

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### TURKEY

**Special 301 Recommendation:** We recommend that Turkey be lowered to the Watch List.

#### **EXECUTIVE SUMMARY**

There are signs in Turkey that the enforcement system, from raid to court, is beginning to have a positive effect on the market for some products and services. Significant street raids in the past few years have opened up the legitimate market for some copyright owners in Turkey. In addition, increased cooperation among enforcement and judicial authorities in issuing warrants, and in the adjudication of copyright infringement cases, is beginning to reap benefits in the market in terms of decreased piracy. The motion picture industry experienced a general increase in the sheer number of raids and seizures,<sup>1</sup> and worked with authorities in 2007 to bring more criminal prosecutions against commercial copyright pirates. In two cases decided in 2007 involving repeat copyright infringers, unsuspended prison sentences resulted, providing a level of deterrence not previously seen in court cases in Turkey. Finally, the Turkish government took action in 2006 against the Pirate Bay website through the main ISP in Turkey,<sup>2</sup> and this event in Internet enforcement has led to similar actions against other websites involved in piracy in 2007.

At the same time, IIPA's recommendation does not reflect a view that all problems have been solved. Quite to the contrary, Turkey remains one of the world's worst pirate markets for published materials. The business software industry, while receiving more cooperation in 2007, still suffers from significant losses due to hard-disk loading and unauthorized use of software in a business setting. Turkey has a serious problem with recidivism in copyright infringement cases, due in large part to the very long litigation periods and the fact that most cases are sent up on appeal where they sit for years. Rising Internet and broadband usage means piracy in the online space increased in Turkey. The banderole system still remains burdensome, but if administered by rights holders, could prove more effective and less prone to abuse (publishers would prefer abolishing the program as to books).

#### **PRIORITY ACTIONS REQUIRED IN 2008**

- **Defeat Recidivism Through Deterrent Sentencing and Affirming Lower Court Decisions:** Some criminal convictions, especially against the Uçar optical disc plant in 2005, and "The End" video shop and the Halilogullari family in 2007, sent the signal that piracy does not pay and that engaging in copyright piracy might actually land the defendant in jail. Unfortunately, these sentences are the exception rather than the rule. More likely, criminal convictions result in suspended jail sentences or small fines, and even then, since almost all cases are appealed, most pirates never pay one Turkish Lira in fines. To add to the saga, due to court backlogs at the appeal level, many cases never get affirmed, are subject to amnesties, or are thrown back to the lower court since the law under which the defendant was convicted has been amended. As a result, recidivism runs rampant. Deterrent sentencing and appellate court improvements in getting through the backlog are the only answers.

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<sup>1</sup> Turkish creators now have a large stake in protecting their works – industry noted that Turkish movie titles have become more popular than foreign titles, unfortunately, evidenced by the pirate market where local film titles now outnumber foreign film titles in many areas of the country.

<sup>2</sup> The record industry reports that Pirate Bay is still accessible in Turkey through certain websites.

- **Tackle Growing Internet Piracy, and Sustain Raiding Against Book Piracy, Retail Piracy, Unauthorized Use of Software in a Business, and Other Forms of Piracy in Turkey:** Greater emphasis should be placed on *ex officio* raids, continued work to shut down pirate websites or Internet piracy services/activities, raids against blatant photocopy or print book piracy, and actions against instances of end-user piracy of business software in a commercial setting.
- **Take Urgent Action to Cease Illegal Software Use in the Public Sector:** Despite a circular published by the Prime Minister, some public authorities such as municipalities still continue to use pirated software. The Office of the Prime Minister and the relevant ministries should instruct their agencies to comply with the legislation and set an example of compliance for the public.
- **Fix the Banderole System:** The Turkish authorities should run market sweeps to clear the shelves of product with fraudulent banderoles or no banderoles if the credibility of this program is to be preserved. In addition, rights holder associations can and should be permitted to administer the banderole or, if they choose, to forego the use of banderoles as appropriate.
- **Join the WCT and WPPT:** The Copyright Law of 2001 omits protection for technological measures used by rights 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 has just completed the EU Twinning Project, so there is promise that some positive changes in legal infrastructure are to be considered in 2007. Turkey should finalize harmonization with the EU legislation, protect TPMs, and join the WIPO Treaties.
- **Amend the Private Copy Levy System:** While IIPA members do not generally believe private copying levies are the best way of addressing private, non-commercial copying (and it is critical that they address no more than such forms of copying in any event), the fact remains that some countries like Turkey have chosen to implement them. Where the law provides for a levy and it therefore forms part of the legal and regulatory environment in which right holders operate, it is important that the levies are in fact collected and fairly distributed to right holders. The Turkish Copyright Law contains a levy system but right holders do not receive anything. Instead, the Ministry of Culture and Tourism collects and keeps the fees paid for recording equipment and blank media. This collected amount is neither distributed among right holders nor even used for useful anti-piracy purposes or in ways helpful to right holders. The system in Turkey should be changed as a matter of priority and in a way to make it compatible with the Berne Convention (and by extension, the TRIPS Agreement).

