

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

TURKEY

EXECUTIVE SUMMARY

Special 301 Recommendation: We recommend that Turkey remain on the Watch List.

Overview of Key Problems: Turkey remains a market replete with book piracy, in the form of large-scale commercial photocopying and highly organized print piracy. In recent years, right holders have been shocked by the increasing amounts of optical disc piracy in Turkey, mainly in the form of “burned” CD-Rs and DVD-Rs. A difficult enforcement environment, coupled with reluctance on the part of judges to impose deterrent sentencing in copyright cases, called for a change in the legal system. That change came in the form of Law No. 5101 on Amendments to Various Laws, published in the Official Gazette on March 12, 2004. While the law lowered criminal penalties to address the judges’ concerns, the amendments also banned the street sale of copyrighted works, granted *ex officio* powers to law enforcement authorities, subjected pirates to possible prosecution under the Organized Crime Law, deleted conflicting provisions of the Cinema Law, and provided for an ISP notice and takedown procedure, among other features. The effect of the new law was almost immediate, with major campaigns carried out against street piracy in mid-2004. Court cases in 2004 also demonstrated an increased willingness to impose higher penalties. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Turkey were US\$187 million.

Actions to be Taken in 2005:

Enforcement

- Follow the MOCT plan to shut down all pirate street vendors.
- Establish specialized units responsible for IPR crime within the Turkish Police and give these units the necessary competence and mandate as well as the operational means to carry out sustained enforcement actions *ex officio* throughout the country.
- Ensure that other agencies run sustained enforcement, for example:
 - The Ministry of Finance should take action against those individuals who are evading the payment of income tax related to undisclosed illegal activities, including pirates of books and other copyrighted materials.
 - The Ministry of Justice should ensure that key pirates are brought to justice, found guilty and punished.
- Close down printers and copy shops engaged in piracy of published materials.
- Enforce copyright at the borders through customs’ efforts to stop pirate imports and exports.
- Invigorate activities of Inspection Committees, by empowering them with adequate resources; create better cooperation with prosecutors to bring cases to final conviction.
- Have Ministry of Education carry out a comprehensive program to legalize use of publications and other copyrighted materials in schools throughout Turkey.

Judicial

- Enforce the copyright law through the courts by: granting civil *ex parte* search orders; imposing deterrent sentences on pirates, including jail time and significant fines; decreasing delays and burdens placed on right holders; awarding increased civil damages and costs.
- Streamline and ease procedural requirements for proof of ownership and similar issues, ensuring that defendants can no longer cause undue delays by triggering overly onerous evidentiary burdens.

Legislative/Regulatory

- Introduce, without delay, essential changes to the copyright law and related enforcement legislation, and join the WCT and WPPT.
- Enact optical disc regulations, including coverage of CD-R “burning,” and then investigate sources of production of optical discs/“burned” CD-Rs.
- Improve the banderole system so that it decreases fraud and ensures that right holders are not increasingly burdened by such a system.

For more details on Turkey’s Special 301 history, see IIPA’s “History” appendix to this filing.¹ Please also see previous years’ reports.²

TURKEY										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2000-2004³										
	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	50.0	45%	50.0	45%	50.0	45%	50.0	40%	50.0	50%
Records & Music	15.0	70%	15.0	75%	18.0	75%	3.5	35%	4.0	40%
Business Software⁴	99.0	66%	81.0	66%	38.5	58%	22.4	58%	78.6	63%
Entertainment Software⁵	NA	NA	NA	NA	NA	NA	23.7	90%	116.2	96%
Books⁶	23.0	NA	25.0	NA	25.0	NA	27.0	NA	28.0	NA
TOTALS	187.0		171.0		131.5		126.6		276.8	

¹ <http://www.iipa.com/pdf/2005SPECIAL301HISTORICALSUMMARY.pdf>.

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁴ BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Turkey, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses, resulting in a significantly higher loss estimate (\$127 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁵ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.” The methodology used by the ESA is further described in Appendix B of this report.

⁶ Local estimates of book piracy in Turkey range from 90% (photocopying) down to 40%. The Turkish Publishers’ Association assesses the piracy level at 53% for “cultural” books (general trade titles); 50% for imported books (ELT and college) and 50% for local textbooks.

COPYRIGHT PIRACY

Turkey Is One of World's Worst Book Piracy Markets

Book piracy continues to be a major problem all over Turkey, severely affecting the markets for both Turkish and foreign publishers. Illegal commercial photocopying (at up to a 90% piracy rate) and organized printing of books (with lower piracy levels than photocopying but still hovering at or above 50%) combine to give Turkey the region's lead in book piracy. Virtually all types of books are affected, including local fiction, non fiction and school books, as well as local and imported college texts and imported English language teaching (ELT) texts. Pirates are well connected and highly organized. While significant enforcement action led by right holders, combined with currency stabilization factors,⁷ increased sales and reduced piracy somewhat in 2004, Turkey remains the worst pirate market in the region.⁸ Clearly, there is much to be done.

