (including making, possessing or adapting an optical disc mould for forging manufacturer’s code; altering, gouging or scouring a manufacturer’s code on or from a mould or any disc; selling a production part not marked with manufacturer’s code, etc.).
- 4) **License Record Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) **Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such “commercial optical disc duplication,” giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) **Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) **Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) **Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) **Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

- 10) **Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**
- 11) **Possibility of Closure of a Plant.**

The copyright industries look forward to working with the authorities of Turkey to draft, implement and enforce comprehensive optical disc regulations.

The Cinema, Video and Music Works Law Remains Inadequate

Now that the copyright law in Turkey has been amended, the 1986 Cinema, Video and Music Works Law (Law No. 3257) ("Cinema Law") must also be updated to delete conflicting and confusing provisions and to bring weak penalties up to the amended copyright law standards. IIPA now understands that, as of the end of 2002, the process of amending the Cinema Law has been aborted, and that the Cinema Law will be replaced by a new law entitled "Law on the National Cinematography Institute."⁴⁶ The new law will apparently establish The National Cinematography Institute as a separate legal entity within the Ministry of Culture, which would act as an official central body for the overall cinema and audio-visual sectors in Turkey. Its duties would cover a wide range, from making administrative and legal arrangements, providing support for the industry to issue licenses, inspect, and classify productions, arrange for co-productions, and set up and operate establishments and facilities, including archives, libraries, studios and an observatory. The new law would also apparently also cover inspection and classification of audiovisual productions, meaning the "inspection" system (a kind of censorship) will not be fully abandoned. However, classification criteria were not stated in the law, and probably would be arranged by Ministry regulations.

Because the present Cinema Law (Law No: 3257) would be repealed and superseded by this legislation, IIPA notes that the courts and the Banderole Commission, among others, would no longer be able to apply the Cinema Law for piracy offenses rather than the Copyright Law in order to bypass the stiff criminal penalty provisions in the Copyright Law.⁴⁷ For the copyright industries, this would be an extremely positive development.

Generalized System of Preferences

The U.S. government continues to investigate Turkey's IPR practices under the Generalized System of Preferences (GSP), a U.S. trade benefits program. To qualify for benefits under the GSP Program, namely, duty-free imports of many important Turkish products into the U.S., the United States must be satisfied that Turkey meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." A review of Turkey's eligibility under this program was initiated after IIPA filed a GSP petition against Turkey in June 1993, and Turkey remains under GSP review. In the first eleven months of 2002, \$426.6 million in Turkey's imports to the United States benefited from the GSP

⁴⁶ The Minister of Culture announced on December 24, 2002 that a semi-independent "Turkish National Cinematography Institute" would be founded by a new piece of legislation and the Ministry posted a draft text of the proposed legislation on its website on December 30, 2002. The full title is "Draft Law on the Establishment and Terms of Reference of the Turkish National Cinematography Institute."

⁴⁷ Some prosecutors insist to refer a/p cases to municipalities for administrative fines per the Cinema Law instead of filing criminal cases under the Copyright Law.

program, accounting for 13.1% of its total imports to the U.S.⁴⁸ While many of the benchmarks noted by IIPA in previous submissions have been accomplished, the key notable failure is in the area of enforcement, namely, taking effective enforcement actions to their conclusions to address widespread piracy. This last standard has obviously not been met, and Turkey should not continue to enjoy benefits of GSP if it fails to take significant action to provide adequate and effective enforcement in 2002.

WIPO Treaties

Turkey's recent amendments to its copyright law implemented many of the requirements of the WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WCT went into force on March 6, 2002, and the WPPT went into force on May 20, 2002. While certain key elements still have not been provided satisfactorily in the legislation in Turkey (the most notable deficiency is the failure to prohibit the circumvention of technological protection measures, including the trafficking in circumvention devices), this should not discourage Turkey from seeking immediate ratification of the WCT and WPPT, and swift deposit in Geneva. We note, for example, that the Turkish Criminal Code (Article 525 *et seq.*) at least partially implements that requirement of the treaties, by providing protection against circumvention of computer encryption. Joining the WIPO treaties would be a vital step toward Turkey's establishment of an adequate legal framework for electronic commerce.

⁴⁸ In 2001, \$437 million in Turkey's imports to the United States benefited from the GSP program, accounting for 14.4% of its total imports to the U.S.