

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# TURKEY

### EXECUTIVE SUMMARY

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IIPA recommends that Turkey remain on the Special 301 Priority Watch List. Optical media piracy has hit the Turkey markets. Estimated losses due to copyright piracy of U.S. copyrighted materials in Turkey have increased to \$266.5 million in 2000. The high levels of copyright piracy affecting most of the copyright industries are compounded by the inability of the Turkish criminal and civil legal systems to deter such theft. In late 1999 and early 2000, the Ministry of Culture made great progress in revising the copyright law amendments to improve its provisions upward to satisfy most international standards. Sadly, despite those positive steps, the Turkish General Assembly has not acted on the bill for almost a year. Turkey's current copyright law (distinct from any proposed amendments) fails to meet the substantive obligations of the TRIPS text. Furthermore, the Turkish criminal system has not proven to provide effective deterrence against copyright piracy. Significant barriers remain in particular for business software companies to pursue civil *ex parte* actions, a measure which is an integral part of that industry's anti-piracy campaigns in many countries. Levels of copyright piracy in Turkey remain high across most industry sectors.

Turkey has been under U.S. government scrutiny of its intellectual property rights regime for the last decade. Four years ago, the U.S. government, USTR outlined six benchmarks for progress in Turkey during its 1997 Special 301 cycle. These include the Turkish government: taking effective enforcement actions to their conclusions to address widespread piracy; passing copyright and patent law amendments to bring Turkey into compliance with its TRIPS and Berne obligations; amending the Cinema, Video and Music Works Law to include higher, nonsuspendable fines and jail terms; issuing a directive to all government agencies to legalize software; starting a public anti-piracy campaign about the software end-use problem; continuing training of enforcement officials so that the levels of piracy decline; and equalizing taxes on the showing of foreign and domestic films. The first four of these copyright-related goals have not been met.

In addition to bilateral attention under Special 301,<sup>1</sup> the U.S. government continues to investigate Turkey's IPR practices under the Generalized System of Preferences (GSP) program, a U.S. trade law which contains requirements of "adequate and effective" copyright protection. This review was initiated after IIPA filed a GSP petition against Turkey in June 1993, and Turkey remains under GSP review.<sup>2</sup> As a member of the World Trade Organization, Turkey is currently obligated to provide the standards of copyright protection found in the TRIPS Agreement.

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<sup>1</sup> For further details on Turkey's history under Special 301 and GSP, see Appendices D and E of IIPA's 2001 Special 301 submission.

<sup>2</sup> USTR announced on January 16, 1998, that it would not consider any requests to expand the scope of preferential trade benefits Turkey receives under GSP. This means that no new products can be added and no additional competitive need waivers can be granted to Turkey. In 1999, \$335.3 million in Turkey's imports to the United States benefited from the GSP program, accounting for nearly 12.9% of its total imports to the U.S. For the first eleven months of 2000, \$403.2

**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1995 - 2000**

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level										
Motion Pictures	50.0	50%	50.0	85%	59.0	95%	59.0	95%	59.0	95%	57.0	95%
Sound Recordings / Musical Compositions	4.0	40%	4.0	30%	4.0	30%	8.0	30%	7.0	30%	8.0	30%
Business Software Applications <sup>3</sup>	68.3	69%	78.2	74%	44.5	87%	48.4	84%	85.7	87%	48.6	89%
Entertainment Software <sup>4</sup>	116.2	96%	95.1	82%	92.3	80%	96.7	84%	98.0	89%	28.0	86%
Books	28.0	NA	32.0	NA	28.0	NA	20.0	NA	20.0	NA	18.0	NA
<b>TOTALS</b>	<b>266.5</b>		<b>259.3</b>		<b>227.8</b>		<b>232.1</b>		<b>269.7</b>		<b>159.6</b>	

## COPYRIGHT PIRACY IN TURKEY

### Pirate Optical Media Product Threatens the Legitimate Markets

More and more pirated digital product, including illegal copies of VCD (video compact discs), CD-ROMs (both entertainment and business software), music CDs and DVDs have entered the Turkish markets over the past three years. While much of this illicit product is produced primarily in Asia (Hong Kong, Macau, and Taiwan), pirate product shipped from Eastern Europe also enters the Turkish market. At last report, the activities of the three CD plants operating in Turkey have not given the industries cause to complain.

VCD (video CD) piracy in Turkey has become the most dangerous form of audiovisual piracy in Turkey. This involves infringing copies of prerelease feature films which are imported from Asia. Mass importation has been prevented by a government circular, but the pirates have creatively found alternative ways to import pirate VCDs. Locally produced product has also become a problem. According to MPA, Turkish viewers prefer to play VCDs on personal computers rather than on VCD players. In the past, audio CD players and PlayStation® consoles are also modified for multipurpose usages to include the playing of VCDs. This is not such a problem any more because original VCD players are now widely used and easily available through newspaper promotion campaigns and are sold for only U.S.\$70-80 in the market.

