

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

TURKEY

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

EXECUTIVE SUMMARY

Turkey remains one of the world's worst pirate markets for published materials, with the situation worsening in 2006 (notwithstanding that raiding begun in 2005 was thought to have signaled at one point some progress). The business software industry suffers from significant losses due to hard-disk loading and unauthorized use of software in a business setting. At least some pirate optical disc production occurred in Turkey in 2006 – a disturbing trend – although one major plant raid hopefully will send a signal that such production will not be tolerated. The motion picture industry noted a dramatic up-tick in the sheer number of raids in 2005, and in 2006, they continued to achieve positive results in terms of raids and products seized. However, Turkey suffers from a serious repeat offender problem, which is largely due to the very long litigation period and appeal stage. While broadband penetration remained relatively low, rising Internet usage meant piracy in the online space increased in Turkey. The government began to take steps to correct this nascent problem, for example, by blocking access Pirate Bay (which has sizable amounts of pirate Turkish content), but much more will need to be done to avoid an onslaught of online piracy.

PRIORITY ACTIONS REQUIRED IN 2007

- **Sustain Raiding, Including Against Book Piracy, Optical Disc Pirate Production, Retail Piracy, Unauthorized Use of Software in a Business:** The positive raiding of street stalls in 2006 must be sustained in 2007, and key pirates of all kinds of products (books, motion pictures, recorded music, business software, entertainment software) need to be driven out of business before right holders will be able to claim solid success in opening up the Turkish market to legitimate business.
- **Defeat Recidivism Through Deterrent Sentencing and Improvements in Court Procedures:** Those engaged in commercial piracy activities must be given deterrent sentences, or already rampant recidivism will continue to plague the market in Turkey. Courts are backlogged, and while some cases moved through to successful conclusion in Turkey in 2005 and 2006, particularly some important criminal cases in 2005, other cases languished or were beset by a number of procedural hurdles. The simplest approach would be to establish more courts (and judges in each of them specially trained to deal with IP cases), since court dockets remain overflowed, and ease restrictions on the ability for right holder representatives to assist in case management without the need to hire local counsel for every step of a litigation.
- **Cancel Banderole System:** There were instances in 2005 of the use of fraudulent banderoles in the Turkish market on blatantly pirate materials, and in 2006, industry reports that the banderole system (holograms on books) is in a state of total disarray. This system should be abandoned forthwith and replaced with anti-piracy activities that are effective. The

Turkish authorities should in the least run market sweeps to clear the shelves of product with fraudulent banderoles if the credibility of this program is to be preserved. Otherwise, as right holders continue to find the program burdensome, it should be scrapped.

- **Amend Copyright Law to Prohibit Circumvention of Technological Protection Measures, and Join the WCT and WPPT:** The Copyright Law of 2001 omits protection for technological measures used by right holders to protect their products. The law should be amended to prohibit the act of circumvention of technological protection measures and the trafficking in circumvention devices. The government of Turkey should also accede to the WIPO Internet Treaties, the WCT and WPPT. IIPA understands the EU Twinning Project is underway to harmonize Turkey’s laws with those of the EU, so there is promise that some positive changes in legal infrastructure are to be considered in 2007.

For more details on Turkey’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

TURKEY Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2002-2006¹										
	2006		2005		2004		2003		2002	
	Loss	Level								
Books	20.0	NA	23.0	NA	23.0	NA	25.0	NA	25.0	NA
Records & Music	20.0	80%	18.0	80%	15.0	70%	15.0	75%	18.0	75%
Business Software²	203.0	66%	157.0	65%	107.0	66%	81.0	66%	38.5	58%
Entertainment Software	NA	NA								
Motion Pictures³	NA	NA	29.0	NA	50.0	45%	50.0	45%	50.0	45%
TOTALS	243.0		227.0		195.0		171.0		131.5	

PIRACY UPDATES IN TURKEY

Book Piracy Worsened in 2006: Book piracy worsened in 2006 and 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 make Turkey the region’s worst book piracy market. Virtually all types of books are affected,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Turkey under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Turkey, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA’s 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or “hard” goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

including local fiction, non fiction and school books, as well as local and imported college texts and imported English language teaching (ELT) texts (the piracy rate for ELT (ESL) books is around 50%, while the academic/textbook piracy rate is around 65%). Pirates are well connected and highly organized. In 2005 and continuing into 2006, publishers redoubled their efforts to lead a new campaign in Turkey against book piracy, gathering intelligence, conducting raids, and seizing pirated books.⁴ In 2006, publishers continued to get some help from the police. However, the court system simply is not working. The Turkish government has taken virtually no action to combat illegal uses of published materials on university campuses (raids on university campuses do take place but this is at the initiative of the publishers). In addition, publishers report an influx of pirated books from Iran. Publishers are also dismayed to see optical disc media bearing hundreds of titles for sale in the marketplace.

