

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY¹

IIPA recommends that Turkey be elevated to the Special 301 Priority Watch List.

The piracy situation for most copyright industry sectors has worsened in Turkey over the past twelve months, with several contributing factors. First, the banderole (sticker) system is not working to defeat piracy. Fraud and abuse mar the system (for example, this year many millions of stickers earmarked for anti-piracy/enforcement of copyright were unaccounted for), and the government is not taking adequate steps to catch and punish those using banderoles or dealing in or otherwise illegally allocating banderoles. Second, unauthorized distributors have obtained registrations from the government (Ministry of Culture) to distribute pirate or unauthorized copyrighted product based on false documentation. In one administrative case that is still on appeal at the highest court, the appellate court ruled that registrations issued by the Ministry of Culture to a company that did not have proper authorization to distribute the works in question should be cancelled. The Ministry of Culture that issued the registrations has appealed the ruling, an extraordinary step. The issuance of registrations to “false” licensees is one example in Turkey of the government condoning piracy, with another example including photocopy piracy at public universities. Lastly, technological advancements have meant increasing levels of digital piracy in Turkey, and the government of Turkey has done little to address high piracy levels, for example, in the area of entertainment software (all platforms) and motion pictures (mainly pirate VCDs).

The government of Turkey must apply its will to attack the problems of piracy, and root out systemic roadblocks in order to lower levels of piracy. The implementation of the banderole system should be seriously improved this year. The Ministry of Culture must also cease supporting piracy through issuing registrations to unauthorized distributors, and should drop its appeal of the motion picture industry’s case against an unauthorized distributor. To fight digital piracy, the government of Turkey must also strengthen enforcement within and at the borders. The positive steps taken in 2000 and early 2001, including passage of an improved copyright law in March 2001, will only result in improvements on the ground if, in addition to the steps mentioned above: Customs reinvigorates its efforts to stop pirate imports (and where applicable, exports) at the borders; authorities engage in sustained raids against known pirate operators and seize all instruments of piracy; provisions purportedly allowing civil *ex parte* searches and orders are implemented and utilized by the judiciary; and the new intellectual property courts take steps to decrease burdens and costs placed on right holders in civil cases, award increased civil damages in cases brought forward, and mete out deterrent sentences in criminal cases. And while the amended copyright law is an improvement over the previous legislation, the government in Turkey was ill-advised in, and should reconsider, its introduction of regulatory measures during the

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

summer 2001 that conflict with international standards and/or impose unreasonable restrictions on the ability of parties to contract freely, especially in the areas of collective management and compulsory licensing of certain broadcasts.

The government of Turkey must also address problems within the court system that hinder effective enforcement of the copyright laws, including: remedying lengthy delays and protracted proceedings; decreasing the reliance of courts on experts that do not have the requisite experience in copyright law; improving the recovery of costs in legal proceedings; addressing understaffing problems within the judiciary; and providing training in copyright law for judges and personnel involved in copyright practice.

The long-standing review of Turkey under the Generalized System of Preferences trade benefits program is still underway, and while many of the benchmarks noted as necessary steps in resolving the review in favor of Turkey 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.

Estimated losses due to copyright piracy of U.S. copyrighted materials in Turkey were \$163.1 million in 2001.

TURKEY: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	50.0	40%	50.0	50%	50.0	85%	59.0	95%	59.0	95%	59.0	95%
Sound Recordings / Musical Compositions	3.5	35%	4.0	40%	4.0	30%	4.0	30%	8.0	30%	7.0	30%
Business Software Applications ²	58.9	64%	78.6	63%	78.2	74%	44.5	87%	48.4	84%	85.7	87%
Entertainment Software	23.7	90%	116.2	96%	95.1	82%	92.3	80%	96.7	84%	98.0	89%
Books ³	27.0	50%	28.0	NA	32.0	NA	28.0	NA	20.0	NA	20.0	NA
TOTALS⁴	163.1		276.8		259.3		227.8		232.1		269.7	

² BSA loss numbers for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's loss number of \$68.3 million for 2000 was reported as preliminary. BSA's final 2000 numbers were finalized in mid-2001, and are reflected above.

³ The publishing industry reports that over 50% of all published materials purchased in Turkey are pirated. Thus, the 50% piracy level reported herein is considered conservative. Also, the value of the Turkish lira declined 50% from spring 1999 to January 2001, and a further 59% in the next 11 months of 2001, and while it has rebounded, it is still worth only 51% of its February 1, 2001 value. Thus, loss numbers have diminished slightly, but the number of pirated copies has increased.