Several years ago, the main source of supply for pirate music CDs had been Bulgaria, but because of action taken by the Bulgarian government to control exports, imports of Bulgarian pirate product into Turkey have dropped. According to the recording industry, pirate CDs produced elsewhere in Eastern Europe are now entering the Turkish market, and are being sold on the street

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million of Turkish goods entered the U.S. under the duty-free GSP program, representing a 32.6% increase over the same period last year.

<sup>3</sup> BSA estimates for 2001 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss and level figures were not available. BSA's 2000 numbers were finalized in mid-2000, and are reflected above.

<sup>4</sup> IDSA estimates for 2000 are preliminary.

for about U.S.\$3. Reports also indicate that pirate music CDs are being exported from Cyprus into Turkey. Some of these discs may be originated in Israel and/or Southeast Asia.

For the entertainment software industry, numerous pirate PC (personal computer) and CD game titles are available in Turkey, most of which appear to come from the Far East, primarily Malaysia, Hong Kong and Singapore. Imports from Russia are also reported. There was a slight resurgence in optical media out of Bulgaria, too. Pirate cartridge-based videogames manufactured in China and shipped through Hong Kong also flood the Turkish market. Most of the pirated videogames in the Turkish market are imported.

## Copyright Piracy Continues to be Rampant in Turkey

The motion picture industry suffers from several forms of piracy in Turkey. Estimated losses due to motion picture piracy in Turkey remain at \$50 million in 2000. VCD piracy has emerged as the most significant form of piracy in Turkey, involving counterfeit copies of prerelease titles imported from Asia. Mass importation of pirate VCDs has been prevented through a government circular, but the pirates have now found alternative methods to obtain their supply of material, including carrying it in personal luggage. In addition to the existing pirate VCD imports problem, locally produced pirate VCDs have become a major hurdle in 2000. Pirates now duplicate VCD copies of prerelease titles with Turkish subtitles as well as make back-to-back copies of legitimate VCD titles with Turkish dubbing. Turkish viewers generally prefer to play VCDs on PCs rather than dedicated VCD players. Audio CD players and PlayStation consoles are also modified for multipurpose usage to include the playing of VCDs. Sales of VCD players are nonetheless on the rise and sell for as little as U.S.\$70-80. The number of VCD players is now estimated at 200,000-250,000, with an additional 400,000-500,000 CD-ROM drives on PCs.

Pirate VCDs are openly sold in retail stores and, increasingly, by street traders. Street traders are especially active in major cities and certain tourist locations. The average number of pirate VCDs varies between 200 to 800 per retailer, and 100 to 300 per street trader. All new titles are available prior to and/or together with their theatrical releases. They are also used as masters for producing pirate videos and for unauthorized public performances. The local motion picture anti-piracy organization, AMPEC, began to combat VCD piracy in late 1998. In 2000, AMPEC cooperated with the police to seize a total of 124,110 pirate VCDs in numerous raids against retail stores, street vendors and wholesale distributors. The Financial Police are also estimated to have seized an additional 200,000 VCDs through *ex officio* actions under the smuggling law. Although Customs has been told to stop mass importations of pirate VCDs, pirates continue to find ways to pass the borders. Importantly, domestic production of pirate VCDs is on the rise. The Turkish government (ministries, police and municipalities) continues to ignore the vast level and quantity of VCD piracy and its adverse impact on the legitimate motion picture industry. Anti-piracy actions taken are sporadic and do not reflect any concerted response to this serious problem. And finally, unauthorized parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) now account for almost 50% of the total DVD market.

The rental of back-to-back VHS copies of released titles and of prerelease titles is still a problem. There remain around 150 to 200 video rental outlets in Turkey, with an average pirate copy stock of between 50 to 200. Pirate copies are generally produced individually by these shops for their own use. Mass production and distribution are nonexistent. Copies are generally poor quality, with typewritten or handwritten labels. Pirates use legitimate videos, imported VHS

cassettes, laser discs and especially pirate VCDs as masters. Occasionally, pay television broadcasts are used to produce pirate copies. The level of video piracy was 50% in 2000, a significant drop from 85% reported for 1999. Video piracy was replaced by increasing levels of VCD piracy, which explains why the estimated levels of losses remained constant between 1999 and 2000.

Broadcast television piracy has been a serious but declining problem in Turkey. It is now estimated that approximately 10% to 15% of the 230 local broadcast stations continue to engage in broadcast piracy, transmitting domestic and foreign films, including MPA members' titles, using home video cassettes and sometimes pirate products as masters. License overruns by some major television stations, which had been a recurring problem, have now become less frequent due to AMPEC and RTUK supervision. However, the short 20-year term of copyright protection in the old Turkish copyright law (prior to its 1995 amendments) means that these television stations show many still-valuable titles without authorization.

MPAA reports that unauthorized public performances of new and popular films on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters are frequently encountered. Certain intercity coach services also show video films during journeys. AMPEC identified and investigated nine public performance piracy cases in 1999 and 25 cases in the first half of 2000. The problem is steadily increasing.