Optical Disc Piracy: There are essentially three forms of pirate optical disc found in the Turkey market today. First, there are locally produced factory discs. Second, there are imports of pirate optical discs produced elsewhere. Third, there remains some local burning of content onto recordable discs (CD-R or DVD-R).

Regarding local production, which has become by far the most serious concern, there are now 10 optical disc production plants in Turkey with a total of 21 production lines, with a capacity to produce an estimated 73.5 million discs per year (a conservative estimate).

Regarding imports, pirate CDs, CD-ROMs and DVDs are imported mainly from Russia, Malaysia, China, Bulgaria, and Ukraine and recent reports have discs coming into Turkey from Iran over the eastern borders. Most of these discs appear to be coming from individual couriers. Pirate DVDs of newly released titles with Turkish subtitles 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 Malaysia and Bulgaria, while cartridge-based games continue to be imported from China.

Regarding local burning of pirate works onto recordable media, it should be noted that the significant decrease in the street sale of locally burnt discs has pushed piracy under-the-counter in retail shops where shop owners burn on order for trustworthy customers, especially in cities outside Istanbul and Ankara (such as Izmir and Antalya).⁵

Internet Piracy Threat Emerging: Growth in broadband connectivity in Turkey is truly remarkable. In the third quarter of 2006, Turkey was 10th in the world in terms of number of broadband lines added, adding almost 390,000 new subscribers (Turkey was 14th place during the second quarter).⁶ From the third quarter of 2005 to the third quarter of 2006, Turkey was 8th in the world in terms of broadband growth, at 121% growth (and was 7th in the world from the

⁴ In 2005 and 2006, international publishers allied themselves with the Turkish Publishers Association and, more specifically, its anti-piracy committee, EDISAM. From July through November 2005, working with the Police, this group conducted 57 raids, resulting in the seizure of 21,000 pirate books and 10,000 pirate book covers. Unfortunately, outside of Istanbul and Ankara, police were reluctant to act in a timely and vigorous manner. There were also some indications of leaks/collusion by police and the pirates in outside locales. There had some successes in the courts, including five prison sentences in 2005. One conviction against key Ankara pirate, Ince Mehmet, who received a sentence (for book piracy only) of four years imprisonment is a significant and positive sign that the court system can work and the authorities in Turkey are taking book piracy more seriously than before.

⁵ In 2004, after the passage of amendments banning street sales, the immediate increase in enforcement actions reduced the number of street vendors, especially in Istanbul (a decrease of 80%) and Ankara (a decrease of over 50%).

⁶ Point Topic Ltd., *World Broadband Statistics Q3 2006*, December 2006 (on file with IIPA).

second to third quarters).⁷ As a result of this remarkable change, Internet piracy increasingly has had a negative affect on the legitimate market. For example, as in 2005, CD/DVD sales were not as good as expected in 2006, mainly due to Internet piracy. The music market is particularly hard-hit by illegal downloading. In addition to downloading, the trading of hard goods through websites or in newsgroups also remain Internet piracy concerns. It is particularly disturbing that Turkish Telecom, in promoting broadband Internet connections, was advertising its services by pointing to how many songs or movies can be downloaded in a particular time frame with a particular speed connection. Unauthorized use of software in Internet cafés is also a growing concern for entertainment software publishers.

Business Software Piracy: Unauthorized use of business software by company end-users causes right holders significant losses in Turkey. Unlike other industries, which have benefited from market sweeps, the dilemma of unauthorized use of business software in corporate settings requires a different approach, including campaigns aimed at getting inside information from companies using illegal software, inspections against such companies, and hands-on programs to explain to the Turkish government and businesses the basics of software asset management. The business software industry has found the current approach of the Turkish government to be inadequate. Other problems affecting the business software sector include hard-disk loading, either pre-loaded, or the sale of “stripped PCs” that are later loaded with pirate software.

Entertainment Software Piracy: Videogame piracy did not improve in 2006, and may, according to entertainment software publishers, have gotten worse at least for pirated optical disc games. While there is some burned product in the market, the majority of pirated entertainment software in Turkey continues to be factory replicated optical discs, or imported from Bulgaria, Malaysia, or China. Pirated videogame software, though no longer available at larger retailers, continues to be widely available at flea markets and low end retailers. Though counterfeit cartridge-based games continue to enter the country (largely imported from China), piracy of *Nintendo* cartridge games appears to have decreased in 2006, due in part to support from the police. In 2006, there were over 30 police raids conducted on behalf of *Nintendo*, but unfortunately, no customs actions occurred in the entire year.