For more details on Turkey's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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: 2003-2007<sup>3</sup>**

INDUSTRIES	2007		2006		2005		2004		2003	
	Loss	Level								
<b>Books</b>	23.0	NA	23.0	NA	23.0	NA	23.0	NA	25.0	NA
<b>Records &amp; Music</b>	22.0	80%	20.0	80%	18.0	80%	15.0	70%	15.0	75%
<b>Business Software<sup>4</sup></b>	193.0	64%	184.0	64%	157.0	65%	107.0	66%	81.0	66%
<b>Entertainment Software</b>	NA	NA								
<b>Motion Pictures<sup>5</sup></b>	NA	NA	NA	NA	29.0	NA	50.0	45%	50.0	45%
<b>TOTALS</b>	<b>238.0</b>		<b>227.0</b>		<b>227.0</b>		<b>195.0</b>		<b>171.0</b>	

## PIRACY UPDATES IN TURKEY

**Internet Piracy Threat Real:** While street piracy is improving, Internet piracy, in the form of P2P file sharing, video hosting sites, forums providing direct download links, and torrent sites (employing swarm technology for efficient downloads)<sup>6</sup> is steadily increasing due to the increase in broadband connectivity, which has proliferated and become less expensive. All kinds of creative content owners – of music, movies, software, and books – are victims of Internet piracy. Turkey now boasts 16 million Internet users in total (217,887 independent Internet hosts), amounting to a 21.1% Internet penetration rate.<sup>7</sup> There are more than 3.2 million broadband connections in Turkey today (some estimate more than 4.3 million ADSL users). Internet usage of copyright materials is beginning to displace physical product in Turkey.<sup>8</sup> The good news is that the Turkish government began to take steps to correct this nascent problem. In addition to working with Turkish Telecom to block certain access points to the Pirate Bay website, in 2007, access to 107 websites were blocked upon the motion picture industry group AMPEC's applications based on Additional Article 4 of the Copyright Law.<sup>9</sup> An additional 885 websites have been

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf).

<sup>4</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Turkey, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>5</sup> MPAA's trade loss estimates and piracy levels for 2007 are not available.

<sup>6</sup> According to the data on consumption of daily content from TNET, the ADSL service of Turkish Telecom, users generally access P2P websites and file sharing web sites, such as those employing BitTorrent technology and sites like Emule (the next generation of eDonkey) which reportedly has around 3 to 5 million users. See <http://en.wikipedia.org/wiki/EMule>.

<sup>7</sup> See *The World Factbook*, Turkey, at <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats4.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also *Internet World Stats*, Turkey, at <http://www.internetworldstats.com/europa2.htm#tr> (reporting that there were 16 million Internet users as of September 2006, representing a 21.1% penetration rate, according to the International Telecommunications Union, and 3,236,700 broadband Internet connections as of September 2007, according to the International Telecommunications Union).

<sup>8</sup> The following chart is instructive of the overall shift from physical to online in Turkey. It demonstrates that the number of banderole stickers (intended to be used to distinguish legitimate product from pirate product, but see *infra* discussion of problems with banderole system) has steadily decreased while broadband connections have increased.

	ADSL SUBSCRIPTION	BANDEROLES
2003	55,000	39,832,279
2004	450,000	43,927,887
2005	1,520,000	30,750,888
2006	2,800,000	24,658,074
2007	4,300,000	15,132,225

<sup>9</sup> Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. Once an infringement is detected on a site, a cease and desist letter is sent to the site requesting the site to cease infringement within 3 days. If, after this period, infringement continues, a folder containing (a) the printouts of the site showing the infringements; (b) an investigative report about the site; (c) the "ownership license of work of art" related to the titles; (d) the WHOIS details of the site administrator. That folder is provided to a prosecutor together with a formal application to block the site in

blocked following injunction proceedings initiated by the recording industry group MÜ-YAP since August 2006.