For the entertainment software industry, most of the piracy in the Turkish market is due to pirate imports of pirated videogames, on all platforms. As mentioned above, numerous pirate PC (personal computer) and CD game titles are available in Turkey, most of which appear to come from the Far East (Malaysia, Hong and Singapore) as well as Russia. There was a slight resurgence in optical media out of Bulgaria, too. Pirate cartridge-based videogames manufactured in China and shipped through Hong Kong also flood the Turkish market. The estimated level of piracy increased very significantly over the past year, up to 96% in 2000. This means almost the entire videogame market in Turkey is composed of pirate product. IDSA reports that estimated losses due to entertainment software piracy in Turkey escalated to \$116.2 million in 2000.

Retail stores sell pirate software and game titles, with some pirate titles sold for as little as \$6. For example, one videogame company reports that 98% of their platform-based product in Turkey is pirate, and 98% of the PC products are pirate. All of this pirate CD product are silver CDs, meaning they have been produced at factories, and all imported from Malaysia, Thailand, Hong Kong and Singapore. There is no gold CD burning reported in Turkey. There is a highly organized and effective network used to distribute pirated product. To compound matters, Internet-based piracy of games has appeared. AMPEC, working in conjunction with Turkish police, seized 40,000 pirate game CDs during 2000.

U.S. book publishers continue to report that the book piracy situation in Turkey remains among the worst in the region. Illegal photocopying and unauthorized translations and offset reprints of science, technical and medical texts remain high. English as a Second Language (ESL) materials continue to flood the market. The education market is growing, as new private universities open. Photocopy shops are established outside the gates of most universities. Such photocopying also occurs on a semi-official basis, whereby a professor includes sections of books in his course notes and the bound notes are available for sale in the photocopy shop. Publishers report that the problem of unauthorized offset publications is declining. Bookstores mix both legitimate hardcover product on their shelves with pirate editions, and it is difficult to distinguish

the real from the piratical product. It is common practice in Turkey for bookstores to swap overstocked books without documentation, and as a result, this makes it very nearly impossible for the legitimate industry to bring actions against suspected stores because of the difficulties in tracking ownership of the suspect material. The main bookselling section in a shopping mall in downtown Ankara sells mainly legitimate titles, but there is a section nearby where pirate text and reference books are easily available. Booksellers estimate that anywhere between 30% to 70% of the market is supplied by pirated books. Estimated trade losses due to book piracy are \$28 million in 2000. Losses probably would have been higher, if not for the general economic difficulties in Turkey during 2000.

Estimated piracy levels and trade losses due to business software piracy in 2000 are \$68.3 million, with a 69% piracy level; both these statistics reflect a drop over the prior year. Software piracy continues to be a significant problem in both the distribution channel and with end users. Although the police raided one street market in December 2000 and seized a number of illegal CD-ROMs, illegal CD-ROMs are still being sold openly in street markets and in retail shops. The illegal loading of software onto the hard drives of PCs continues to be a major problem. The police conducted raids of approximately 30 resellers and 10 end users in 2000; however, the reseller fines issued averaged approximately \$3,500 per reseller, an amount which is not remotely deterrent. No end user cases reached judgment in 2000. A court in Izmir did order one reseller to serve three months in jail and to pay a substantial fine but the sentence was appealed and is now postponed under the general amnesty issued late last year.

For the recording and music industry, the estimated level of piracy for 2000 was 40%. Estimated trade losses to audio piracy remained at \$4.0 million last year. Affiliates and licenses of the major international record companies continue to be actively involved in local anti-piracy activities.

## **COPYRIGHT ENFORCEMENT IN TURKEY**

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Enforcement efforts by the Turkish authorities remain inconsistent. The most notable deficiency is that the criminal and civil judicial systems simply do not impose any effective deterrence against piracy. There is a litany of problems: The penalties issued are too low and not sufficient to deter piracy; judicial proceedings take too long; civil remedies and procedures are inadequate; and TRIPS-compatible civil *ex parte* searches are not available. While there has been cooperation between the industries and the various Turkish authorities on running raids and seizing infringing product, both in the cities and at the border, these actions have not translated into expeditious prosecutions and judgments which have a deterrent effect on piracy in Turkey. To compound matters, a general amnesty was adopted in December 2000 which had the effect of postponing sentences in cases involving crimes committed before April 22, 1999 – including copyright cases which had been decided or were in process of prosecution. The copyright industries continue to play active roles in investigating and conducting anti-piracy actions on the ground as well as working toward effective copyright law reform. Beyond existing legislative shortcomings, the handling of piracy cases in the Turkish courts must be improved.