Unauthorized Public Performances and Broadcast Piracy: Unauthorized public performances of new and popular films using DVDs and VCDs on wide screen systems at schools, cafes and bars, cultural centers and unlicensed video theatres are frequently encountered in Turkey. The motion picture industry enforcement group in Turkey, AMPEC, has been very active sending cease and desist letters and organizing raids with the police. Broadcast/signal piracy of motion pictures also exists. Music broadcast piracy in Turkey is a concern, as only a small minority of over 1,500 radio and television broadcasters have 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 made-on-the-spot, 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.

⁷ *Id.* For example, Turkey had 1.1 million DSL subscribers as of the 3rd quarter of 2005, but had almost 2.5 million DSL subscribers as of the 3rd quarter of 2006 (while holding steady at 30,000 cable modem subscribers).

ENFORCEMENT UPDATES IN TURKEY

Over the past couple of years, the Turkish authorities have reportedly been very active in sweeping out piracy from the streets of major cities. It is reported that the national Police have made efforts in enforcing intellectual and industrial property rights and in training their staff. Between 2000 and 2004, a reported 2.9 million pirated items were seized in police raids, but from March 12, 2004 (after the Police became authorized to run *ex officio* actions in public places) to June 2005, more than 3.5 million pirated items were seized,⁸ and out of some 4,771 raids, 5,056 accused were referred to anti-piracy commissions and public prosecutors to be fined administratively or arraigned before the courts.

While IIPA members report generally good relations with Turkish Police, Prosecutors and specialized IP judges, the experience with the Ministry of Culture is less positive (for example, they claim to lack authority to enforce against hard-disk loading without authorization of software onto computers by computer retailers, leaving the problem to the Police who refuse to take *ex officio* actions against this form of piracy).⁹ In addition, problems in court, including procedural problems and inefficiencies in court and overall lack of deterrence, result in widespread recidivism.¹⁰ Finally, the enforcement infrastructure remains largely unable to deal with nascent Internet piracy.¹¹ This last concern must be addressed in the coming year to fend off what could otherwise become insurmountable losses to the copyright industries in Turkey.

Enforcement Results in 2006: The good news story in Turkey continues to be impressive copyright enforcement raid results. The Istanbul Security Department has started to take *ex officio* actions with the authority given to them by the 2004 Copyright Law amendments, although these actions appear to be limited to big cities such as Istanbul, Ankara and Izmir. By the end of the third quarter 2006, for example, AMPEC had conducted 1,500 investigations and 918 raids resulting in the seizure of 739,217 pirate CD-Rs, 9,866 pirate discs with DivX movies (DivX is a private company, but "DivX" has become generic for an MPEG-4 file format which is a compressed form of DVD), 78,534 pirate DVDs, 191,885 pirate DVD-Rs, 353 CD-burners, 278 DVD-burners, 38 duplicators, 95 PCs, 8,365 master CDs, 5,641,841 inlays and 9,368 blank CDs & DVDs.¹² AMPEC estimates that the anti-piracy initiatives were successful in temporarily driving down piracy levels (combined for street vendors, shops, warehouses, etc.) in big cities such as Istanbul, Ankara and Izmir by 85%, 70%, and 50%, respectively. The entertainment

⁸ Statistics reported by the Association of American Publishers.

⁹ When software companies have tried to take self-help measures, computer resellers have resorted to selling stripped PCs (unloaded) to avoid detection.

¹⁰ A key problem remaining in the market in Turkey is recidivism as a result of the slow pace of justice. As an example, the motion picture industry enforcement group (AMPEC) raided a pirate business *for the 18th time* on May 10, 2006, with the support of Security Officers against a notorious family engaged in piracy. The May raid against one of their shops in the Uskudar district resulted in the seizure of 1,450 pirate CD-Rs, 344 pirate DVDs and 75 pirate PlayStation2[®] CDs. The family, already subject to seventeen raids in the past against various family members and shops, employs bribery and threats as tactics and will resort to violence to escape from justice. For example, during a raid on another shop owned by the family in October 2005, AMPEC investigators were offered bribes before being threatened and one investigator was physically assaulted and required hospital treatment.

¹¹ Some industries now regularly send cease and desist letters to Internet service providers and site operators, and organize raids with the police against the homes of pirates engaging in such activities.

¹² While the statistics are somewhat overlapping in dates, a nationwide enforcement initiative of AMPEC and authorities from October 2005 to June 2006 resulted in record seizures of 1,206,261 pirate optical discs and 795 optical discs burners, as well as the arrest of three suspected motion picture pirates. Law enforcement agencies conducted 1,100 raids in an effort to crack down on the availability of illegally pirated movies in retail shops and markets and from street vendors especially during the new theatrical seasons.

software industry as well as the business software industry received good support from the Turkish authorities.¹³

The business software industry conducted a number of successful criminal raids in 2006 against companies engaged in end-user software piracy. The right holders obtain search warrants from the courts and conduct the raids together with police and experts. In almost all raids copyright infringement was detected, and criminal proceedings were commenced against the authorized individuals of the companies involved.