In addition to Internet piracy engaged in by users at their computers, shops (including formerly legal shops) are now capitalizing on Internet connectivity to engage in CD-R burning of content downloaded from the Internet and burning compilations on demand to CD-Rs. Another pirate 'service' consists of recording illegal content (including that downloaded from the Internet) directly onto new carriers such as MP3 players and mobile phones. New piracy phenomena, such as mobile device piracy will quickly require a coordinated response in Turkey or the risk is that they will grow out of control.

The trading of hard goods through websites or through newsgroups also remain Internet piracy concerns. Hard good sale lists primarily offer copies of pirate versions of television series (*Lost, Prison Break, Nip/Tuck, House, Grey's Anatomy*, etc.) rather than movies. Auction site authorities have usually responded quickly to industry warnings regarding hard good piracy sales.

**Book Piracy Problem Remains Severe:** While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, it is unfortunately falling short of potential due to a severe book piracy problem. In fact, illegal commercial photocopying and organized printing of books combine to make Turkey the region's worst book piracy market. Virtually all types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, English language teaching (ELT) texts and scientific, technical and medical (STM) materials. Photocopying is especially prevalent in and around universities, and indeed almost all university campuses are surrounded by photocopy shops, and authorities are often reluctant to enforce against them. Turkey also suffers from pirate imports from Iran over the Eastern borders. There is a fear that in time pirates in Turkey will turn to exporting prints to neighboring markets, so the need for action is immediate.

In 2007, enforcement efforts remained consistent, with significant engagement between the Turkish Publishers Association and key ministries, but cooperation is inconsistent at best. While the Ministry of Culture and Tourism seems increasingly receptive and responsive to articulated publishers' needs, prosecutors' offices have by contrast displayed a lack of cooperation. Unfortunately, this reluctance has led to a series of stymied raids and general disillusionment. Publishers have also faced difficulties with arbitrary amnesties and court delays.

The most bizarre development in 2007 was the Ministry of Education's campaign to encourage photocopying on campuses. This "photocopy machine for every school" campaign – a policy that all state schools should purchase a photocopy machine to provide free supplementary materials for students—devastated the market for both Turkish and foreign publishers of supplementary materials, as schools ceased purchasing such materials altogether. Instead, during this campaign, all the educational materials were simply photocopied and sold to students for the marginal cost of copying. This blatant disregard for copyright is truly stunning, and as a government policy, the "campaign" likely constitutes a violation of Turkey's international obligations.

**Business Software Piracy:** Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. Unlike other industries, which have benefited from market sweeps, the unauthorized use of business software in corporate settings requires a different approach, including campaigns aimed at getting information about 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. 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.

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question. The prosecutor sends the "decision of closure" in no longer than one week (to Turkish Telecom), and access to the sites in question is blocked. Industry notes that Article 4 provides for "rules and procedures" to be issued by the Ministry, but these rules and regulations still have not been completed.

The business software industry reported generally good cooperation from enforcement authorities in 2007 in seeking to improve the end-user software piracy problem. The business software sector seeks the assistance, as do others, of the specialized IP units established under Ministry of Internal Affairs, General Directorate of the Police (a national and armed civil force) to combat end-user piracy infringements. They provide value-added in operations against resellers of pirate software and pirate end-user targets raided in accordance with search warrants issued. In 2007, Business Software Alliance members conducted around 20 raids against corporate end-user piracy targets, which resulted in seizures of pirated material, financial settlements paid by infringers. These raids received media coverage. The industry has also had success in obtaining both civil and criminal actions against pirate software resellers.<sup>10</sup>

**Optical Disc Piracy:** There are essentially three forms of pirate optical discs found in the Turkish market today – local burning of pirated works onto recordable media, imports of pirate optical discs produced elsewhere, and locally produced factory discs. The optical disc piracy problem is predominantly locally burnt discs (both CD-Rs and DVD-Rs). At the same time, 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). Pirate CDs, CD-ROMs and DVDs are also being imported into Turkey, with recent reports having discs coming into Turkey from Iran over the eastern borders, but with discs also likely emanating from Asia, as in the past. Regarding local factory production, there are now 10 optical disc production plants in Turkey, four of which have DVD capabilities, and having a total of 21 production lines, with a capacity to produce an estimated 73.5 million discs per year (a conservative estimate). It appears that the optical disc piracy problem does not extend as much to factory pressed discs, as at least one industry (the motion picture industry) reports no seizures of pirate pressed discs (whether local pressed or imported) in 2007.