### **Failure to Impose Deterrent Criminal Penalties for Copyright Infringement**

IIPA's Special 301 reports consistently have identified the deficiencies in Turkey's enforcement system. Historically, the police have been willing to run raids. But raiding alone, without effective deterrent penalties imposed upon wrongdoers, will not result in deterrence. Simply put, Turkish authorities have failed to impose deterrent criminal penalties in piracy cases. Those cases which have been decided are characterized by low penalties and suspended sentences. Pirates view these merely as a "cost of doing business." Sentences are generally suspended by the court for first offenses. According to Law No. 647 for the implementation of criminal sentences, judges are required to automatically commute sentences of year (or less) into a fine. Fines can even be paid in installments (and given the depreciation problem, deterrence is again lacking). Also missing from the current copyright law are provisions which increase the penalties in cases of repeat offenses, provisions to withdraw business licenses, and provisions to order the closure of businesses. The pending copyright bill should cure these omissions.

On the audiovisual side, AMPEC, the local audiovisual anti-piracy organization of which MPA is a member, has conducted thousands of raids and close to a thousand legal actions over the years. AMPEC uses the criminal provisions of the copyright law; between 1988 and 1995, AMPEC primarily used the administrative sanctions available under the cinema law, since the penalties under the old copyright law were so abysmal. In late 1998, AMPEC began to focus on optical media piracy. During 2000 alone, AMPEC opened 325 investigations and conducted 109 raids, resulting in 93 new legal actions. Seizures included 124,110 pirate VCDs, 841 pirate DVDs and 578 pirate videocassettes. Despite this high level of activity, there is no deterrence within the Turkish legal system. To give a sense of scope of the industry's campaign over the last decade (1988-2000), 4,945 investigations were initiated; 1,198 raids were run; over 293,200 infringing copies of audiovisual works were seized; 1,003 legal actions initiated; and 604 decisions issued. In almost all these cases, prison terms were commuted to fines, and the fines were generally suspended.

The Business Software Alliance (BSA) has an active criminal enforcement program in Turkey, targeting primarily resellers and end-users. With respect to business software efforts, the software industry filed criminal complaints which resulted in raids of approximately thirty resellers and ten end users in 2000. Of the twenty-five criminal cases which came to judgment in 2000, eighteen ended in convictions. However, in seventeen of the cases, the court commuted the jail sentences to a fine and then suspended the fine. The average amount of fines was \$3,500, hardly a deterrent penalty for a successful pirate. However, the amount is somewhat irrelevant as the fines are not actually imposed. Consequently, the software industry must devote additional resources to appealing the suspension of the sentences and fines.

In one case this year, the court ordered a reseller to three months in jail and to pay a fine equivalent to \$77,000. This is the first case in Turkey in which a jail sentence has been ordered and the second with a substantial non-suspended fine. Predictably, the sentence was appealed (and the jail sentence has now been postponed under the general amnesty). Although the issuance of a deterrent-level fine by the trial court is a positive step, the court's decision appears to have been based on factors distinct from the actual infringement and was primarily in response to the defendant's excessive criminal record and contemptuous attitude to the court during proceedings. As in past years, if the court does convict, the software industry is often forced to expend considerable resources arguing appeals lodged by convicted defendants. Of the eighteen convictions in 2000, six are currently on appeal. In addition, seven defendants have been acquitted in spite of clear evidence of infringement. These cases are also being appealed. BSA's appeals have so far been upheld by the Court of Appeal. Even so, it is a waste of time and

resources to have to consistently appeal both unwarranted acquittals and the suspension of sentences and waivers of monetary penalties.

A recurring problem is the judiciary's lack of expertise and knowledge with respect to copyright cases and the inefficiency of the judicial system. For example, Turkish courts routinely request expert reports on issues of law, as well as fact, including basic legal questions, such as whether use of software without authorization is a violation of copyright law. BSA's experiences in Ankara highlight the problem. The court-appointed experts do not have the necessary expertise in copyright law and generally issue reports stating that they cannot determine if hard disk loading is a copyright infringement. On the basis of these reports, the court will grant an acquittal (as noted above, this has happened in seven cases this year).

Defendants can also use the court's over-reliance on expert reports to prolong proceedings. Defendants can stall cases for years by objecting to expert reports repeatedly without having to show any reasonable grounds for such objections. It often takes up at least two months for the court-appointed experts to issue a straight forward report; if the issues are complicated or if there is a high volume of work, it can take up to a year. In one case, which was filed in 1998, the defendant has objected to the expert report and requested that a new report be prepared three times. In addition, contrary to the rules of Turkish civil procedure and the general practice of courts, the court ordered BSA to pay the costs of obtaining all three reports even though BSA had raised no objections to any of the reports.

Several companies in the entertainment software industry pursue anti-piracy efforts in Turkey during 2000. There has been some success in working criminal cases with Customs officials. For example, one company ran over 70 raids in 1999 in retail areas in Istanbul and Ankara. Cooperation with customs has been very good. While the raids have helped those retail markets, they have not reached far enough to disrupt the distribution and supply chain, which often has organized crime elements. Another publisher participated in over 80 raids run by AMPEC which resulted in the seizure of 26,000 pirate videogames. Of the resulting ten cases, five included prisons sentence and fines, which were suspended; in the other five cases, these sanctions were not suspended. The obstacles to enforcement continue to be low penalties and slow prosecutions. The general amnesty passed in late 2000 ended many of the ongoing criminal prosecutions.