⁴ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Turkey were \$266.5 million in 2000. Because of the adjustment to reflect BSA's final 2000 statistics (see footnote 2), estimated total losses to the U.S. copyright-based industries in Turkey in 2000 are raised to \$276.8 million.

COPYRIGHT PIRACY IN TURKEY

Retail Markets Now Afflicted With Digital as Well as Analog Piracy

Piracy losses and levels remained roughly the same in 2001, with the entertainment software, business software and motion picture industries continuing to suffer the most egregious losses. Piracy levels for entertainment software in Turkey remained at over 90% in 2001, unacceptable by any international standard, and on a par with the worst pirate countries in the world. A recent phenomenon has been the growth of digitized forms of piracy of copyrighted works, in all kinds of optical media (media read by a laser, such as CDs, VCDs, DVDs, etc.), much of which is imported into Turkey from Asia (primarily from Malaysia, Hong Kong, Thailand, Taiwan), Ukraine and Bulgaria, as well as some from Russia and Eastern Europe.⁵ IIPA understands that the Ministry of Culture (Copyright and Cinema General Directorate) issued a circular in 1998 banning the mass importation of pirated materials, but this circular has gone largely unheeded since its issuance. Meanwhile, pirates have found many methods to obtain their supply, including by carrying it in personal luggage on airplanes. Pirate product is sold in retail markets, through highly organized and effective distribution networks, and recently, even through the Internet (through online ordering of pirate copies of copyright works in digital formats). The following bullets summarize the problems:

- For the entertainment software industry, numerous pirate videogame titles in all formats, including PC (personal computer) and CD (console-based) games, are available in Turkey at retail stores (for as little as US\$6 per title), through street vendors (that had disappeared for a while but reemerged in 2001) and elsewhere (including through the Internet). Most pirate videogames are imported from Asia while some content comes from Eastern Europe. Pirate cartridge-based videogames manufactured in Asia and shipped through Hong Kong also flood the Turkish market. Increasing numbers of “gold” blank CD-Rs that end up being burned with the latest games are also being imported into Turkey, causing a major in-country “burning” (CD-R) problem (which also hurts the motion picture industry).
- For the motion picture industry, VCD piracy is the most significant form of piracy in Turkey, involving counterfeit copies of new movies prior to their release in theaters (so-called “pre-release” titles), almost all imported from Asia (including Malaysia and Thailand). Internally, mostly small-time pirates in Turkey use CD-R (CD recordable) technology to produce and duplicate VCD copies of new titles with Turkish language subtitles, as well as make so-called “back-to-back” copies of legitimate VCD titles with Turkish language dubbing. These kinds of illegal activities, as well as Websites advertising pirate movies on the Internet, occur in small facilities and even in homes. VCDs can be played on computers (Turkey has a base of roughly 500,000-800,000 CD-ROM drives on PCs), modified CD players and videogame consoles, and, of course, VCD players, sales of which (at US\$50-75) are on the rise, and now number roughly 800,000-900,000. The financial crisis and increased unemployment in Turkey have led to more open and blatant street trading (100-300 discs per table) in addition to traditional retail

⁵ Turkey has six “optical media” plants at present (and one which will open in the near future), for which IIPA has little information regarding their operations. The main optical disc problem in Turkey is now the burning of CD-Rs, which may take place in plants (when such devices are “banked”) but we are not aware of this phenomenon in the currently operating plants.

sales (stores generally stocked with 20-50 copies) of pirate VCDs, especially in major cities and certain tourist locations (although since the passage of the Copyright Law in 2001, the number of stores has fallen, as has the number of copies in stock; whether this will be a permanent improvement is yet to be seen). Pirate copies of motion pictures are also used as masters for producing pirate videos and for unauthorized public performances.