Authorities are taking raids *ex officio* but only under the banderole system, i.e., when pirate materials do not bear the obligatory banderoles. The motion picture industry group AMPEC conducted 1,154 investigations and 976 raids as of the end of December 2007. As a result, a total of 518,065 pirate DVD-Rs, 685,795 pirate CD-Rs, 17,990,490 covers, 395 CD-Writers, 230 DVD writers, 54 duplicators and 67 computers were confiscated. A total of 944 legal cases have been initiated by AMPEC lawyers as of the end of December 2007. MÜ-YAP conducted 1,532 raids, netting 978,220 pirate optical discs, 67,957 MCs, and 4,516,008 inlay cards.

**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 also a major concern, as only a small minority of over 1,200 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.

**Signal Theft/Cable Retransmissions:** Retransmission rights are included in the Turkish Copyright Law, but a court decision denied the collecting societies' rights and, as a result, the main cable operator and the biggest digital platform in Turkey are not paying royalties for re-transmission. This problem causes severe monetary loss for right holders in Turkey.

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<sup>10</sup> While authorities usually do not take *ex officio* actions without a right holder complaint, the municipalities and police force are taking actions to prevent the sale of pirate copyright material in public places such as streets, parks etc. Furthermore, there are administrative boards which are organized by the City Governorships, which take actions against sale of pirated material in public places.

## **ENFORCEMENT ISSUES IN TURKEY**

As noted in the piracy descriptions above, there are many piracy issues – Internet piracy, book piracy, end-user piracy of business software, optical disc piracy, unauthorized public performance piracy, unauthorized broadcasts, and signal theft/cable retransmissions, all of which sap legitimate copyright business in Turkey, and which require coordinated but often very different approaches to enforcement. The statistics, including the following chart according to the Police Secretary General Directorate, demonstrate that significant seizures of pirated materials are taking place, but also suggest the large scope of the problems industry faces in Turkey. The sections below highlight some key enforcement struggles faced by the industries, including lack of deterrence at court (due to length of time to adjudicate copyright cases, length of appeals, amnesties, low fines and sentences, and other issues), recidivism, the troublesome Attorneyship law, problems with the banderole system, and other issues.

<b>SECURITY GENERAL DIRECTORATE ENFORCEMENT STATISTICS 2007</b>	
<b>JANUARY 1, 2007 – DECEMBER 31, 2007</b>	
TOTAL OPERATIONS	3,741
ARRESTED PERSONS	4,132
<b>SEIZED MATERIALS</b>	
CD/VCDs WITHOUT BANDEROLES	2,143,635
DVDs WITHOUT BANDEROLES	490,195
BOOKS WITHOUT BANDEROLES	234,715
VIDEO CASSETTES WITHOUT BANDEROLES	388
MUSIC CASSETTES WITHOUT BANDEROLES	27,785
PORNOGRAPHIC ISSUES	84,598
CDs/VCDs WITH BANDEROLES	12,165
DVDs WITH BANDEROLES	1
BOOKS WITH BANDEROLES	10,681
MUSIC CASSETTES WITH BANDEROLES	54,900
CD/VCD/DVD INLAYS	8,218,632
<b>TOTAL SEIZED</b>	<b>11,285,567</b>

**Deterrence in the Courts:** One of the chief reasons for relatively high recidivism rates in Turkey is lack of deterrence at the court. Simply put, piracy is a high-profit, low-risk enterprise. If one is caught, chances are the case (civil or criminal) will make its way through the local courts within a short time, but once on appeal, the case may never be decided. The following are the key issues and concerns:

- **Lack of Speedy Appeals:** The most serious issue in the courts is the failure for verdicts or judgments to make it through the appeals process. While the lower courts take six months to two years to decide copyright cases, once on appeal, even the simplest cases languish for years. Some cases date back to 1999. In many cases, because the appeal took so long, the initial decision had to be thrown out since the law had changed in the time intervening between the initial decision and the decision on appeal. Amnesties have also occurred affecting copyright owners' cases. The Supreme Court of Appeals has reportedly issued no copyright decisions since 2004.
- **Difficulty Obtaining Search Warrants:** 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). Public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case.
- **No Presumption of Ownership in Some Cases:** The courts still do not, on many occasions, provide presumptions of ownership to rights holders, but instead impose burdensome documentary requirements on right holders to prove ownership.<sup>11</sup>

<sup>11</sup> 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  
International Intellectual Property Alliance

- **Difficulty Obtaining Preliminary Injunctions:** IIPA members have had difficulty obtaining preliminary injunctions against pirate operations, notwithstanding overwhelming evidence or indicia of piratical activity.<sup>12</sup> Evidence requirements should be made more reasonable and injunctive relief granted by judges more effectively.