## Lengthy Delays in Criminal Infringement Cases

Initiating criminal actions can often be cumbersome and expensive for injured parties under the current system. A typical criminal action in Turkey always starts with a complaint to the public prosecutor and a raid with the police under the copyright law. *Ex officio* actions are not possible for copyright offenses. In order to ensure that pirate products are confiscated, therefore, private parties (such as AMPEC or a member of the BSA)<sup>5</sup> must file criminal complaints, and the Public Prosecutor has to approve a police raid followed by a criminal action.

Following a raid where suspect material is seized, the Public Prosecutor then presses criminal charges and the copyright owner's lawyers immediately submit a petition of intervention so as to become a party to the case. Without such intervention, cases, if lost, cannot be appealed.

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<sup>5</sup> The Attorneyship Law forbids private entities such as AMPEC and BSA from protecting third parties (rightholders) without having a local lawyer as an intermediary for each and every case. Professional associations (such as collecting societies) do have standing to bring cases in their own right on behalf of their members.

Without the copyright owner's intervention on behalf of its member companies, it is also unlikely that cases would be won (without the presence of the copyright owner's attorneys, the accused can challenge rightholders' rights, and prosecutors are likely to find it difficult to prove their cases because of a lack of access to rightholders' documentation). As a result, lawyers must be hired for three key phases of any case to: (1) file an initial complaint with the public prosecutor and obtain a search warrant; (2) conduct a raid with the police; and (3) have the Public Prosecutor press charges and to assist him in the courtroom to obtain a conviction. Securing practical copyright protection can thus be a long and expensive process.

One IDSA company reports that it has had 70 criminal cases pending since 1998. Due to the recent amnesty bill (below), about 40 of these cases have been dropped. The rest remain pending in the Turkish courts.

Courts take one to two years to decide piracy cases and an additional 8 to 12 months to decide appeals. The few cases that have been decided are characterized by low conviction rates and low penalties, which fail to deter pirates. Penalties cannot be increased during trial, so the amounts of fines depreciate about 65% per year.

## **False Registrations of Banderoles**

The number of false registrations of banderoles grew over the past year, and have adversely affected several copyright industries, especially book publishers and audiovisual and videogame companies. The banderole system has been around for years yet only recently is becoming a barrier to legitimate trade. It also impacts on anti-piracy operations, commercial market entry, and for the publishing industry, freedom of speech.

It has been increasingly difficult for legitimate rightholders to deregister these banderoles, which were obtained by unauthorized persons and/or companies. In other cases, it has also been difficult for legitimate rightholders to obtain banderoles in a timely manner in the first place. Two years ago, one foreign publisher refused to enter a copublishing deal with a local publisher because of significant difficulties in being able to procure government banderoles (official stickers) on a timely basis. Meanwhile, local Turkish publishers do not bother to procure the banderole, and the authorities do not follow up on publishers' using the stickers. The proposed copyright amendments do contain provisions aimed at addressing this problem; the industry remains wary about whether the Turkish authorities will be able to correct these problems in an immediate and effective manner once the law is adopted.

The international publishing industry wrote to President Demirel in protest of the use of the banderole in book publishing, especially as the freedom to publish and distribute books is a right guaranteed by several international agreements, including the European Convention on Human Rights.

## **Ineffective Turkish Border Measures**

Large quantities of pirate optical media product – videogames, VCDs and the like -- continue to enter Turkey. Customs offices have been warned by the Ministry of Culture and the General Customs Authority to stop mass importation of pirate VCDs. Nevertheless, pirates have found ways to bypass customs controls.

One of the keys to addressing this problem is to have effective border enforcement. The Turkish Customs Law has been reenacted very recently. Customs regulations have also been revised to harmonize with the mechanisms in the European Union system. Reportedly, these regulations require that the rightholder file a complaint or application to initiate action and that the customs authorities cannot act on their own initiative. TRIPS Article 58 requires “competent authorities to act upon their own initiative and to suspend the release of goods.” Given the rise in piratical optical media products entering Turkey, there is much room for improvement in border enforcement. It should be noted that some copyright industries do experience good cooperation with customs officials on raiding actions.

## **Lack of Effective Civil Remedies, Especially *Ex Parte* Searches**

BSA has encountered difficulties in obtaining judicial authorization to order civil *ex parte* searches and it is not clear that Turkish law provides for civil searches that would fulfill its obligations under TRIPS. The Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law without citing any specific provision. The only provisions that IIPA is aware of are Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL) which provide a procedure to help a plaintiff collect evidence to build a case but are insufficient to meet TRIPS requirements because they depend on the consent of the alleged infringer. According to Articles 368 and 369, 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, the plaintiff may apply to the court for a request to search. If the court finds it necessary to protect the plaintiff’s rights, Article 372 provides that the court may dispense with the notification of the opposing party. The search of the infringer’s premises for evidence must be conducted by a judge in the presence of a bailiff, an expert witness appointed by the judge and the applicant.