Print piracy primarily affects the markets for commercial bestsellers, professional materials such as medical texts and English language teaching materials. Pirate printing of books is a highly organized activity and is funded and managed by people who are quite knowledgeable about the publishing market in Turkey, and who protect their "market share" almost on principle.⁹ Sidewalk vendors sell poor-quality pirate editions on the most crowded streets and intersections, and in marketplaces and overpasses. This is the most common channel for pirated books. Public markets such as Kadiköy Carsisi and Beyazit Meydani are full of these versions, as are street stalls throughout the country. Pirates also employ door-to-door marketing schemes, selling illegal copies in homes and work places. These entities often operate using fake names and other deceitful tactics, and employ vulnerable or desperate people to take the fall.¹⁰ It is also common to find pirated books in second-hand bookshops. Many pirated course books are sold in this way. Finally, pirates take advantage of small-town bookshops, where investigations are rarer than in the cities.

Illegal commercial photocopying is common in and around university campuses and thus obviously affects the university textbook market most severely. Students purchase one copy of an adopted text and then order further copies, or chapters, at any one of dozens of photocopy

⁷ The current economic stability is helping legitimate sales, and publishers are hopeful that the recent changes to the currency will help end-users to understand the small price differential between original and pirated books.

⁸ This is obviously a consideration as the EU is considering Turkey's accession proposals, as publishers are concerned about possible flooding of EU markets with pirate materials originating in Turkey. Local publishers' groups have noted that vigorous enforcement against copyright piracy should be listed as a primary, short-term objective during the EU accession talks.

⁹ As an example, in 2004, the legitimate publisher of a best-selling title claimed one million copies sold, mainly because of the low price – around TL3m (just over US\$2). The book was treated by the legitimate publisher as a "loss leader," meaning it was released with little anticipation of profit in order to establish the publisher's brand in the market. Despite the lack of an apparent, attractive market for a pirate edition, the title was pirated in large numbers. Local observers agreed that the pirates couldn't have made any money, but they simply did not want to give publishers the satisfaction of having released a book free of the pirate menace. This phenomenon is not limited to foreign publishers. Local non-fiction titles are also regularly pirated, as are locally produced translations.

¹⁰ As print pirates selling pirate books in open book shops began to be punished in 2004, they began putting books into boxes or suitcases in front of the book shops. When an investigation commenced into that store, the pirates told the police that the suitcases and boxes did not belong to them. Therefore, the books were seized but nobody was arrested. Another tactic used by pirates is to find young persons in need of money to carry around bags of pirated books on the street, perhaps to deliver on demand, thereby acting as the "fall guy" should an arrest be made. Finally, pirates frequently rent cars and use the trunks to store pirated materials. The lessee of the car is invariably a child or an elderly person, with no traceable chain to the pirates. Clearly such abuses, not only of the copyright system, but of vulnerable members of society, must be stopped.

establishments lining universities. They then sell the illegal copies to their fellow students. Professors at public universities often endorse these practices, even further facilitating it by having students purchase “bound notes” for their classes, containing unauthorized copies of entire sections of books.¹¹

Illegal photocopying and piracy in the higher education sector are also evidenced by increased requests by teachers for access to free supplementary materials through electronic databases in areas where sales have plummeted. This problem is likely to worsen as digital copying and print-on-demand technology become more common. IIPA asks the Ministry of the Interior to take a more active role in combating the commercial piracy plaguing the book industry, and asks the Ministry of Education and university administrations to demand use of legitimate materials on campuses, putting systems of consequences into place for breach of these demands.

Optical Disc Piracy Remained Dominant Form of Piracy in Turkey, Although Enforcement of New Law Curtailed Piracy Somewhat

Optical disc piracy continued to harm right holders in 2004, although government efforts to enforce the 2004 law resulted in significant decreases in the visible presence of pirated materials on the open market, especially in Istanbul and Ankara. The sale of “burned” pirate CD-Rs by street vendors, often selling from catalogs, still remains a serious problem, especially in other big cities such as Izmir and Antalya.¹² Burned CD-Rs constituted over 90% of music optical discs in Turkey in 2004, and most movie discs are burned CD-Rs and some DVD-Rs, with only a few of the discs being imported from abroad as masters. These “burned” CD-Rs/DVD-Rs are produced locally in small- to medium-sized facilities, “workshops,” and in private residences. Other optical discs are imported from Asia (e.g., from Malaysia, Hong Kong, Thailand, Taiwan, Ukraine, Bulgaria, and Russia, with the number of pirate DVDs imported from Ukraine and Russia increasing again in 2004).¹³ Much of the pirated product is smuggled in, as pirates often carry pirated materials in personal luggage on airplanes. The domestic market (with Istanbul as the center of distribution) is replete with pirated CD-Rs/DVD-Rs, sold by street vendors in Turkey and sometimes “under-the-counter” in retail shops, although, as noted, enforcement actions in 2004 after the implementation of the 2004 law banning street sales of copyrighted materials began to make headway into this pirate trade.