- Other forms of piracy of audiovisual works in Turkey include video piracy, broadcast piracy, and unauthorized public performances. There remain around 100 video rental outlets in Turkey, each holding an average stock of between 20-50 poor-quality pirate copies (generally produced by the shops themselves, often from legitimate videos, imported videocassettes or DVDs, pirate VCDs, or pay-TV broadcasts). Broadcast television piracy is now a declining phenomenon in Turkey, as approximately 10-15% of the 230 local broadcast stations continue to engage in such activities by transmitting videocassettes and pirate VCDs of domestic and foreign films. Unauthorized public performances occur frequently of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theaters. Certain inter city coach bus services also show videocassettes (and VCDs) without authorization during journeys.
- U.S. book publishers continue to report that the book piracy situation in Turkey remains among the worst in the region. 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. Copy shops near the universities (and bookstores) thrive in the pirate trade.⁶ There has been a noticeable increase of reprints in 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. Some booksellers are fighting piracy by denouncing pirates and taking them to court,⁷ but fines are ridiculously low – the new, higher fines in the copyright law have apparently never been implemented.
- According to the recording industry, most pirate audio CDs are locally produced illegal CD-R compilations. Imported pirate CDs from Eastern Europe (mainly Ukraine) still pose problems, and sell on the streets in Turkey for about US\$1 to \$1.50.
- Business software piracy continues to be a significant problem in both the distribution channel and with end users. Illegal CD-ROMs are still being sold openly in street markets and in retail shops. The police usually do not intervene to stop sales of pirated materials, even if such sales take place in the open, unless the relevant right holder files a complaint with the police. Additionally, the illegal loading of software onto the hard drives of PCs prior to their sale continues to be a major problem.

⁶ 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.

⁷ 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.

Turkish Government Condoning Piracy

There are two distinct areas in which we identify the government of Turkey as either being actively involved or tacitly approving piratical activities:

- registrations given to false licensees by the Ministry of Culture; and
- tacit approval of the practice of public universities that encourage students to buy illegal photocopies at shops (some of which have ties to the public institution).

Since 1998, the motion picture and entertainment software industries have been plagued by the issuance by the Ministry of Culture of registrations to unauthorized distributors to deal in their copyrighted works, based on false documentation.⁸ In one case that is still before the highest court on appeal, a company called Planet Electronics relied on bogus letters from U.S. suppliers (purporting to grant it local distribution rights to Zone 1 DVDs, which are destined for sale in North America only) to register hundreds of U.S. motion pictures (and other copyrighted goods as well). By registering the titles for distribution as Zone 1 DVDs, Planet has been able to distribute unauthorized product in Turkey, acquire the local distribution rights to banderoles (stickers) for the Zone 1 DVDs, and even issue cease and desist letters and raid local DVD outlets, all with the government's imprimatur.

The motion picture industry brought administrative litigation against Planet seeking the de-registration of titles, which was decided in favor of the copyright owners in March 2001, and affirmed on appeal in July 2001. The three-member appeals court panel ruled that the Ministry of Culture should not have registered the titles without submission of a contract between Planet and the rights holder, and that Planet had no right to import the DVDs without a valid contract between it and the right holders.⁹ While this was an extremely positive development, both Planet and, somewhat extraordinarily, the Ministry of Culture, appealed the appellate court affirmance of the lower court ruling (on August 18, 2001). The Ministry in its appeal is arguing that:

- the registration process is under the General Directorate of Copyright and Cinema Office's purview (under the Minister), not the court's;
- according to Turkish law,¹⁰ the Ministry has no responsibility to de-register titles registered based on the declarations of a manufacturer or importer; and

⁸ Under the 1986 Cinema, Video and Musical Works of Art Law, an operating certificate is issued by the Ministry of Culture (MOC) for the distribution and exhibition of protected works; the holder of this operating certificate is then responsible for placing banderoles (stickers) on the copies of the products. A similar registration and banderole system is also codified in the revised Copyright Law.

⁹ In addition to the decision on the merits, the court also awarded the plaintiffs TL27,840,000 for attorneys' fees and costs a total of approximately US\$20 (exchange rate as of August 2001). IIPA has noted in the past, and notes here, the totally unacceptable cost/fee awards in Turkey (see TRIPS Article 45). For example, 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. However, the Turkish courts award attorney's fees based on the fees fixed by the Turkish Bar, not based on the amounts actually paid to attorneys – and the former is always much lower than the latter, as demonstrated in the award in the Planet case.

¹⁰ Law No. 3257, art. 5.

- the Ministry should not be responsible for determining who owns copyright in the titles, but that issue should be resolved between the plaintiffs (or their local distributors) and Planet in a commercial case.

If the high court affirms the decision of the lower courts, the practical effect of the ruling (even though the decision applies only to those titles already registered with the MOC) would be to prevent Planet from continuing its practice of registering IIPA member titles without right holders' authorization. Also, MOC would invariably be required to seek production from the prospective registrant of a contract between it and the legitimate right holder before registering any title. As a practical matter, MOC has stopped registering Zone 1 DVDs.