However, Articles 368 and 369 allow the alleged infringer to refuse to allow the search of the premises and neither the applicant nor the court can enter the premises under any circumstances in the event that the target refuses entry. This search provision is not adequate and is not compliant with TRIPS. It does not allow a plaintiff the ability to do anything other than request to enter the premises of a company which is believed to be engaging in illegal behavior. The opposing party has every incentive to refuse entry; therefore, this procedure does not allow the software industry to collect the evidence necessary to bring civil actions against infringers.

In addition, under this procedure evidence cannot be seized unless a separate application for injunction is made and a precautionary injunction is granted. Therefore, the plaintiff must first apply for a search order and, if granted, entry to the premises would be gained. However, in order to seize the evidence at the premises, the plaintiff would then have to apply for an injunction. The problem is that by the time it takes to accomplish this two-step process, the evidence would likely have been destroyed as between search and seizure there would be sufficient time for the target to destroy or dispose of the evidence.

BSA is not aware of any instance where this search procedure has been successfully used. An application filed by a BSA member for both a search and an injunction was rejected because the court considered the request to be too unusual. The fact that the court rejected the BSA member company’s application for an order not commonly presented to courts, even though there

is nothing in the law to prevent its being granted, is another indication of the critical need for judicial training in software enforcement cases.

### **Awards of Expenses in Civil Cases**

Articles 413-426 of the Civil Procedure law allow awards of court expenses, which include all reasonably incurred costs, appropriate attorney's fees, costs of collecting evidence, preparing and duplicating documents, travel, retaining exporters, and the like. Industry reports indicate that the Turkish courts award attorney's fees based on the fees fixed by the Turkish Bar, and not based on the amounts actually paid to attorneys – the form is always much lower than the latter. We request additional information from the Turkish government as to whether and how the Turkish courts, as a matter of practice, award such expenses in copyright infringement cases. The tariff based on which the attorney fees are reimbursed is determined and published by the Ministry of Justice. The inflation is not taken into account and this tariff is far from being realistic. The courts reimburse costs based on this tariff. Awards of expenses in civil cases must be clarified and consistently applied.

## **COPYRIGHT LAW REFORM IN TURKEY**

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The copyright industries have been pressing for copyright law amendments for over five years, and our frustration with the inability to adopt these amendments is palpable.

### **Amendments to the 1951 Copyright Law Need to be Adopted By the Parliament to Bring Turkish Law Up to International Standards**

IIPA and the U.S. government consistently have urged the Turkish government to amend its copyright law to establish "world class" protection for copyright and neighboring rights. This would include making appropriate amendments to bring the law into compliance with Turkey's obligations under the Berne Convention and the WTO TRIPS Agreement. IIPA also has recommended that any legislation also should implement the standards set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and Turkey should also take the necessary steps to ratify these treaties with WIPO. Turkish officials have indicated that they will consider ratifying these treaties after the copyright legislation is passed.

#### **The pending copyright legislation should be adopted swiftly.**

During 1999, efforts by the Turkish authorities to revise its copyright law up to international standards increased significantly. IIPA and its members were optimistic about local reports that the Turkish government would be able to revise the August 1999 version and achieve legislative passage by the end of 1999 so that Turkey might satisfy its January 1, 2000 TRIPS obligations. The Turkish Ministry of Culture did introduce a copyright bill to Parliament on October 21, 1999, and a Subcommittee in the Education and Culture Committee of the Parliament was tasked with discussing and making further technical amendments to the bill. Unfortunately, that WTO deadline came and went.

The good news was that the Ministry of Culture again took the lead in greatly improving the quality of this proposed legislation in late 1999-early 2000. IIPA and its members worked

informally with the Ministry of Culture drafter to explain the legal issues involved and recommend necessary revisions to the copyright law amendments. More amendments were made to the copyright bill, circa February 2000 and we heard again in the summer of 2000; all reports indicated that these were “positive” amendments. The copyright package was approved by the Education and Culture Committee on March 23, 2000, and unfortunately, the General Assembly went out of session for the summer before it could vote on the legislation. In the fall of 2000, we were informed that the copyright amendments were near the top of the agenda of the General Assembly. There was some hope that the bill would pass by late November or by the end of 2000. Sadly, that did not come to pass, and another year of the legislature’s inability to pass this legislation was marked. The bill is still pending its second reading.