On top of domestic production of pirate CD-Rs/DVD-Rs and import piracy, the growth in optical disc production capacity in Turkey must not escape notice. In 2004, sources indicate that Turkey had eight known optical disc plants in operation, with 23 known production lines, for a

¹¹ There are exceptions, of course. Some professors have taken an active role in fighting piracy, demanding that students bring legitimate versions of books to their classes. We commend these efforts and urge MOE and universities to create a climate in which it is easier for other professors to follow suit.

¹² The audiovisual industry notes that street vendors are directly supplied by local networks operating in complete secrecy. Istanbul still appears to be the center of the illegal production and wholesale distribution of imported and locally produced pirate product. “Under the counter” piracy also exists in some retail outlets and the average number of pirate CD-Rs varies between 50 and 100 per retailer. All new titles are available prior to and/or together with their theatrical release at an average price of US\$1.50 per title.

¹³ Pirate DVDs of newly released titles with Turkish sub-titles can be found in retail stores for about US\$8 to US\$10. Entertainment Software products in optical disc format (typically factory-produced silver discs) continue to be imported from Asia, while cartridge-based games continue to be imported from China. In one raid in Germany, product being transhipped to Turkey from Asia was seized. The entertainment software industry continues to report that Malaysia exports pirate product to Turkey. Recently, some DVDs for which the source cannot be identified have been found in the Turkish market with only English and Turkish subtitles.

total optical disc production capacity of at least 80.5 million discs,¹⁴ well above legitimate demand for discs in Turkey. Given this potential overcapacity, the government should pass and implement an effective optical disc law; included in such a law should be measures to collect exemplars from all plants to verify whether they produce licensed content.¹⁵

Other Piracy Phenomena in Turkey

Several other forms of piracy appear in Turkey. For example, the growth of the Internet has introduced the country to pirates advertising the sale of hard goods and home-burned CD-Rs over the Internet (websites, auction sites, or newsgroups).¹⁶ In general, Internet piracy, including peer-to-peer piracy, is growing in Turkey. Other problems for the motion picture industry include unauthorized public performances of new and popular films (25% piracy level) using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers, inter-city coaches, and unlicensed video theaters,¹⁷ and broadcast piracy (15% piracy level).¹⁸ There is also music broadcast piracy in Turkey, with only a small minority of over 1,500 radio and television broadcasters having a proper license agreement with the local recording industry group, MÜ-YAP. A new phenomenon in music piracy has recently occurred, especially in Turkey's tourist hot spots: hotels (including well-known international hotels), bars and clubs selling on-the-spot made, illegal CD-R copies of the music they play. Moreover, most of the sources of music played in bars and discos are illegal copies or Internet downloads. Business software piracy continues to be a significant problem in Turkey. Both the unlicensed use of software in a business setting (corporate "end-user" piracy of business software), and the loading of many programs onto the hard drive of a computer prior to its sale (so-called "hard-disk loading") are found in Turkey.

COPYRIGHT ENFORCEMENT

The biggest development in Turkey by far in 2004 was the crackdown on street vendors that commenced on March 1, right around when the 2004 amendments (to several laws) went into force. However, most actions still stop after regular business hours, when pirates return to the streets. Therefore, the law enforcement agents should also carry out their actions beyond regular business hours.

The motion picture industry group, AMPEC participated in raids leading to seizure of 723,183 pirate CD-Rs and 206 CD burners by the end of 2004.¹⁹ As a result of sustained

¹⁴ Production capacity of optical discs is derived by multiplying the number of lines by 3.5 million; this is by all accounts considered a conservative estimate.

¹⁵ Article 44 of the 2004 law provides that specific implementing regulations will be issued for a new certification system. These implementing regulations (which IIPA understands are currently on the Prime Minister's desk) will require all optical disc producers and distributors to obtain a special certificate from the MOCT to produce, sell or show optical discs in public performances. In order to obtain such a certificate, the production facilities will have to meet some criteria set by the MOCT, and facilities without a certificate will not be permitted to operate. It is hoped that these regulations will facilitate the inspection and monitoring of the known production facilities.

¹⁶ The motion picture industry enforcement group in Turkey has organized raids with the police against the homes of such Internet pirates. As a result of actions taken against Internet piracy, a total of 10,754 Divx Cds, 2,190 CD-Rs, 8 PCs, 10 CD-Writers, 6 DVD-Writers, and 4 DVD-ROM writers have been confiscated, and legal actions initiated.