**Special IP Courts:** One positive development in the last several years has been the establishment of specialized IP courts, and six new IP courts were established in 2007 (three criminal, three civil), bringing the total number to 18. There are now IP courts in: Istanbul – 13 IP courts (six criminal and seven civil); Ankara – four IP courts (one criminal and three civil); and Izmir – one IP Court (criminal). As a result, some rights holders are finding it easier to obtain search warrants and decisions in relatively shorter time periods. Nonetheless, industry also reports that the specialized IP courts are seeing their cases overturned on appeal or negated through amnesty.

**Some Favorable (and Deterrent) Court Decisions in 2007:** There were two big piracy convictions in 2007, following on some significant decisions in recent years (for example, the decision against the Uçar optical disc plant).<sup>13</sup> In particular, it should be noted that these cases represent the most significant sentences imposed on pirate operators to date, and in the instances below, the first case IIPA is aware of in which a defendant convicted of copyright piracy has served jail time.<sup>14</sup>

- **The End Case:** On April 9, 2007, the owner of a video shop, “The End”, located in Istanbul was sentenced to an unsuspended prison term of two years, four months by the Istanbul Specialized IP Court. This decision resulted from two raids conducted by AMPEC and the police in the first half of 2004 that yielded 8,505 pirate discs. Although these seizures were not particularly significant, the judge took into account the blatant recidivist nature of the defendant who had been raided, to date, 30 times by AMPEC and the police (yielding cumulatively more than 120,000 pirate discs). The defendant was also ordered to pay attorney’s fees and costs. After the Uçar optical disc plant sentence of the plant owner (five years, seven months and 15 days of prison term plus a \$120,000 fine), this was the second stiffest sentence to date (under the 2004 amended Copyright Law 5101). Although the defendant has lodged an appeal, this stiff sentence is a positive sign that the Turkish judiciary is now willing to judge repeat offenders in a deterrent manner.
- **Halilogullari Case:** From 2003 to date, AMPEC organized a total of 20 raids on the pirate shop “Film Dunyasi/Gumus Dunyasi” operated by the Halilogullari family, seizing a total of 36,259 pirate CD-Rs,

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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).

<sup>12</sup> The case involving the EMRE CD Plant indicates how the system fails to function properly. As a result of an investigation by MÜYAP some pirate discs were found at an optical disc plant known as EMRE. One of these CDs was sent to the IFPI-run forensics laboratory for source identification, confirming that the products had indeed been manufactured at EMRE. MÜYAP started a litigation and filed for a preliminary injunction, but the court denied the injunction and the plant received Ministerial approval and certification, notwithstanding clearly incriminating evidence against this plant.

<sup>13</sup> On July 6, 2005, a raid was run against the “Uçar CD” plant, located in the Kagithane district of Istanbul, revealing three VCD/DVD lines, and resulting in the seizure of 8,650 pirate VCDs, 4,700 pirate DVDs and 10 silkscreens for labels. Upon obtaining a warrant to seal the lines, the machines had been moved. After several months searching, the lines were found on October 27, 2005 on the top floor of a two-story building in Umraniye. 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. The court also ordered that the sentence be published in three newspapers having a circulation of over 100,000. Although the defendant appealed to the Supreme Court, his conviction and sentence sent a very important message to Turkey’s pirate community. IIPA members noted other favorable decisions in 2005 obtained from different provinces of Turkey. For example on March 9 2005, two video shop owners in Istanbul were 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 were recidivists. 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.

<sup>14</sup> Although there are no details available, AMPEC reports that they have recently learned that well over 20 persons sentenced to fines for copyright violations were sent to prison since they were unable to pay the fines.

9,587 pirate DVD-Rs, and 1,276,320 covers.<sup>15</sup> In a landmark court decision at the Istanbul IP Court in 2007, a defendant with a long history of IP offenses was given an unsuspended prison sentence of two years, one month upon conviction for repeat offenses. The defendant, the head of the Halilogullari piracy operation, missed the deadline to appeal and is serving the sentence. This is the first time a prison sentence has been serviced for a piracy offense in Turkey. The court refused to suspend the sentence in view of the likelihood that the defendant would commit another offense, and its suspicions were justified when three business addresses belonging to the same family were raided on September 17, 2007, netting 1,775 pirate CDRs, 4,730 pirate DVDs, 330 pirate PS2 DVD, and one million covers. The latest raids were covered by 'Show TV' for a news report.