The publishers continued to have some success with enforcement actions. In the 15 months from October 2005 to January 2007, 119 successful raids (out of a total of 163, or 73% success rate) were conducted, including 61 in Istanbul, 15 in Ankara, and 43 in other cities. While even more raids were planned, those raids could not be carried out since no search warrants could be obtained from the prosecutors or courts for various reasons. In addition, 72 raids were conducted in 24 cities solely against copy shops copying academic books on or around the university campuses, resulting in seizures of thousands of copies of 430+ different academic textbooks (a mix of Turkish & English). In those 72 raids, 50 photocopy machines were confiscated and 48 court cases have been opened. Unfortunately, the publishers also report a general lack of cooperation by the Public Prosecutors' Offices, resulting in a series of stymied raids and the disillusionment of the Police.

Successful Court Actions Increased in 2005, But Bottlenecks Remain: The favorable decisions in 2005 obtained from different provinces of Turkey demonstrate that the judiciary is finally beginning to recognize piracy as a serious crime and is imposing more serious sentences.¹⁴ For example, on July 6, 2005, a raid was run against the "Uçar CD" plant, located in the Kagithane district of Istanbul, by fifteen officers from the Security Department at Istanbul Police Headquarters, accompanied by motion picture industry representatives and technical experts from the recording industry. The plant had three VCD/DVD lines (forensic analysis by IFPI of discs found on the local market confirmed that they matched exemplars collected during a visit to the plant in April 2005). The raid resulted in the seizure of 8,650 pirate VCDs, 4,700 pirate DVDs and 10 silkscreens ready for printing professional-looking labels.¹⁵ The Ministry of

¹³ One entertainment software company reported 30 police actions and 7,958 pirate cartridge-based products.

¹⁴ The motion picture industry oversaw initiation of 581 legal actions in 2005, almost all criminal, and nearly 50 court decisions have been obtained. For example, on December 8, 2004, a local warehouse owner was fined TL50 billion (US\$35,600) by the Izmir Specialized IP Court. On March 9 2005, two video shop owners in Istanbul were each sentenced to unsuspended prison terms of two years by the Istanbul Specialized IP Court, with the severity of the sentences based on the fact that these pirates had been raided several times but had continued to engage in illicit activity. Some important decisions were also obtained from the Adana Court, sentencing pirate street vendors to unsuspended prisons terms and/or fines because of their recidivist nature. In one case which arose from an AMPEC (the motion picture industry's anti-piracy group in Turkey) operation against a street vendor in 2005, a defendant was sentenced to 14 months imprisonment and a fine. Although the case involved only 56 pirate CD-Rs, the court refused to suspend the sentence, because the defendant was a repeat offender. In a second case, the defendant was sentenced to five months imprisonment, but the sentence was suspended, because of his previous good conduct.

¹⁵ The raid lasted a total of five-and-a-half hours, and the plant owner was temporarily detained for questioning. Seizures included pirate copies of *Sin City* (which had not yet been theatrically released in Turkey), *Batman Begins*, *Monster in Law*, and *Coach Carter*. Unfortunately, the original search warrant issued by the judge did not allow for the sealing of the lines at the plant, but upon obtaining a warrant and proceeding to the plant to seal the lines the following day, the machines had been moved. A number of other locations associated with the plant were then raided, but these yielded little additional information or evidence. Unfortunately, due to a mistake in the initial warrant, the lines could not be sealed that day, and by the next day they had vanished. The missing DVD line and silkscreen printer were found on October 27, 2005 on the top floor of a two-story building in Umraniye. Three individuals were found on the premises, whose premises were also searched in July 2005 and that is believed to have been used for pirate disc production. When the raiding party entered the building, the three men were conducting test runs on the

Culture and Tourism subsequently revoked the license granted to the plant, and on January 17, 2006, the defendant owner of the plant was sentenced to a term of imprisonment of 5 years, 7 months and 15 days, and was also fined approximately US\$120,000.¹⁶ This is the highest penalty ever imposed in a piracy case in Turkey. Although the defendant appealed to the Supreme Court (which could take a year to reach a final determination), his conviction and sentence sent a very important message to Turkey's pirate community.