¹⁷ Certain inter-city coach services also show films during journeys without authorization. The motion picture industry group in Turkey, AMPEC, is very active in this area and is regularly sending cease and desist letters and organizing raids with the police.

¹⁸ It is now estimated that approximately 15% of the 230 local broadcast stations continue to engage in transmitting domestic and foreign films using videocassettes and pirate VCDs as masters.

¹⁹ For example:

raiding throughout 2004, according to at least one industry group, pirate street vendors almost completely disappeared from the streets of Ankara, piracy having gone underground with the pirates becoming extremely cautious about the individuals to whom they sell. Other industries obtained raids as well, with one raid netting 40,000 products from a warehouse.

The recording industry group MÜ-YAP carried out 311 operations in 28 towns and reports seizures of over 630,000 pirated CDs and over 18,000 music cassettes (clearly showing the ratio between illegal optical discs and cassettes in favor of optical discs). In addition, 37 pieces of replication equipment (such as CD burners) were seized in 2004; over 900 suspects were arrested. It should be noted, however, that these results were achieved largely because the private sector initiated and supported raids that led to the seizures. The relevant law enforcement bodies, including the Inspection Committees, have generally failed to take *ex officio* action. With a country as vast as Turkey and piracy present everywhere this places a very heavy burden on the copyright industries in terms of human and financial resources.

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- On March 1, 2004m On March 1st, the Istanbul Inspection Committee and the Istanbul Police conducted coordinated raids in various notorious pirate locations in the city, resulting in the seizure of around 18,000 "burned" CD-Rs. Most of the discs contained U.S. motion picture titles, like *The Last Samurai*, *The Lord of The Rings: The Return of The King*; *Mona Lisa Smile*; *Runaway Jury*; and *Brother Bear*. Although many of the street vendors ran when the police showed up, they left their street stalls and pirate CD-Rs behind. Fourteen individuals were arrested and detained for questioning. The estimated street value of the seized discs was around US\$34,000. In order to amplify the deterrent effect of the operation, local police were accompanied by 20 journalists during the entire operation, resulting in extensive reports by the major national TV channels and newspapers.
 - From April 28 to May 12, 2004, AMPEC coordinated with the record industry group in Turkey, MUYAP, and the Istanbul Inspection Committee to conduct systematic raids in the areas of the city most affected by street vendor sales. Eleven raids were conducted against five video shops, four storage warehouses and one pirate CD-R duplication lab, resulting in the seizure of 121,400 pirate optical discs (76,000 CD-Rs with movies, 1,900 pirate DVDs, 36,000 music CDs, 7,500 discs containing game and software), 15 CD burners, 7,400 inlay cards, and in the arrest of 128 persons.
 - In October 2004, AMPEC secured additional raids in Istanbul against major distributors and storage areas, resulting in the seizure of nearly 12,500 pirate optical discs containing movies and the arrest of 6 individuals.
 - Between October 6 and 19, 2004, AMPEC and the Ankara Police conducted multiple raids against retail shops, street vendors and storage areas in Ankara, resulting in the seizure of more than 14,000 pirate discs containing movies (13,712 CD-Rs and 457 pirate DVDs), 305,000 inlay cards, 4 CD-R burners and the arrest of 11 persons.
 - On November 23, 2004, AMPEC secured a raid in Istanbul against a major distributor in the Kadikoy district, resulting in the seizure of 2,085 CD-Rs with movies, 450 CD-Rs with interactive games, 500,000 printed inlay cards for movies, 4,500 inlay cards for PlayStation® and PC games, and resulting in the arrest of one individual. This individual was selling CD-Rs to be used as masters and the corresponding inlays to trusted sub-distributors. The sub-distributors were then using the master CD-Rs to duplicate many more copies and were using the purchased inlays for the packaging.
 - On November 19, 2004, AMPEC and the Istanbul Inspection Committee raided a CD Shop in the Kadikoy district of Istanbul called "The End," resulting in the seizure of 2,435 pirate DVDs and 2,600 pirate CD-Rs. It is suspected that the source of most of the seized DVDs is Russia and/or Ukraine. It is estimated that the total market value of the seized materials is around US\$22,000. A legal action was initiated.
 - On November 10, the Istanbul Security Department raided a cine-café called "Kafika" which shows U.S. motion picture DVDs without authorization. The café had been raided on five prior occasions over the past few years., with the latest raid, in March 2003, resulting in the café's closure. However, the club reopened in July 2004. After the raid, the Istanbul Security Department closed the café in September 2004, but it quickly resumed its illegal activities. All of the prosecutions resulting from the previous raids are still pending. The latest raid resulted in the seizure of 88 original DVDs used for public performance and 210 pirate music CDs. After the raid, six rooms that were used as small theaters with big screens and comfortable armchairs were sealed by the police for an indefinite period and criminal actions were initiated. The café was sealed due to absence of the appropriate license, and then the café reopened upon a re-application.
 - On December 23, the Istanbul Inspection Committee organized a public destruction of pirate discs and books with the involvement of the Vice-Governor and the head of the Inspection Committee. The discs destroyed were ones seized in cases that have come to a conclusion. A total of 45,988 CD-Rs and DVDs, 2,371 books and 263,611 inlay cards were seized from 108 defendants.