**Recidivism:** Notwithstanding the positive results in a few cases, it is largely due to the very long litigation period and appeal stage that Turkey still suffers from a serious repeat offender problem. The motion picture industry group AMPEC has prepared and submitted some files to the related courts containing the details of repeat offenders to attract attention. Yet, the Supreme Court has issued no decisions in copyright cases since the latest amendment of the Copyright Law in March 2004. Since almost all cases are appealed, no sanctions have been applied in those cases against defendants. Thus, it is no surprise that the system lacks deterrence and that the police raiding pirate operations find the same defendants in charge time and again.

**Attorneyship Law Stymies Right Holders:** 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.<sup>16</sup> The industries must therefore hire local attorneys to seek raid approval from public prosecutors. Following the raid and the public prosecutor pressing criminal charges, the industry association's lawyer must immediately submit a petition of intervention to become a party to the case, or else cases, which are lost in court, cannot be appealed.<sup>17</sup>

**Banderole System Should be Administered by Rights Holders, and Right Holders Should Choose Whether to Forego Banderole Use As Appropriate:** 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. Book publishers also have reported fraudulent banderoles being used on unauthorized books in the market.

IIPA recognizes that the banderole system is the basis on which the authorities are taking raids *ex officio* (i.e., under Article 81), but wishes to see the system improved. Most important, the government 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). IIPA also urges consideration of allowing right holder associations such as MÜ-YAP and AMPEC (and others) to administer the banderoles beginning in 2008. We understand that negotiations with the Ministry of Culture and Tourism are ongoing. Publishers note that the banderole system does not work for books, in that it does not work to curtail piracy as intended, and creates additional burdens and costs associated with doing business in Turkey.<sup>18</sup> It should also be noted

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<sup>15</sup> During a raid in October 2005, one of the motion picture industry group's investigators from AMPEC was assaulted and required hospital treatment to recover from injuries.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> The government has hinted at possibly removing the banderole requirement as to published materials only. As long as *ex officio* authority is retained, IIPA's position is to support this move.

that as copyright moves into the digital age, there is a marked decrease in the number of banderoles issued simply due to the decrease in physical product.<sup>19</sup>

**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 they recently hired a bigger warehouse to be used to store pirate materials.

**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 groups apparently need to apply every month to every Customs office with multiple copies of the same application form (one copy is required for each Customs official sitting in that office). Despite these efforts by right holders to comply with such formalities, cooperation with Customs authorities did not improve in 2007.

**Organized Crime:** Copyright piracy is an easy target activity for those engaged in other criminal behavior, due to the fact that in Turkey, for the most part, it is a high-profit, low-risk activity (although the recent criminal convictions will hopefully change this). As such, it is not surprising but still unsettling to note that raid targets often turn out to be part of larger organized crime communities, and representatives either come across other indicia of criminal activity or are subject to physical violence or threats. In one operation conducted in 2007 against a pirate lab, the motion picture industry representative from AMPEC and the authorities found fake ID cards, burnt discs and recording equipment/burners, as well as some equipment used to produce the fake ID cards. The individuals apprehended were suspected to be involved in organized crime activities. As noted, the Halilogullari family has long been involved in piracy, and during a raid in October 2005, one of the motion picture industry group's investigators from AMPEC was assaulted and required hospital treatment to recover from injuries. Publishers note that their representatives have been physically threatened when participating in raids in the past.

## **TRAINING/PUBLIC AWARENESS**

**Trainings in 2007:** Copyright owners continued organizing trainings (e.g., for Police and Customs) and participated in others in Turkey in 2007. In addition, at the local level, various public awareness activities have been implemented, such as television advertisements. Both AMPEC and the Business Software Alliance (BSA) held trainings. The business software sector reports good cooperation in creating awareness both in the public sector and the end-user side on the importance of using only legitimate software. BSA also worked to raise awareness among members of local reseller associations about the need to install only legal software on the hardware they sell. For example:

- In November 2007, a BSA representative attended the Informatics Summit organized in Ankara by the IT industry in Turkey, providing speakers and sponsoring events. The audience included representatives of informatics sector, academia and enforcement authorities. The topic of the presentation delivered by BSA was copyright protection and enforcement activities against piracy.