Despite the recent relative successes, problems still remain in court adjudication in Turkey. Seeing criminal actions through the court process can often be cumbersome and expensive for injured parties under the current system.¹⁷ The long, drawn-out process often leads to cases collapsing and, in addition, the government has been known to announce amnesties to clear dockets. Other specific problems include the following:

- First, very few cases lead to convictions and imposition of deterrent penalties. For example, for the publishers, 228 court cases involving piracy of published materials have been commenced since 2002, but only 15 cases resulted in convictions with penalties (with the rest collapsing or still continuing). In addition, several verdicts have been overturned on appeal by higher (non-specialized) courts.
- Second, search warrants for criminal raids are difficult to obtain, due to procedural rules requiring them to be obtained not from the specialized courts but from an ordinary criminal judge (in practice, the criminal judge is requiring far greater evidence than it is believed would be required from the specialized judge). Moreover, public prosecutors require special search warrants from judges to approve any action.
- Third, the courts' dockets remain seriously overloaded (leading to delays in adjudication of copyright cases), with too many files and too many actions to be dealt with by the only two civil courts and three criminal courts dealing with IP matters (for example, in Istanbul, an IP judge has to hear more than 2,000 cases per year). Courts take six months to two years to decide such cases and an additional eighteen months to decide appeals.¹⁸ New courts with greater numbers of specialist judges should be established, in order to obtain justice in courts in other cities, which are not as familiar with copyright issues and copyright litigation.
- Fourth, the courts still do not provide presumptions of ownership to right holders, but instead impose burdensome documentary requirements on right holders to prove ownership.¹⁹

DVD line. The raid also yielded 50 silkscreens, 39 DVDs, and 3 stampers, together with order documentation, files and contact lists.

¹⁶ The court also ordered that the sentence be published in three newspapers having a circulation of over 100,000. It should also be noted that a further prosecution has been instituted against the defendant's sister, whose name appeared on the rental contract for the building where the missing DVD line was found in October 2005.

¹⁷ A typical criminal action in Turkey starts with a complaint by the right holder to the Public Prosecutor and a raid with the police under the Copyright Law. In order to ensure that pirate products are confiscated, private parties must file criminal complaints, and the public prosecutor has to approve a police raid. As an additional burden in force since mid-2003, public prosecutors always require a special search warrant from the judge giving approval for any action.

¹⁸ Industry reports that, to date, no first instance judgment has been confirmed by the appeals courts. The entertainment software industry reports that it 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.

¹⁹ In cases brought by publishers in the past, many judges demanded notarized translations of original contracts between the author and publisher in order to prove copyright ownership for each title. Since this contract is in English, it must be translated and notarized. The notaries in Turkey have apparently added to the burden by charging inordinate fees. The audiovisual industry 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

- Fifth, right holders find it difficult to obtain *ex parte* civil searches, as required by TRIPS.²⁰
- Sixth, in order to ensure that pirate products are confiscated, private parties must file criminal complaints, and the public prosecutor must then approve a police raid followed by a criminal action.
- Seventh, right holders report that courts fail to award reasonable costs and fees in civil and administrative actions.

The Attorneyship Law remains problematic for right holders, as it forbids private entities from protecting third parties without having a local lawyer acting on behalf of the right holder as an intermediary.²¹ The industries must therefore hire local attorneys to seek raid approval from public prosecutors. Following the raid and the public prosecutor presses criminal charges, the industry association's lawyer must immediately submit a petition of intervention to become a party to the case, or cases which are lost in court cannot be appealed.²²

Internet Enforcement: In November 2006, the Chief Public Prosecutor granted AMPEC's application on behalf of local movie distributors to require Turkish Telecom to block access to the infamous pirate website www.thepiratebay.org. This was the first application of its kind under an administrative procedure. It was brought by AMPEC as a test case and relied on local Turkish titles which are heavily pirated on the Pirate Bay website. This positive first case must be replicated to ensure that Internet piracy does not take hold in Turkey.

Fraudulent Banderoles Continue to Cause Problems in Turkey: 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. Some plants have in the past held unnecessarily large quantities of unused banderoles, which were not secured adequately. In the 2005 "Uçar CD" case, fraudulent banderoles were found on pirate discs in the market. The entertainment software industry faces the same situation, with banderoles being issued and applied to pirated video games in the market.²³ Book publishers also report fraudulent banderoles being used on unauthorized books in the market. IIPA believes that the experiment of employing banderoles as

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).

²⁰ 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.

²¹ The Attorneyship Law requires a local lawyer to be hired to act on behalf of the right holder 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.

²² Industry expertise is in fact important to success of these cases, since the accused can challenge right holders' rights, and prosecutors find it difficult (without involvement of an industry lawyer) to prove their cases because of a lack of access to right holders' documentation.

²³ Entertainment software publishers continue to be plagued by the banderole system which is already severely compromised as pirates have been able to obtain these stickers with great ease. Although pirates use false documentation claiming to be authorized distributors for a company, MOCT has refused to take action, claiming they are not responsible for verifying the authenticity of the documents being used to obtain the banderoles. In one case, a pirate seller had over 70,000 pirated products for which he was able to obtain banderoles, yet the Ministry refused to revoke the banderoles.

an anti-piracy device has failed, and that the system should be scrapped. If the government decides to keep the banderole system, it must take immediate steps to inspect the markets for false banderoles, and to ensure that those who are caught dealing in copyright works without banderoles, using banderoles without authorization, or using fraudulent banderoles, are prosecuted to the full extent of the copyright law (Article 81 provides for fines and imprisonments for such offenses).