In the book publishing area, increasingly, professors at public universities endorse the practice of having students purchase "bound notes" for their classes containing 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). 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 deal with this problem immediately.

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
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 ¹¹	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 ¹²	4	\$600	3

¹¹ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2000.

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 ¹³	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 ¹⁴	5	\$1000	2

The key issues that the government of Turkey must tackle in 2002 include:

- the drastic reform and improvement of the enforcement of the banderole (sticker) program;
- increased deterrence in criminal cases;
- more *ex officio* action against egregious piracy;
- decreased burdens and costs placed on right holders in civil cases, including in obtaining *ex parte* civil searches;
- increased civil damages that are a deterrent to further infringements in Turkey, and reasonable awards of costs and attorney's fees;
- improvements in customs' ability to track imports (and where applicable, exports), and to set into place effective mechanisms for right holders to seek out seizures, and where warranted, forfeiture and destruction of pirated product heading into Turkey at the borders;

¹² For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended.

¹³ For motion pictures and entertainment software, this number denotes the number of cases pending from 1998-2001.

¹⁴ For motion pictures and entertainment software, this number denotes number of cases in which a fine was levied; in other cases, fines were suspended.

- improvements within the court system, including remedying the lengthy delays and protracted proceedings that hinder effective copyright enforcement; decreasing the reliance of courts on experts who do not have the requisite experience in copyright law; improving the recovery of costs in legal proceedings; addressing the understaffing problem within the judiciary; and providing training in copyright law for judges and personnel involved in copyright practice; and
- amendment of the Cinema, Video and Music Works Law to bring it up to the standards of the Copyright Law.

It is hoped that the establishment of specialized intellectual property courts by the Ministry of Justice, in line with the amended Copyright Law, will assist in solving some of the problems encountered by right holders seeking to enforce their copyright through the courts, including more expeditious prosecutions and deterrent judgments.

Banderole System Not Working to Curtail Piracy

The banderole system has not worked to stem piracy, and even though strengthened provisions were introduced in the latest copyright law revisions (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), those provisions have remained largely untested in 2001. Fraud and abuse mar the system. For example, in 2001 over 5 million stickers were unaccounted for and probably made their way into unauthorized users' hands and onto unauthorized product, making them look "legal."¹⁵ In addition, proceeds from the banderole allocation are neither being collected nor used for anti-piracy purposes.¹⁶ The Turkish government must take all necessary and appropriate steps, including instituting procedures to eliminate fake applications for banderoles from being processed and to prevent banderoles from being handed to unauthorized persons.

As with the Planet case described above, increasing numbers of banderoles are issued to those holding false licenses to deal in copyright works, which defeats the purpose of the program, namely, to ensure that only persons engaging in authorized exploitation of works receive banderoles (indeed, Article 81(3) of the amended copyright law makes subject to criminal penalties one who obtains banderoles from the Ministry of Culture through "false deeds or documents" or by otherwise misleading the Ministry). As noted above, de-registration of false licensees, which would necessitate surrender of banderoles from the unlawful registrant, has not been easy to achieve, resulting in many more illegal products on the markets that contain banderoles. This phenomenon makes enforcement exceedingly difficult, and results in barriers to legitimate right holders' trade in their own products (as they are competing with unauthorized distributors, and sometimes even being turned away from the government upon application for banderoles for legitimate product).

¹⁵ IIPA has heard that a suspect was detained in connection with this disappearance, who was an employee of the Istanbul Copyright Office, and that he was actually jailed for a few months, and later banned from public service.

¹⁶ For example, the entertainment software industry reports that banderoles for game software are being obtained falsely by pirates supplying false documentation to the Ministry of Culture, which does not take steps to ascertain whether documentation presented is legitimate. Sometimes game pirates are obtaining banderoles intended for music that are then used on pirate game software. Banderoles are reportedly appearing in upper-tier retail stores on pirated videogames. This phenomenon demonstrates another way the Turkish government is aware of and condones piracy.

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).¹⁷ 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.”