The version of the bill which IIPA reviewed was circulated circa June 2000. In general, this version includes many positive points:<sup>6</sup>

- the range of criminal penalties have been increased. For infringement of economic rights, the jail terms are to be four to six years and a 50-150 billion lira fine (about U.S.\$74,000-\$220,000). This would help eliminate the issue of suspended sentences, which can be issued in cases where the law provides specifically for jail terms of two years or less. However, proposed penalties for certain other offenses, including storage of infringing materials for commercial purposes, were decreased; these should match the higher penalties for economic rights.
- the range of criminal penalties for unauthorized uses of banderoles has been increased to the same level, as above.
- repeat offenders will be subject to a doubling of penalties when another infringement is committed within a two-year period.
- the longstanding TRIPS-incompatible retroactivity issues appears to be fixed adequately. In this regard, IIPA also has requested confirmation that the proposed sell-off period for certain products will be narrowly targeted to pre-June 12, 1975 videos only, not to other copyrighted materials.
- the sections on exclusive rights (including reproduction, distribution, importation and broadcasting) have been amended in positive ways, including incorporating obligations of the WIPO Treaties.
- the objectionable exception for nonprofit public performances in education and instructional institution appears to have been narrowed.
- defendants who cannot produce evidence of legality for the copies they use will be presumed guilty.
- prosecutors will be granted authority to apply to the court for an order to close a business engaged in illegal reproduction, as well as to order the seizure of pirated copies. In urgent cases, prosecutors will themselves have the authority to issue such an order without applying to the court.
- procedures for injunctions to be ordered by Customs have been included.
- criminal sanctions for people who remove rights management information have been inserted.
- provisions have been added which state that the Customs Laws shall apply in cases where there is a possible importation or exportation of infringing copies.

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<sup>6</sup> We must point out a caveat that the Turkish government may have made several additional amendments to the legislation since June 2000. IIPA does not have that text and therefore cannot comment on their adequacies or deficiencies.

- an intellectual property court will be established.

IIPA applauds the advances made in improving the quality of the proposed legislation. We support its swift adoption. Nevertheless, we note for the record that we still have several points of ongoing concern:

- the bill does not provide express provisions regarding civil *ex parte* search measures.
- the bill does not include provisions on anti-circumvention of technical measures. Both criminal penalties and civil remedies for these acts are a necessary part of effective enforcement of copyright rights, especially in the digital age.
- provisions requiring the recording and registration of music and films have been proposed. While the Turkish government may intend to establish a licensing system with a goal of enhancing the protection of these works, such registration formalities may very likely violate the Berne Convention and TRIPS.
- additional last-minute amendments affecting the *banderole* may have been made which will require further evaluation.
- it appears that a new transition article will establish regulation regarding the compulsory deposit of copyrighted materials. To the extent that this is a formality prohibited by the Berne Convention, it would violate Turkey's TRIPS and Berne obligations.
- modifications have been made regarding how the Council of Ministers will use the funds generated by the blank tape levy, and states that the distribution of such collected amounts will be left to regulations which will be issued after the law passed. This issue needs to be monitored closely.
- IIPA had urged that clear provisions on contractual transfers, especially for those involving cinematographic works, be included in the bill.

### ... to correct deficiencies in the current copyright law

In June 1995, the government of Turkey amended its 1951 copyright law, after years of consideration.<sup>7</sup> Despite the few improvements brought about by these 1995 amendments, the current law still does *not* comply with the TRIPS Agreement. IIPA has provided lengthy summaries of the deficiencies in the Turkish copyright law in prior Special 301 submissions.<sup>8</sup>

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<sup>7</sup> The June 1995 amendments improved the 1951 law by adding protection for software (mostly in line with the E.C. Software Directive), protecting producers of sound recordings, adding rights of distribution and rental for works and sound recordings, and providing protection against piratical importation. Those amendments also increased the fines for infringement to 300 million to 600 million Turkish Lira (at current rates, approximately U.S.\$445 to \$890).

<sup>8</sup> Here is a brief outline of the deficiencies IIPA has identified in the current copyright law over the years: (a) the failure to provide full protection for pre-existing U.S. works, sound recordings and performances, as required by TRIPS; (b) short jail terms and the low level of fines, which are not a sufficient deterrent to copyright infringement and are far too low, both in terms of statutory levels and as applied in practice; (c) clarification is needed regarding the availability of civil *ex parte* searches, as required by TRIPS; (d) the law contains a Berne- and TRIPS-incompatible article permitting the creation and use of anthologies for educational purposes without permission; (e) a presumption which grants any owner of a copy of a cinematographic work the right to exhibit it remains in the law, and is Berne- and TRIPS-incompatible; (f) the system permitting a right of remuneration only for the public performance of works recorded on audio or video media remains and is Berne- and TRIPS-incompatible; (g) clarification is needed that compilations and databases are protected as "literary works"; (h) the exception for the nonprofit public performance of published works for public education and charitable purposes is vague, overbroad and likely violates Berne and TRIPS. In addition, IIPA urged that the government clarify that it may not issue a decree expropriating foreign works and sound recordings first published in Turkey and that moral rights should be made subject to waiver.

## **Implementation of the 1998 Software Circular Remains Lax**

On February 6, 1998, the Turkish Prime Minister signed a circular requiring all government ministries to adopt measures designed to legalize their software. These measures include audits and separate budgeting for software. In IIPA's 1999 Special 301 filing, BSA reported that it was "too early to assess definitively the impact of this circular. Initial feedback from the software industry suggests that the government has made some progress toward compliance." However, another year has passed and compliance remains disappointing. Ensuring that adequate funds are provided for software purchases remains largely unaccomplished. While BSA understands that the events of 1999 may have slowed process in Turkey, the government should begin to take concrete steps to put systematic procedures in place to monitor current and future use of software and to allocate sufficient funds to acquire all necessary licenses. BSA and its members have conducted sessions to training enforcement officials on the end user issue. This Circular appears to have had a minimal impact.