Storage Problems: Unfortunately, perhaps as a symptom of the Police's success over the past couple of years, all the Police and Istanbul Inspection Committee warehouses are filled with pirate materials. This situation is unfortunately impeding the Police's willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and of the Ministry of Justice who promised to solve this problem by renting additional warehouses and by accelerating the destruction process as much as possible.

Customs Law Imposes Undue Burdens on Right Holders: IIPA has in the past raised concerns that Customs procedures are not working efficiently to interdict pirate shipments. The motion picture industry reports that Customs procedures are too complicated and time-consuming. The local anti-piracy group apparently needs to apply every month to every Customs office with tens of copies of the same application form, as one copy is required for each Customs official. Despite these efforts, cooperation with Customs authorities did not improve in 2006.

TRAINING/PUBLIC AWARENESS

Trainings in 2006: Copyright owners continued organizing trainings (e.g., for Police and Customs) and participated in many more in Turkey in 2006. Both AMPEC (the motion picture industry enforcement group) and the Business Software Alliance (BSA) held trainings, the latter on software protection. For example:

- On September 5, AMPEC, with the support of the Istanbul Inspection Committee and Istanbul Governorship, hosted a day-long training seminar for local security forces. Around 200 Police Officers from 32 districts in Istanbul attended the seminar to learn about distinguishing pirate products from genuine movies, recorded music, software and games, as well as to learn about the applicable laws and recent amendments. The seminar began with a press conference attended by the Deputy Governor of Istanbul who made reference to the huge tax losses impacting on the local economy as a consequence of piracy. He declared support at the highest possible level to address piracy.
- On October 18, the World Customs Organization conducted a Seminar on Protection of IP Rights at the Border.
- On October 29, the Ministry of Culture, Turkish Patent Institute and General Directorate of the Police Department hosted a training seminar in Ankara to instruct various divisions of law enforcement on IP law and pirate product. The seminar covered the production of pirate and counterfeit products, and how to distinguish pirate and counterfeit goods from legitimate ones. Participants included key police officers from 81 provinces, Ministry of Culture officials, representatives from the Turkish Patent Institute, judges and prosecutors from IP Courts of Istanbul, Ankara and Izmir, and industry representatives.

Notwithstanding these training programs, the industry consensus is that there is still a considerable level of need for such trainings in Turkey, especially hands-on enforcement trainings.

Turkish Government Publications and Circulars: IIPA appreciates the attempts made by the Turkish government in 2006 to highlight the problem of piracy through publications and circulars made available to government officials.²⁴ For example, in September 2006, a publication entitled “Government’s Tax Losses Due to Intellectual Property Right Piracy and Counterfeited Goods” was issued by the Ministry of Justice. The circular is addressed to all public prosecutors and can be considered as both advice and an instruction for future action. IIPA hopes that circulars such as these can motivate both Prosecutors and Police to increase their efforts against piracy. These publications should signal to pirates that they can and will be prosecuted for tax evasion as result of their copyright infringements.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law Still Missing Protections Against Circumvention of Technological Protection Measures: 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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). A notable exception is the failure to prohibit the act of circumvention of technological protection measures and the trafficking in circumvention devices. The government of Turkey should amend its law to provide such protections as soon as possible and should also accede to the WCT and WPPT.

On December 28, 2006, Law No. 5571 introduced an amendment into the Copyright Law which stipulates financial awards for public officials who act to seizure illegal copies. The Law is subject to approval of the President. IIPA has not had an opportunity to review this amendment, although supports the notion of such meritorious awards in principle.

Two pending implementing regulations of the amended Copyright Law have been issued: (1) the Regulation on the Recordation and Registration of Intellectual and Artistic Works;²⁵ and (2) the Regulation on Principles and Procedures of the Use of Deductions Made From the Prices of Carrying Materials Containing Intellectual and Artistic Works and of Technical Devices Used for Reproduction of Such Works.

New Regulation on “Certification of Businesses” Includes Some Key Components of Good Optical Disc Regulation: The Ministry of Culture and Tourism (MOCT) issued the “Regulation on the Certification of Businesses Undertaking the Distribution or the Recording, Reproduction and Sale of Materials on which Intellectual Property and Works of Art Are Fixed” on April 18, 2005, requiring facilities involved in recording (including optical discs), exhibiting,

²⁴ For example, a circular issued on May 26, 2003 by the Istanbul Police Chief (Celalettin Cerrah) and addressed to the Istanbul Police Headquarters, to all District Police Departments, and to all branches of Police Departments, indicated “the sale of [pirated] works is a financial source of terrorist organizations.”