Book publishers continue to find that they too must self-initiate raids, and various companies run hundreds of raids against pirate photocopy shops and print pirates per year. Unfortunately, the Turkish government remains reluctant to tackle the problem of piracy on university campuses, i.e., they will not instruct universities to implement policies to ensure that professors and students are using only legal materials. Certain practices by the Ministry of Education and the Council of Educational Policy (*Talim Terbiye Kurulu*) have actually helped the pirates by keeping legitimate books out of the market.²⁰ For example, the MOE often changes prescribed books on extremely short notice, giving publishers little or no opportunity to import legitimate versions of books. These practices, which have the incidental effect of promoting piracy, must be re-evaluated.

Inspection Committees in Major Cities Effective in 2004

The Inspection Committees, first established in 2002,²¹ played a part in the fight against street piracy in 2004. However, these Committees rarely took any *ex officio* action. In most cases right holders had to initiate actions and provide support. As a result of the March 2004 amendments the Inspection Committees formed in most provinces were annulled (with the exception of Istanbul, Izmir and Ankara). Although the Committees should not be abolished altogether, the core task of anti-piracy law enforcement should be shifted to specialized IPR units within the Police. These units should be established as a matter of priority. They would, provided they are given the necessary competence, mandate and operational means, guarantee a country-wide involvement of a key law enforcement body in the fight against piracy. At the same time, it would free up the remaining Inspection Committees to refocus their activities on other important enforcement-related tasks, such as optical disc plant inspections, in conjunction with private sector representatives, under the forthcoming optical disc regulation.

Courts Meting Out Larger Penalties Under New Copyright Law

IIPA hoped that the 2004 amendments to various laws, including the copyright law, would result in administration of deterrent sentences by the courts.²² At long last, two decisions were reached in late 2004. In the first, on September 22, 2004, a video shop owner from Ankara was sentenced for piracy to a fine of TL60 billion (nearly US\$45,000) by the Ankara Specialized IP Court. The case arose from a police raid conducted on March 17, 2003, against a video retail outlet that resulted in the seizure of 1 CD burner, 600 pirate CD-Rs, 50 blank CD-Rs and 400 inlay cards.²³ The decision is important since the judge resisted applying the lowest possible penalty, imposing an unsuspended fine. In December, a second favorable decision was rendered by the Izmir Specialized IP Court. A local warehouse owner was fined TL50 billion

²⁰ For example, on August 28, 2003, the *Talim Terbiye Kurulu (TTK)* wrote to the provincial governors revoking the approval for a number of imported course books to be used in schools. This only paves the way for pirate supply of the market. In addition, foreign publishers are required to pay at least double the standard fee to have books approved by the Ministry of Education (MOE) and the *TTK*. Decisions such as these are made without adequate transparency or explanations as to reasoning. Finally, to the best of IIPA's knowledge, MOE has never taken any steps to discourage students from bringing pirated books to school.

²¹ Eighty one "Inspection Committees," one for each province in Turkey, were officially established in 2002.

²² IIPA notes that judges trained abroad (in the U.K. and elsewhere) were appointed to the specialized IPR courts in major cities; this move, along with the 2004 amendments, will hopefully make the courts more effective in combating copyright piracy in Turkey in 2005.

²³ Despite the seizure of only one CD burner, the Judge classified the activity as running an illegal production facility (which carries a prison term of from two to four years, or a fine of from TL 50 billion or over US\$37,500 to TL150 billion or nearly US\$112,500, or both) rather than only as a sale of pirate products (subject to a prison term of from three months to two years, or a fine of from TL5 billion or US\$3,750 to TL50 billion or nearly US\$37,500, or both). Finally, the judge decided that the fine would not be suspended, given the pirate's propensity for recidivism.

(more than US\$37,500). The decision followed a raid conducted by AMPEC and the police on March 19, 2004 that resulted in the seizure of 50,000 PlayStation inlay cards and 70,000 CD inlay cards. The decision is significant because despite the fact that there were no production materials seized in the raid, the inlay cards alone were regarded as proof of pirate reproduction. In another case dating back to 1999, a defendant received 27 months in prison; unfortunately, the defendant appealed (on a technicality) and thus, that case continues.