## **The Cinema, Video and Music Works Law Remains Inadequate**

Any Turkish effort to amend the 1986 Cinema, Video and Music Works Law would resume only after the passage of the pending copyright law amendments. Such amendments would parallel the provisions found in the pending copyright law amendments, IIPA was told by Turkish officials. Efforts to change the 1986 cinema law have been in play, off and on, for over six years. The 1986 law fails to provide adequate protection, though initially it was helpful in curbing piracy. Efforts to amend it stalled back in 1995, and then were dropped by the then-current government. Before the copyright law was amended in 1995, the motion picture industry used the cinema law almost exclusively to conduct its anti-piracy campaign. The major problems with the cinema law are its low fines and the lack of jail terms. Several versions of draft amendments to this cinema law have included proposals to increase fines and to permit the closure of businesses engaged in illegal activities. The last draft which IIPA reviewed (circa 1995) failed to include jail terms and contained discriminatory registration fees and tariffs for the recording and registration of films (which violate GATT). Also missing were provisions to increase the penalties in cases of repeat offenses, provisions to withdraw business licenses, and provisions to order the closure of businesses. Any effort to revise the 1986 cinema law must not repeat the problems in prior sets of draft amendments. Penalties should be the same in both this law and the copyright law. As described above, MPA and AMPEC currently rely on the copyright law, not the cinema law, to fight piracy in Turkey. The Turkish courts have confused the two.

## **Criminal Code Issues**

### **A general amnesty law was adopted in 2000**

Over the last two years, the copyright Industry has been gravely concerned about the effect any general amnesty would have on pending criminal cases for copyright infringement. In September 1999, the Turkish Parliament passed a separate general amnesty bill, which was subsequently vetoed by the President. The president vetoed that 1999 bill and a subsequent one presented in December 2000, but ended up signing a second amnesty bill presented days later. As a result, this amnesty law (Code No. 4616) entered into effect on December 22, 2000. It

reduces sentences for a variety of violent and nonviolent crimes and permits early release from overcrowded prisons. We were informed that this amnesty bill is retroactive, and applies to all offenses (not just copyright infringements) committed before April 23, 1999. For cases in which no final decision has yet been issued, the cases will be suspended for five years, and if the defendant does not commit another crime within five years (from December 22, 2000), the case will be dropped. We have been told that this amnesty does not waive any criminal fines imposed in decided cases.

The bottom line is that, for all intents and purposes, any cases involving acts committed before April 23, 1999, will be dropped. Given the longstanding problems the industries have had in getting any criminal cases through the Turkish courts, the passage of the copyright law amendments (which contain higher criminal penalties) becomes even more imperative. IIPA is in the process of gathering information about this amnesty's impact on pending copyright cases. BSA reports that the majority of its pending cases have been postponed due to the amnesty. In the audiovisual area, AMPEC reports that 174 cases (most of which involve video and VCD retail cases) have been adversely affected by the amnesty. One IDSA member company reports that 40 of its 70 pending cases have been affected (i.e., dropped) by this amnesty.

### **Criminal code reform accomplished in 1999**

Amendments to Turkish Criminal Code and the Criminal Enforcement Act entered into force on August 1, 1999.<sup>9</sup> These amendments increased fines eightfold for all laws that entered into force between January 1994 and December 1998. These 1999 amendments also automatically update all fines under these laws by the inflation rate in the preceding year, as defined by the government. The Culture Ministry is working with the Justice Ministry to ensure that the higher fines in the copyright law will be at least as high as those calculated using the criminal code multiplier.

### **Computer Crimes Law (CCL)**

Software piracy is currently punishable by one to five years in jail under the CCL. In the case of conviction under either the copyright law or the computer crimes provisions, all material including illegal software is confiscated and destroyed following final conviction. In 1999, some public prosecutors denied ordering the seizure of personal computers (PCs) that contain illegal software. Although BSA has been working closely with the public prosecutors to explain why it is critical for PCs or hard drives to be seized, this has continued to be an issue in cases filed this year. This is a major problem because in order to get convictions, the PCs must be produced in court as evidence; the courts do not view expert reports detailing the illegal software found as sufficient and will not issue a decision unless the PCs, with the illegal software, are produced in court as evidence. Given the lengthy trial schedules, the PCs may not be put into evidence for a year or more. By then, the defendants will have deleted the infringing software from their PCs, and the court will acquit them on the basis of lack of evidence. This phenomenon points to the urgent need to educate prosecutors and the courts about the fact that digital evidence can be quickly and easily disposed. In fact, using the CCL can involve delays; it can take up to 10 days to obtain a search. During this period, targets have enough time to defeat the object of the intended search.

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<sup>9</sup> IIPA does not have the text of this bill.