²⁵ 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. 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.

and distributing copyright works to receive certificates from the MOCT. Almost immediately, the Turkish authorities worked with industry to inspect the plants to collect “exemplars” (samples of discs to do forensic tests). Although all concerned premises were supposed to obtain such certificates by October 18, 2005, the MOCT had to postpone the deadline to December 2006 due to the very low number of applications received.

These regulations provide some essential elements of effective optical disc regulation, including the following:

- **Coverage of Any Business Engaged in Producing Discs Containing Content:** The Regulation does not seem to distinguish between businesses that produce large-scale factory-produced discs and those that “burn” content onto recordable discs. This means all those businesses (whether factory or commercial burning) must be certified, and failure to do so can lead to fines. Thus, it is expected that all the optical disc production facilities in Turkey (the 10 known plants and any more that come on line in the future) will have to apply for a certificate from the MOCT (including those that produce of blank recordable discs, see Article 5(a)). In addition, any premises engaging in “burning” of content onto recordable optical discs also must be certified.
- **SID Code Required for “Fixing Facilities”:** All facilities “where intellectual property and works of art are fixed and reproduced” must use SID Code (mastering LBR code and mold code are not specified, however, and should be).
- **“Fixing Facility” Information Requirement:** “Fixing facilities” must furnish reports indicating their “capacity and that they have the necessary technical equipment,” “[a]n itemised list of the technical equipment at the premises as well as copies of invoices or sale transfer documents of the same,” and “SID code document” and to “inform the General Directorate of all changes in the type of activity, equipment and capacity within ten days and to place the SID code and the certificate numbers on the fixing materials.”
- **Inspection Authority:** MOCT appears to have broad authority to run surprise inspections.
- **Cancellation Remedy:** The sanction for a breach of the Regulations is cancellation of the certificate, if “it is determined that the certified facilities no longer meet the requirements for obtaining certificates,” or “there exists a finalised court conviction arising from having violated the law,” upon notification of such “by the rights owners, professional associations of the relevant field of activity or local authorities.”
- **Administrative Fines:** The only remedy for operating one of the businesses specified without a certificate is an “administrative fine.”

Unfortunately, the Regulation suffers from two major weaknesses. First, the certification authority is overly broad, veering into areas like “[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films,” “[p]remises ... importing, distributing or selling empty fixing materials,” and “[p]remises undertaking sale, distribution, importation and marketing of intellectual property and works of art and fixing materials concerning productions entailing intellectual property and works of art through any means and techniques including digital transmission and those that rent these out.” This broad certification authority unfortunately undercuts the purpose of the legislation, since it requires legitimate businesses (in sectors where the risk of piracy is low) to be certified and subject to the regime, while illegal

businesses will never come forward to be certified. This has already proved to be the case, as noted, since MOCT had to postpone the deadline. One category of operators having to be certified is those engaging in Internet distribution. We underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by this certification requirement; those engaged in online piracy will ignore it. Second, while the Regulation calls for “administrative fines” for operating without certification, in the case of optical disc factories, it is feared this remedy is not enough to deter them from simply going underground. The remedies for operating an optical disc plant without certification must include seizure and forfeiture of all equipment and goods found in such a plant, closure of the plant, and criminal liability including deterrent fines and imprisonment, and including individual liability to pierce the veil of the company engaging in production without a certificate.

EU Twinning Project: The European Commission offers funding to enable countries close to being ready for membership of the European Union to enter into “twinning partnerships” with Member States. Twinning project funding is given to Member States to work with these countries on institution building (legislation, administration, and implementation). In respect of IPR, Turkey has entered into a twinning partnership with Greece. A committee has been established comprised of EU experts, representatives of Turkish Ministries (such as Ministry of Culture and Tourism, Ministry of Justice, Ministry of Internal Affairs), representatives of professional associations, representatives of the Turkish Patent Institute and other Turkish specialists. Industry views are also represented.²⁶ There are five key areas of work under the project: 1) computer programs and rental, lending and related rights; 2) satellite broadcasting and cable retransmissions; 3) terms of protection, resale rights; 4) Information Society Directive implementation;²⁷ and 5) enforcement of copyright. Other matters concern developing a training package for judges, and developing a public awareness campaign strategy to inform the general public on the importance of the protection of copyright.

IIPA is of course encouraged by the project, and notes that, as regards the legal framework for enforcement, in the least, full alignment with the EU Enforcement Directive should result, in particular as regards provisional and precautionary measures (and, while outside of the scope of the project, Turkey should also implement measures to adopt the Council on Europe Cybercrime Convention). This project is slated for conclusion by November 2007, with periodic meetings for each committee until then.