It is hoped that the above cases are indicative of what right holders can expect from specialized IPR courts in Turkey.²⁴ IIPA is also hopeful that the Supreme Court will not overrule the decisions taken by the First Instance Courts. It is, however, at this early stage, difficult to predict whether the few recent case decisions are a trend or an exception. Most cases initiated under the amended law are still in process. Toward the second half of 2005 these cases are expected to reach a final verdict, at which point in time conclusions can be drawn as to the effect of the changes in the court system and the attitude of the judiciary toward IPR crime. IIPA notes that historically the courts have been marred by many procedural hurdles²⁵ and largely non-deterrent results in copyright cases.²⁶ The chief reasons for the continued inadequacy of the court system in Turkey include the following: judges do not consider copyright piracy to be a serious offense warranting high fines and imprisonment in severe cases; the courts' dockets remain seriously overloaded (leading to delays in adjudication of copyright cases);²⁷ the courts still do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership;²⁸ copyright cases are given low priority by prosecutors and courts; the Attorneyship Law requires that a private copyright owner

²⁴ The copyright industries considered the prospect of establishing specialized intellectual property courts (*Fikri Haklar mahkemesi*) under Article 76 of the 2001 Copyright Law as a very positive development, and IIPA understands that there are currently three criminal and two civil specialized IP courts available in Istanbul.

²⁵ The publishing industry reports onerous burdens on copyright holders to prove ownership, often in the form of notarized translations of original contracts between authors and publishers for each title. The notary fees alone act as a deterrent to copyright owners wishing to defend their rights.

²⁶ There were six first-instance court decisions issued under the 2001 copyright law. The defendants in the first two cases appealed to the Supreme Court. In both cases, the result was no conviction, with the court finding there was no evidence that the pirate discs displayed in the defendant's shop had been personally manufactured by the defendant. In the next four first instance decisions, all issued in 2003, the courts initially sentenced defendants to two-year prison terms and fines ranging from US\$7,000 to US\$11,000. However, due to the defendants' good conduct, the courts later reduced the sentences by 1/6 (as per the Turkish Criminal Code) in all four cases, resulting in all sentences becoming *de facto* within suspendable limits; consequently, no appeals were filed by the defendants.

²⁷ Copyright infringement cases generally take two years to adjudicate in the first instance, and up to one year further to appeal. Since 2002, the local record industry group, MÜ-YAP, initiated 495 music piracy cases, of which 245 ended up in court. However, only 10 suspects were sentenced to a suspended prison term. This means that, despite the huge piracy level, there is still no actual prison term being served for music piracy. Some cases have languished in the courts for five years.

²⁸ In cases brought by publishers, many judges are now demanding notarized translations of original contracts between the author and publisher in order to prove copyright ownership for each title. The police and the courts have often introduced complex and expensive requirements on U.S. publishers; for instance, they have required publishers to produce the original author's contract to prove that copyright lies with the publisher. Since this contract is in English, it is sometimes necessary to translate the contract and notarize it as an accurate translation. The notaries in Turkey have apparently added to the burden by charging inordinate fees. The audiovisual industry has experienced similar problems. Judges and public prosecutors often ask for the proof of copyright ownership and sometimes even request the establishment of "chain of title" by presenting all the relevant contracts, despite the presumption in Article 15 of the Berne Convention and Articles 11 and 80 of Turkish Copyright Law (which provide presumptions of ownership). In addition, Article 13 of the Copyright Law provides for a registration system in Turkey for movies that will be distributed theatrically in Turkey, but there is no such registration for movies not distributed theatrically, causing chain of title problems for such titles (note that this represents most titles that are legitimately distributed in Turkey). When regulations for Article 13 of the law are issued, it will be possible for film companies to register their works with the Minister of Culture, which hopefully, will relieve right holders of this burden.

representative hire a local lawyer to be an intermediary for many aspects of a copyright case;²⁹ and the use of “court experts” and, specifically, defendants’ use of objections and experts, has led to excessive delays and even wrongful acquittals.³⁰ A fundamental problem is the amount of time cases take to move through the system; for example, the entertainment software industry has cases pending from as far back as 1999. Such time frames cannot provide the deterrent needed for an industry whose product has a short shelf life. Another problematic feature of judicial enforcement in Turkey involves the difficulty of obtaining *ex parte* civil searches, as required by TRIPS.³¹ Finally, courts must make reasonable costs and fees available in Turkey in civil and administrative actions.

The Banderole System Needs Improvements

It remains the case in Turkey that the banderole (sticker) system does not function well as an anti-piracy tool. Some strengthened provisions were introduced in the 2001 copyright law (including the possibility of criminal penalties for unauthorized uses of banderoles or dealing in works without banderoles), but those remain largely untested. The MOCT, together with local offices in Istanbul, reportedly reviewed applications more strenuously in 2003 and banderoles issued were reported to the right holder organizations. Nonetheless, some plants continue to hold unnecessarily large quantities of unused banderoles, which are not secured adequately. Additionally, pirates are often inserting pirate discs into original jewel cases that have already used banderoles to make them look “legitimate.” Publishers report various problems with the banderole system, including fraudulent purchases of banderoles by pirates, and fraudulent local production of banderoles. 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 provides for fines and imprisonments for such offenses).