Some Enforcement Results in 2001, But Actions Generally Fail to Lead to the Imposition of Deterrent Penalties

IIPA members continue to report that most raids leading to criminal actions result in non-deterrent results or, in cases where sentences have been meted out, suspended sentences. In addition to codification of commutations of sentences to non-deterrent fines,¹⁸ the current copyright law also lacks provisions to increase the severity of penalties for repeat offenders, to withdraw business licenses, and to order the closure of pirate businesses.

Largely through self-help, the copyright industries’ active anti-piracy operations have continued to run raids, leading to some indictments and even convictions for piracy. The motion picture industry reports, for example, that in 2001, approximately 160 raids were carried out, and 133 legal actions were commenced. Along with other raids throughout the country against retail stores, street vendors and wholesale distributors, seizures in 2001 included nearly 135,000 pirated VCDs and smaller numbers of pirated DVDs and videocassettes (the Financial Police were also active taking *ex officio* actions under the smuggling law, seizing an additional 400,000 VCDs).¹⁹ Decisions were reached in 28 criminal cases in 2001, with convictions in 26 cases. In 27 cases filed prior to the new Copyright Law, prison terms were commuted to fines, and the fines were generally suspended. However, in one case filed under the new law, the pirate was sentenced to four years imprisonment and to a TL50 billion (approximately \$38,500) fine. The pirate has appealed, but if confirmed, the sentence will likely not be suspended.

The business software industry has experienced similar results: in 2001, a total of 50 pirate resellers and end-users were raided, with a total of six people convicted in the criminal courts.²⁰

¹⁷ 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.

¹⁸ In fact, non-deterrence is codified in Turkish law. According to Law No. 647 for the implementation of criminal sentences, judges are required to commute automatically sentences of year (or less) into a fine. Fines can even be paid in installments.

¹⁹ The VCDs seized in *ex officio* raids by the Financial Police in 2001 far exceed those seized in 2000 (200,000), indicating continued good activity by that force, but also indicating the increasing severity of VCD piracy in Turkey.

²⁰ In terms of the number of raids undertaken, criminal enforcement in the business software sector in 2001 compares favorably with that in 2000. In 2001, the business software industry filed criminal complaints which resulted in raids of approximately 35 resellers and unauthorized users of business software in a business setting (so-called pirate “end users” of software).

Defendants were sentenced to jail terms of nine months each in three cases; however, these sentences were converted to suspended sentences in each of those cases. The sum of criminal fines meted out by the courts in 2001 totaled US\$1000. These figures were affected to some extent by the general amnesty proclaimed in Turkey in 2001, which decreased the total amount of criminal punishment ordered by Turkish courts in cases involving piracy of software. According to the recording industry, 103 raids were conducted in 2001, in 18 districts in Istanbul and 23 other cities in Turkey. Seizures include 23,485 audiocassettes, 41,384 CDs, 14 pieces of CD-R or audiocassette recording equipment, and 40,400 CD and audiocassette inlay cards. Legal proceedings have been initiated against 380 persons for copyright infringement. The local recording industry enforcement group brought lawsuits against 74 defendants with 54 different files at the Intellectual Properties Courts in five different cities.

However, most cases in the courts for all the industries remain in court.²¹ Procedures are still unacceptably slow and the incompatibility of the new and old criminal copyright provisions (Law Nos. 3257 and 5846) result in confusion, and often, the imposition of the old, non-deterrent fines by judges, instead of deterrent prison sentences, as in the law adopted in 2001.

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 unauthorized uses of software in a business (i.e., end-user piracy), and it remains unclear whether Turkish law provides for such searches in line with Turkey's TRIPS obligations. It is thought that the 2001 amendments to the Copyright Law allow for *ex parte* civil searches, in addition to searches pursuant to the court's authority, for obtaining evidence of copyright infringements. 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. The Ministry of Justice has stated that civil *ex parte* searches are available under Turkish law without citing any specific provisions.

Additionally, it is possible 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.

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 amendments fixed this problem as it appeared on the books, for example, specifying imprisonment for up to three months for a

²¹ For example, there are a reported 500 music piracy cases still languishing in the courts.

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. 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. IIPA is unaware of a single instance in which the search and seizure provisions have been successfully used in Turkey.²²

Ineffective Border Measures in Turkey

Since a significant portion of the pirate trade in Turkey is imported, greater resolve on the part of customs in 2002 will be essential to improving the overall piracy situation in Turkey. IIPA has heard that the official government position has been to prohibit mass importations of pirate product, and yet, this position has not resulted in action against such imports. Pirates have found many methods of obtaining their supplies, including by carrying them in personal luggage on airplanes. Therefore, Customs must work to fully implement the recently amended customs law, which was revised in part to harmonize with the mechanisms in the European Union system. In 2002, we seek improvements in Customs' ability to track imports (and where applicable, exports), and to set into place effective mechanisms for right holders to seek out seizures, and where warranted, forfeiture and destruction of pirated product heading into Turkey at the borders.