<sup>19</sup> The following tracks banderole issuance in Turkey between 2004 and 2007 and is evidence of a decreasing physical market for copyright materials.

<b>Banderole Issuance in Turkey 2004-2007</b>				
	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
<b>Local CD</b>	13,561,500	12,526,294	13,558,571	13,495,433
<b>Local MC</b>	27,868,909	15,806,517	9,010,990	4,557,232
<b>International CD</b>	1,562,010	1,780,370	1,788,003	1,452,421
<b>International MC</b>	935,468	637,707	300,510	41,200
<b>TOTAL</b>	<b>43,927,887</b>	<b>30,750,888</b>	<b>24,658,074</b>	<b>19,546,286</b>

- AMPEC representatives visited a postgraduate education class to provide training and information about piracy for 30 selected students of Bilgi University in Istanbul on May 18, 2007. AMPEC's General Manager, AMPEC's legal counsel, and a police officer from the Istanbul security office gave the students detailed information about enforcement activities in Turkey, piracy and its negative effects, enforcement procedures, how to recognize pirate material, procedures and principles under the new law, the importance of *ex officio* powers granted to the police and municipalities, and how to implement the law properly.
- Istanbul Bilgi University Intellectual Property Law Research Center and MÜ-YAP organized an international symposium titled "Collective Rights Management - Current Problems and Future Prospects" in November 2007. This symposium will be repeated in coming years.
- There have been some seminars and trainings within the context of EU Twinning Project organized by the EU and MOCT. These seminars were attended by the police security forces, municipality representatives, collecting society representatives, MOCT officials, and prosecutors. For example, in a five day seminar from December 11 to 15, 2006, AMPEC participated in a training seminar under the auspices of the EU Twinning project aimed at supporting Turkey's efforts to align its standards with those of the EU and to engage in the fight against piracy.

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.<sup>20</sup> 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 a result of their copyright infringements.

## **COPYRIGHT LAW AND RELATED ISSUES**

**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 entered into a twinning partnership with Greece. A committee was 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 were also represented.<sup>21</sup> There were 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<sup>22</sup>, and 5) enforcement of copyright. Other matters concern developing a training package

<sup>20</sup> 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."

<sup>21</sup> Industry was 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.

<sup>22</sup> 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

for judges, and developing a public awareness campaign strategy to inform the general public on the importance of the protection of copyright.

The Committee concluded its work in Turkey in November 2007. Their conclusions will be packaged into a report and submitted to the Turkish Parliament soon. The Committee's conclusion is essentially that Turkish laws are mostly in accordance with the EU legislation, but that some important changes (for example, adding protections for technological protection measures, TPMs) must be made. IIPA is of course encouraged by the project, and looks forward to its recommendations regarding substantive copyright and alignment with EU Information Society Directive. IIPA also notes that, in regard to the legal framework for enforcement, in the least, full alignment with the EU Enforcement Directive should result in improvements, in particular as regards provisional and precautionary measures. While outside of the scope of the EU Twinning project, Turkey should also implement measures to adopt the Council on Europe Cybercrime Convention.

**Conforming Copyright Law with New Penal Code:** An amendment to the Turkish Copyright Law was published in the Official Gazette on February 8, 2008. The amendment purports to conform the law with the Turkish Penal Code.<sup>23</sup> AMPEC and music industry associations had provided comments, raising certain issues with the proposal, and as a result of this opposition the draft was altered and most of the propositions of the right holders were accepted.

**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), further amended in 2004 by Law No. 5101 (amending several laws including the copyright law) and amended again in 2008 by Law No. 5728. 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 protect technological protection measures, *inter alia*, by prohibiting the act of circumvention of technological protection measures and the trafficking in circumvention devices (and provision of circumvention services).

On December 28, 2006, Law No. 5571 introduced an amendment into the Copyright Law which stipulates financial awards for public officials who act to seize illegal copies that do not comply with banderole obligations. IIPA has not had an opportunity to review this amendment, although supports the notion of such meritorious awards in principle.