Criminal Code Revision: The new Turkish Penal Code was adopted on September 27, 2004 (effective June 1, 2005). The new Code was adopted subject to the European Union

²⁶ Industry is represented by FI-YAP (film producers), SESAM (film producers and importers), AMPEC (film industry), MU-YAP (phonogram producers; very active), YAY-BIR (publishers), and BIYEM-YESAM (software owners), among others.

²⁷ IIPA notes that the following are among the things being raised as key issues:

- There are no appropriate provisions on technological protection measures. These should be added to fully implement the WCT and WPPT (and ensure harmony with the EU Information Society Directive).
- Reproduction right for sound recordings: As regards copyright, Article 22 of the current Copyright Law of Turkey is in harmony with the EU Directive, since it defines the concept of reproduction in accordance with Article 2 of the Directive. An issue has arisen with some of the local jurists as to whether the Article 22 concept of reproduction applies to related rights, since first, it is not expressly made so (unlike, e.g., the concept of “fixation” which is expressly made applicable to both copyright and related rights), and second, because in Article 80 (dealing with related rights), different elements of the concept of reproduction are mentioned (or not mentioned) for different related rights. The broad Article 22 definition of “reproduction” should be made clearly applicable to both copyright and related rights to resolve the potential ambiguity.
- Provisions on exceptions do not seem satisfactory to meet international standards. The government should include a provision on the three-step test to be applied for all exceptions and limitations, and other exceptions must be appropriately narrowed to meet international standards.

harmonization packages and aimed at bringing the Turkish justice system into line with European Union standards. New conforming amendments to the Copyright Law are now on the agenda of Ministry of Culture and Tourism (MOCT). Specifically, a working group has been preparing the draft amendment to harmonize the penalty provisions of the Copyright Law with the New Turkish Penal Code. Although the New Turkish Penal Code does contain some significant improvements, IIPA is deeply concerned that harmonization efforts will slow down the enforcement of criminal penalties in current cases, since the Turkish Appeals Court may return files to local courts without confirming their decisions in order for those files to be reviewed in light of the new amendments made in the Penal Code. Industry has expressed its views on the draft amendment and believes the amendment going forward will improve criminal penalties in the long term. However, it is imperative that cases proceeding move forward without delay.

Proposed Trademark Law Provision Would Exempt Infringing Goods Produced Outside Turkey: A draft amendment to the Turkish trademark law was recently proposed by a member of Parliament, providing that “in order that a penalty may be imposed for a trademark infringement, infringing goods or services should be produced in Turkey.” This bizarre provision, which would certainly violate TRIPS, would appear to exempt all counterfeit goods not produced in Turkey. IIPA understands that it is very unlikely that this proposal would be approved by the Parliament. Nonetheless, IIPA is monitoring this situation closely, and all steps should be taken to ensure that such a provision is never enacted in Turkey.

MARKET ACCESS

Tenders Act: Turkey's Public Tenders Act (Law no. 4734), which came into force on January 1, 2003, applies to the audiovisual sector and created procedures that were far from business-friendly for companies selling films to Turkish Radio and Television (TRT) (Turkish public broadcasting).²⁸ On August 15, 2003, Turkey amended the Act to the effect that Turkey would no longer have to apply public tender rules and would be able to resort to “direct procurement” without the degree of red tape imposed by the initial version of the Act.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

In addition to the Special 301 process, the copyright industries and the U.S. government have used the GSP program, a U.S. trade program that offers preferential trade benefits to eligible beneficiary countries based on discretionary criteria, such as the provision of “adequate and effective” copyright protection, to evaluate Turkey's progress on copyright matters. On June 1, 1993, IIPA filed a petition urging the President to withdraw Turkey's eligible beneficiary status under the GSP program for its failure to provide “adequate and effective protection” to U.S. copyrights. USTR accepted IIPA's petition. The GSP case against Turkey remained pending for almost eight years.²⁹ Finally, in 2003, IIPA was notified formally that the GSP investigation was

²⁸ Although the scope of the Public Tenders Act covers the purchase of films, TRT has dropped its plans to apply the Law to its purchase of TV programming.

²⁹ During that period, there were several developments. First, USTR announced on January 16, 1998, that it would not consider any requests to expand the scope of preferential trade benefits Turkey receives under the GSP program; USTR noted there “Turkey's future benefits under the Generalized System of Preferences (GSP) will depend on progress on the remaining benchmarks [outlined by USTR in 1997].” Second, competitive need waivers under the GSP program were granted back to Turkey in 2002.

closed in 2001. In 2005, \$1.1 billion worth of Turkey's exports to the United States benefited from the GSP program, accounting for 20.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.0 billion worth of Turkish goods (or 20.3% of Turkey's total exports to the U.S. from January to November) entered the U.S. under GSP.