The recording industry reports some improvement in the administration of the banderole system in 2004. The MOCT has increased transparency, sharing detailed banderole information with MÜ-YAP on a weekly basis. However, banderole reports for 2004 show a massive increase in sales of banderoles for international repertoire, which is not compounded by a corresponding increase in actual sales of international repertoire. This could indicate that fraudulent banderole purchase is continuing.

²⁹ The Attorneyship Law adds additional burdens and substantial costs to bringing cases in Turkey. As a result, lawyers must be hired for five key phases of any case: (1) to file an initial complaint with the Public Prosecutor; (2) to obtain a special search warrant from the judge; (3) to obtain a search warrant from the Public Prosecutor; (4) to conduct a raid with the police; and (5) to have the Public Prosecutor press charges and to provide assistance in the courtroom to obtain a conviction.

³⁰ For example, in the past, courts were known to have called upon experts to answer questions on basic issues of law, such as whether unauthorized reproduction of software on the hard disk of a computer is a copyright infringement. In some cases, courts appeared to favor Turkish defendants over foreign plaintiffs and would interpret provisions of the copyright law in ways prejudicial to the foreign right holder. IIPA understands that the new specialized IP court has taken some steps to obtain evidence and appoint experts with more urgency and care than in the past.

³¹ For example, the business software industry relies on civil *ex parte* searches in order to carry out enforcement against unlicensed uses of software in a business setting (so-called “end-user” piracy of business software), and others (e.g., U.S. publishers) need this mechanism as well. The 2001 Copyright Law provides for *ex parte* civil searches.

COPYRIGHT LAW AND RELATED ISSUES

2004 Amendments

Modern-day copyright law in Turkey dates back to a 1951 copyright law (Law No. 5846), which was amended by Law No. 4630 (2001), and further amended in 2004 by Law No. 5101 (amending several laws including the copyright law). The 2001 amendments brought Turkey's copyright regime considerably closer to international treaties standards and implemented many of the requirements of the WIPO Internet Treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.³² Soon after the law's passage in 2001, it became apparent that judges in Turkey would not take the initiative to fully implement the very high criminal penalties contained in the 2001 copyright law, and were ruling that only administrative fines were available in cases of copyright infringement (relying on inconsistent provisions in the Cinema Law).³³

As a result of these problems, a new set of amendments were drafted and passed in 2003, coming into force on March 12, 2004, in Law No. 5101. While the amendments substantially reduced the level of criminal penalties and gave wider sentencing discretion to judges,³⁴ they also banned the street sale of copyrighted works, granted *ex officio* powers to law enforcement authorities, subjected pirates to possible prosecution under the Organized Crime Law,³⁵ deleted conflicting provisions of the Cinema Law and provided for an ISP notice and takedown procedure.³⁶ The law also calls for the establishment of special courts to hear piracy and counterfeiting cases, and these should be set up as soon as possible. In addition, the law provides that Turkish Customs officers must now act *ex officio*, and premises reproducing, distributing and communicating works to the public must be certified by the Ministry of Culture and Tourism (MOCT). The MOCT has, in the meantime, issued a regulation on classification of users of copyrighted materials. It is still expected to issue regulations implementing the certification system for premises reproducing copyrighted materials (the OD regulation) and the notice and takedown procedure for Internet infringements. These are generally positive steps

³² While certain key elements of the WCT and the WPPT still do not appear in the law in Turkey (the most notable deficiency is the failure to prohibit the circumvention of technological protection measures, including the trafficking in circumvention devices; the Turkish Criminal Code, Article 525 *et seq.*, provides limited protection against circumvention of computer encryption), Turkey should, as soon as possible, seek immediate accession to the WCT and WPPT, and swift deposit in Geneva.

³³ In two different cases, the Supreme Court in December 2002 ordered the Istanbul Specialized IPR Court (court of first instance) to send the case files to the appropriate municipalities for the application of administrative fines. In the first case, the Supreme Court ruled that the Cinema Law was a "more specific law" compared to the Copyright Law such that the Cinema Law should be applied where there is an infringement of copyright related to a motion picture. In the second case, the Supreme Court ruled that if a pirate does not personally manufacture pirate goods but is only engaged in the sale and distribution of such goods, the Cinema Law which as the "more specific law" should be applied. Thus, the Supreme Court has made a distinction between the manufacturing of pirate goods (which it has ruled is subject to the Copyright Law) and the sale and distribution of pirate goods (which it has ruled is subject to the Cinema Law).