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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.
- Provisions on copyright levies are not in line with international standards and should be amended in accordance with EC Directive 2001/29. The current Article 44 (Amendment 21.2.2001 - 4630/23) provides,

natural and legal persons who manufacture or import for commercial purposes any kind of materials not carrying works, such as blank video cassettes, audio cassettes, computer discs, CDs, DVDs and all kinds of technical equipment which serve in the course of reproduction of intellectual and artistic works are obliged to collect every month and deposit, until the middle of the following month at the latest, in a special account to be opened with a national bank in the name of the Ministry of Culture and Tourism, an amount to be determined by the Council of Ministers not exceeding 3% of the manufacturing or importation costs. (Addition: 14.7.2004 - 5217/17) A quarter of the amounts collected in the special account shall be transferred to the account of the Ministry of Culture Central Accounting Office and shall be recorded as revenue in the budget. (Amendment: 21.2.2001 - 4630/23; 14.7.2004 - 5217/17) The amounts remaining in this account shall be used for the purpose of strengthening the intellectual property system and the execution of cultural and artistic activities. The rules and procedures concerning the distribution and use of these monies shall be determined with a by-law to be issued by the Ministry of Culture and Tourism. The allowance which is necessary for activities concerning the protection of the cultural heritage within and outside the country shall be placed in the budget of the Ministry. (Amendment: 3.3.2004 - 5101/15) Rules and procedures regarding the application of this article and the fees to be collected shall be determined with a by-law to be issued by the Ministry of Culture.

These articles should be amended to provide for a direct distribution of the relevant remuneration to the right holders.

<sup>23</sup> The Turkish Penal Code was adopted on September 27, 2004 and took effect as of June 1, 2005.

**Other Legislation Under Review by MOCT:** IIPA members have indicated that the Regulation on Banderoles, Regulation on the Recordation and Registration of Intellectual and Artistic Works,<sup>24</sup> the Regulation of Certification of CD Plants, the Regulation of Status for Collecting Societies, and the Regulation of Authorization Mandate are currently being reviewed by the MOCT.

**Private Copy Levies:**<sup>25</sup> The Ministry of Culture and Tourism has issued 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 (dated April 13, 2006) which implements a levy system to account for private copying by users but right holders do not receive any of the levies. There is a private copying exception under Article 38, first paragraph in the Copyright Law and levies are provided under Article 44 (amendment 2001). However, these levies, which apply to blank CDs and other recordable media, are not distributed to right holders. MOCT keeps the levies and does not use them for activities which would support the copyright industries such as better enforcement. The situation should be remedied in favor of right holders. The law should be changed and right holders should be entitled to collect private copying levies.

**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, and distributing copyright works to receive certificates from the MOCT. 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

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<sup>24</sup> 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.

<sup>25</sup> See generally note 22 on the issue of levies.

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, since back in 2005, MOCT could not get all plants to register. 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.

**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 provision, with the possible intent of avoiding application of Turkish law to extraterritorial acts, would actually result in a violation of TRIPS at least as soon as such goods enter the Turkish border and infringement ensues. 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.

**RTÜK (Radio and Television Supreme Council of Turkey)<sup>26</sup> Failure to Enforce Licensing As Pre-Condition to Broadcast:** Radio and Television Supreme Council of Turkey has not taken necessary steps to fulfill its obligations under Law No. 3984 (which stipulates that conclusion of licenses with right holders is a pre-condition to engaging in broadcasting activities), since it has not enforced against broadcasters who do so without a license.<sup>27</sup> Under that Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from YTL125 000 (New Turkish Lira) up to YTL250.000 (New Turkish Lira) and closure of the radio-TV station.

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<sup>26</sup> The Radio and Television Supreme Council – RTÜK, was founded as an impartial public legal entity that has broad competencies and responsibilities compared to its former position pre-1994. It is a statutorily mandated Council responsible for the regulation of the radio and television broadcasts all across Turkey. The Supreme Council is composed of 9 members who are elected by the Grand National Assembly of Turkey. See [http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik\\_id=be70e800-a512-4dd8-803f-857b504fd1f9](http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=be70e800-a512-4dd8-803f-857b504fd1f9).

<sup>27</sup> The amendment in Article 37 of the Law on Radio and Televisions No 3984 provides that broadcasting organizations shall sign agreements so as to get an authorization from right holders or their Collecting Societies of which they are members, within the framework of the Law on Intellectual and Artistic Works No 5846, and to pay the royalties.

## **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. During the first 11 months of 2007, \$1.04 billion worth of Turkish goods (or 24.4% of Turkey’s total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP codes. Turkey should not expect to be able to retain this duty-free status for many of its imports into the U.S. if it cannot meet the discretionary criteria for adequate and effective copyright protection under the GSP statute.