Although it appears that Customs may now act *ex officio* in seizing pirated and counterfeit goods entering Turkey, Customs seldom uses that power. Border enforcement is cumbersome in that in most cases the intellectual property rights owner must locate the offending import and advise Customs of the place, date and other particulars of the illegal importation. There is no means for "posting" the ports of entry in a manner similar to that used in the United States.²³

Establishment of Specialized Courts to Improve Judicial Efficiency, Decrease Court Delays a Positive Sign

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. IIPA hopes these newly established courts will result in the following:

²² 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 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.

²³ In one instance reported in 2001, a large container containing counterfeit products was seized in Customs in Istanbul after Customs was provided with detailed arrival data pertaining to the ship carrying the container. While this is promising, it does not substitute for results by Turkish customs in suspending pirated goods from release into the channels of commerce, as required by TRIPS.

- Less reliance by courts than in the past on outside experts in cases involving copyright. In the past, courts have called upon experts to answer questions 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.²⁴ Court-appointed experts often do not have the necessary expertise in copyright law and have in the past issued reports stating, for example, that they cannot determine if unauthorized loading of software on the hard disk of a computer is a copyright infringement. The business software industry has had several cases over the past few years acquitted on the basis of such “expert” reports.
- Clamping down on defendants’ use of expert reports to prolong proceedings. Defendants have stalled cases literally for years by objecting to expert reports repeatedly without having to show any reasonable grounds for such objections. It has often taken up at least two months for the court-appointed experts to issue a straightforward report, and if the issues are complicated or if there is a large number of works involved, the reports can take up to a year to be issued. In one case filed in 1998, the defendant 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 in that case ordered the plaintiff (a business software industry representative) to pay the costs of obtaining all three reports, even though the plaintiff had not objected to any of the reports.
- Greater efficiency, fewer delays and higher priority placed on copyright cases. Courts have traditionally considered copyright infringement cases to be a low priority. It is not uncommon for the courts themselves to stall, even taking one to two years to decide a basic copyright infringement case (and an additional eight months to a year to decide appeals).²⁵

IIPA understands that the new specialized IP courts have already begun taking steps to obtain evidence and appoint experts with more urgency 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.

COPYRIGHT LAW REFORM IN TURKEY

Amendments Adopted in March 2001, Improving Copyright Law in Turkey

IIPA is pleased that amendments to the 1951 copyright law in Turkey (Law No. 5846) were finally passed in March 2001 (effective date March 3, 2001), and we commend the government of Turkey and the Parliament for having taken this crucial first step. The new Copyright Law has brought Turkey’s copyright regime, as it appears on the books, considerably closer to international

²⁴ 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).

²⁵ The business software industry reports a current average duration of 12-18 months from commencement to judgment for a copyright infringement case in the court of first instance, and an average wait of 8-12 months before judgment in the courts of appeal.

treaties standards, and has even led to some temporary gains in the fight against piracy (as it has been reported that the number of pirate VCDs in retail stores decreased immediately following passage of the new law). Notably, the amended law provides for the establishment of new, specialized intellectual property courts (Article 76), as discussed above. Passage of the new 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.

Improvements in Substantive Provisions

The newly adopted law makes a number of notable improvements over the original antiquated law, including:

- TRIPS-compatible retroactive protection for works (life plus 70 years, Supplemental Article 2) and producers of sound recordings (70 years from "first fixation," Article 82);
- a reproduction right (Article 22) for works that includes temporary reproductions;
- a broad distribution right for works that includes rental and importation (including parallel import protection) (Article 23);
- an exclusive right of "public transmission" right for works that appears to include both an exclusive broadcast right (including a Berne Article 11*bis*-compatible right and an exclusive retransmission right) and what attempts to encompass a WIPO-treaties' "making available" right (although the translation refers to the "sale" of a work through a means by which the public can access the work at a time or place designated by them, so it is unclear whether this right amounts to a WIPO-treaties-compatible "making available" right) (Article 25);
- broad rights granted to producers of phonograms (and TRIPS-compatible rights for performers, see Article 80(A)), including exclusive rights of reproduction, distribution, sale, rental, public lending, public transmission (same general language to Article 25), and what attempts to encompass a WIPO-treaties' "making available" right (although the translation refers to the "sale" of a work through a means by which the public can access the work at a time or place designated by them, so it is unclear whether this right amounts to a WIPO-treaties-compatible "making available" right) (Article 80(B)); note that terms such as "reproduction" and "distribution" are not defined in the law, although it might be surmised that the drafters intended that the meanings assigned for those rights as to works in Article 22 (reproduction) and 23 (distribution) apply *mutatis mutandis* to Article 80 (expressly providing for such a reading would be helpful);
- narrowing of exceptions (the previously overbroad exception (Article 33) for nonprofit public performances has been narrowed to be applicable only to educational or instructional purposes and only for face-to-face instructional activities; the exception permitting the quotation to produce a selection or compilation of works for other than educational and instructional purposes has been narrowed to require the permission of the author (Article 34); the exception allowing for reproduction and transmission of passages of works for news or "current events" is limited by the express inclusion of the key language from the Berne Article 9(2) "tri-partite" test (Article 37);

- narrowing of the provision allowing for the expropriation (of the economic rights in a work deemed to be of importance to the culture of the country, by decree and with just remuneration) by the Turkish government, by limiting any expropriation decree to works “created in Turkey or by Turkish nationals outside of Turkey”; such provisions appear to be applied *mutatis mutandis* to the objects of neighboring rights, so that expropriation is similarly limited to objects of neighboring rights “created in Turkey or by Turkish nationals outside of Turkey”;
- TRIPS-compatible protection for compilations of data (Article 6).

Improvements in Enforcement Provisions

The most important achievement in the amended law is the increased criminal penalties for various offences (which should lead to fewer suspended sentences, since sentences of two years imprisonment and above cannot be suspended), although the unequal treatment of works and objects of neighboring rights (which are subject to much lower penalties) is very disappointing and should be fixed. Overall, provisions in the enforcement area include:

- significant increases in criminal penalties for copyright infringements as to works (including significant fines and imprisonments for copyright infringements, i.e., 4-6 years’ imprisonment and a 50-150 billion lira fine, currently about US\$33,300-100,000, and shrinking) (Article 72);
- identical criminal penalties (as above) for violations of the new banderole sticker provisions (Article 81);
- lesser criminal penalties for copyright infringements as to objects of neighboring rights (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking) (Article 80);
- criminal penalties for storage of infringing materials for commercial purposes and “storing or, distributing technical devices on computer programs for commercial purposes” (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking);
- criminal penalties for removing or tampering with certain “information” placed on copies of works or the objects of neighboring rights (2-4 years imprisonment and a 10-50 billion lira fine, currently about US\$6,600-33,300, and shrinking) (this protection is compatible with the WIPO treaties’ requirement to protect against removal or tampering with “rights management information”);
- doubling of criminal penalties for recidivists (i.e., committing the same offence within a period of two years) as to “the offences stated in this Law” (i.e., as to works, banderole-related offences, offences as to objects of neighboring rights);
- shifting the burden of guilt to the defendant to produce evidence of the legality of the copies being used or possessed;
- increased powers to prosecutors to obtain an order from a court to close a business engaged in illegal reproduction, as well as to order the seizure of pirated copies; in urgent cases,

prosecutors may act *ex officio* (i.e., issue such an order themselves) without applying to the court;

- increased authority to Customs authorities to enjoin the release of goods into the channels of commerce;
- increased authority under the Customs laws with respect to possible importation or exportation of infringing copies.
- authority for quicker action to be taken by the authorities within the criminal system upon the filing of a complaint. Under the new enforcement regime, action by the criminal-enforcement authorities should be obtained within hours of making a filing and establishing facts indicating piracy.