³⁴ The new penalties included up to TL250 billion (some US\$187,000) or a prison term of between three months and six years. Those caught offending a second time can be tried on charges of "organized crime," according to the law. The new legislation also stipulates a fine of up to TL150 billion (about US\$112,500) or a prison term of between two and four years for hackers.

³⁵ Piracy is a scheduled offense for the application of Law No. 4422 on the Struggle Against Organized Crime Aimed at Unlawful Gain and Benefit.

³⁶ Under the law, ISPs are required to remove infringing content within three days of notification by a right holder. If an infringement continues, the right holder may apply to the public prosecutor to take action. The detailed implementation of this notice and takedown procedure is to be determined by ministerial regulation.

and the copyright industries are eager to see effective and efficient implementation of these new provisions.³⁷

The Need for Optical Disc Legislation

The strategic location of Turkey in a region where copyright protection and border enforcement are weak makes Turkey an appealing site for pirate optical media production. In addition, the proliferation of optical disc manufacturing facilities in the past couple of years calls for the immediate introduction of an effective law to regulate optical disc production (including “burning” of CD-Rs) in Turkey. The global community has agreed on the key elements to be included in an effective law, which would include licensing of facilities that wish to produce blank or finished discs; identification codes for discs, moulds and stampers/masters in order to trace the source of production back to the facility; coverage of key parts used to make discs (stampers and masters); licensing of import/export of machines, key parts, and raw materials used to make discs; inspection authority (including participation by right holder groups); and deterrent penalties for engaging in unlawful acts (like producing without a license, gouging or using false identification codes, etc.). Because of Turkey’s rampant CD-R “burning” problem, the law should also require registration of those engaging in commercial duplication of recordable discs.³⁸ The MOCT reportedly has a draft regulation of optical disc plants in the form of a Directive, which is currently subject to inter-ministerial consultation (although IIPA has heard that the draft may be on the Prime Minister’s desk awaiting approval). The following elements are understood from initial information:

- Only plants with injection mold machines will be certified (CD-R burning studios do not qualify and will not be permitted to produce copyrighted materials);
- Only plants with comprehensive facilities qualify (i.e. with pressing, printing, packaging and quality control facilities);
- Capacity reports must be regularly submitted;
- Use of SID Code is obligatory;
- A commission, including private sector representatives, reviews all certification requests;
- Regular controls are foreseen;

³⁷ Some concerns do remain, however, about vague language in certain provisions of the new amendments. For instance, Articles 34 and 35 cover educational and instructional uses as well as quotation of works, employing language that could be interpreted quite broadly. Article 34 allows uses “...for the purposes of education and instruction *within the necessary limits of the purpose*.” This language is apparently not qualified by the three step Berne test for permissible exceptions to copyright protection, except as it applies to certain photographic works. This is a peculiar aberration and should be clarified. Likewise, Article 35 allows for quoting of “a few sentences or passages,” also without benefit of the Berne three-step test. The Article 47 right of expropriation, which may apply to foreign-published works authored by Turkish writers, is vulnerable to abuse and therefore of concern to the publishing industry. Finally, given the industry’s current problems with requirements as to proof of copyright ownership, it is concerned that Article 75’s requirement of documentary evidence of title will be interpreted in such a way to add great cost to right holders protecting their rights in court. These provisions should be clarified at the first available opportunity.

³⁸ A more detailed discussion of optical disc legislation is contained in IIPA’s 2003 Special 301 report on Turkey, which can be found at <http://www.iipa.com/rbc/2003/2003SPEC301TURKEY.pdf>.

- Surprise inspections are possible, with participation of Inspection Committees and, thus, private sector representatives; and
- Sanction for breach of regulation and/or copyright under the regulation is cancellation of the certification.

If these elements are all included, IIPA believes that would represent a positive start. The government of Turkey should, therefore, craft and issue optical media regulations. The global copyright community has agreed that the key elements of an effective optical disc law include the following points:

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

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

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

Generalized System of Preferences

In 2003, the U.S. government formally announced that in 2001, it had closed the investigation into whether Turkey remains eligible to enjoy benefits under the Generalized System of Preferences (GSP) trade program. Nonetheless, IIPA considers the lynchpin of that petition, enforcement, not to have been fully resolved. 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.” While the official investigation was closed, IIPA notes that one key element of the Action Plan agreed to by Turkey has not been fully implemented, namely, that it carry out adequate and effective enforcement against copyright piracy, sufficient to bring down piracy levels. This most important benchmark still has not been met. In 2003, almost \$722.6 million in goods from Turkey were imported into the United States duty free under the program, accounting for over 19.1% of its total imports to the U.S. In the first 11 months of 2004, over \$886.3 million in Turkey’s imports to the United States benefited from the GSP program, accounting for almost 19.6% of its total imports to the U.S.

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