Remaining Ambiguities or Deficiencies

- the copyright law does not include express provisions regarding civil *ex parte* search measures (as required by TRIPS Article 50; *cf.* Article 66, allowing for the court to “order such measures as the circumstances require, and as noted above, Articles 368 and 369 of the Turkish Civil Procedure Law (TCPL), read in conjunction with Article 372 of the TCPL, could but has not been applied in a TRIPS-compatible way). Although IIPA believes articles 76 and 77 of the Copyright Law allow for civil *ex parte* searches, such an interpretation of those provisions has not yet been applied by authorities within the Turkish legal system. IIPA looks to the Turkish government to apply articles 76 and 77 of the Copyright Law to provide for TRIPS-compatible civil *ex parte* searches.
- unlike works, there is no express exclusive importation right (including parallel import protection) for producers of sound recordings;
- the law does not include effective legal remedies 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 of trafficking in circumvention devices);
- provisions requiring the recording and registration of music and films (Article 13) may, if they interfere with the exercise of rights, constitute formalities that violate Article 5(2) of the Berne Convention (and therefore, TRIPS);
- an additional transition article (Supplemental Article 5) regarding the compulsory deposit of five copies of any copyrighted materials may, if it interferes with the exercise of rights, constitute a formality that violates Article 5(2) of the Berne Convention (and therefore, TRIPS); failure to deposit can result in a fine of 5 billion lira (currently about US\$3,300).

Other Regulations to Follow the 2001 Copyright Law Amendments (Including Problematic New Broadcast Compulsory License)

The Ministry of Culture has been tasked under the amended copyright law to prepare and issue the following implementing regulations:

- Regulations on Record and Registration (Article 13);
- Regulations on Right of Dissemination (Article 23);
- Regulations on Intellectual and Artistic Works Broadcast on Radio-TV Institutions (Article 43);
- Regulations on Arrangement and Distribution of Blank Tape Levy (Article 44); and
- Regulations on Banderole Application and Enforcement committees (Article 81).

Troublingly, the Regulations on Intellectual and Artistic Works Broadcast on Radio-TV Institutions were issued by the Minister of Culture on September 15, 2001, and establish a compulsory licensing scheme at least for music that are totally inappropriate. In issuing these regulations, the Ministry of Culture also seems to have exceeded its authority by adopting a regulation that actually alters the copyright law (in that it creates a settlement and arbitration system to settle disputes between parties, and even to determine copyright fees, even though no provision was laid down by the copyright law in this regard). We strongly oppose the introduction of this compulsory license, which conflicts with the copyright law, and which appears to be unconstitutional. IIPA understands that two local professional associations in Turkey are challenging these regulations before the State Council. Its decision is expected in March or April 2002. IIPA supports such a challenge, and will be watching developments closely.

In fact, in early February 2002, a Turkish court, in a case between the recording industry and Turkish national broadcasting company TRT, reportedly decided in favor of the recording industry, holding that the Ministry of Culture Regulation was unconstitutional and, therefore, did not apply to the case. This case decision represents a very welcome development. However, the definitive fate of the regulation lies with the State Council.

Drafting of the other regulations has also commenced at the Ministry of Culture. It will be necessary to monitor all of these regulations closely. In particular, IIPA noted that the blank tape levy has been expanded to include the production or importation of blank DVDs (it already covered audiocassettes, videotapes, computer discs and CDs), but the levy appears to have been lowered to no more than 3% of the production or importation cost. Whereas the distribution had been 75% to the professional associations/collecting societies and 25% to the Ministry of Culture, the distribution of such funds will now be left to 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 be updated to delete conflicting and confusing provisions and to bring weak penalties up to the new copyright law standards. The amendment process has already begun at the Ministry of Culture, and the local motion picture enforcement group (AMPEC) submitted detailed comments to the Copyright Office in January 2001. The Cinema Law amendments will be important as to piracy cases involving film and music works, since the enforcement authorities tend to rely on this law rather than the copyright law for many actions taken. To the extent that the copyright law amendments constitute improvements (e.g., strengthening of criminal penalties), IIPA hopes that the amendments to the Cinema Law will parallel the provisions found in the copyright law amendments (and Turkish officials have indicated that this is the case). Doubled penalties for recidivists, provisions to withdraw business licenses, and provisions to order the closure of businesses, should also be included. In addition, any effort to revise the Cinema Law must not contain problems that appeared in prior sets of draft amendments (e.g., the last draft which IIPA reviewed in 1995 failed to include jail terms and

contained discriminatory registration fees and tariffs for the recording and registration of films, which would violate Turkey's TRIPS obligations).

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 2001, \$407.7 million in Turkey's imports to the United States benefited from the GSP program, accounting for 14.3% of its total imports to the U.S.²⁶ 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 will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly. 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 treaties would be a vital step toward Turkey's establishment of an adequate legal framework for electronic commerce.

²⁶ In 2000, \$435 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.