

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List in 2010.<sup>1</sup>

**Executive Summary:** Visits by both President Obama and Secretary of State Clinton in 2009 to Turkey underscore the country's strategic importance to the United States (and the world), both politically and, increasingly, economically.<sup>2</sup> On December 7, 2009, USTR Ron Kirk and Commerce Secretary Gary Locke, on the occasion of the visit of Turkish Prime Minister Recep Tayyip Erdogan to the White House, inaugurated "a new process of engagement with the government of Turkey on economic and trade issues," to be known formally as the "Framework for Strategic Economic and Commercial Cooperation."<sup>3</sup> Turkey is also in the midst of its accession negotiations to the European Union, in which intellectual property rights have played a prominent part.<sup>4</sup> Specifically, Turkey is obligated to fully implement EU directives on copyright and related issues, which include coverage of, *inter alia*, all subject matter of copyright (including computer programs) and related rights, and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which were also ratified and deposited in 2009 by the European Union. The EU Accession IP Chapter obligates Turkey to make sure that "enforcing bodies dispose of sufficient administrative capacity to enforce the rights concerning the fight against piracy and counterfeit," and that it "provides a satisfactory track record of investigations, prosecutions and judicial treatment of violations and an improved performance concerning the effective enforcement of Intellectual Property Law, including a substantial reduction in the volume of counterfeited and pirated goods exported to the EU."<sup>5</sup>

While the government of Turkey took some incremental positive steps to meet these goals in past years, in 2009, piracy worsened in a couple of key areas. Notably, the Business Software Alliance (BSA) reports a rise in the end-user piracy rate from 64% in 2008 to 66% in 2009, with losses also increasing significantly, to US\$279 million due to piracy of business software. Illegal use of business software by many in the public sector remains a major concern. The music industry notes a significant rise in Internet-based piracy, mostly in the form of P2P file sharing services. Other piracy issues, such as book piracy involving illegal commercial photocopying and print piracy, and piracy of entertainment software products, remain concerns.

The business software industry continued to receive cooperation from the Police based on complaints laid against end-user piracy of business software, but they were less impressed with efforts to implement a Circular of the Prime Ministry to legalize software usage in the public sector. The Police continued to run raids on an *ex officio* basis

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<sup>1</sup> For more details on Turkey's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

<sup>2</sup> Turkey is currently the United States' 39th largest trading partner in goods, exchanging \$15 billion in 2008. Turkey is the 27<sup>th</sup> largest export market for U.S. goods. The U.S. goods trade surplus with Turkey was \$5.8 billion in 2008, an increase of \$3.8 billion from \$2.0 billion in 2007. U.S. goods exports in 2008 were \$10.4 billion, up 58.4 percent from the previous year. See United States Trade Representative, *Turkey*, at <http://www.ustr.gov/countries-regions/europe-middle-east/europe/turkey>. The visit in March by the Secretary of State to meet with Turkish Prime Minister Recep Tayyip Erdogan was, according to her, made "to emphasize the work the United States and Turkey must do together on behalf of peace, prosperity and progress." See *Officials: Obama to Visit Turkey in April*, CNN.com, March 7, 2009, at <http://politicalticker.blogs.cnn.com/2009/03/07/clinton-obama-to-visit-turkey/?fbid=bme5PTYF9HL>. President Obama's trip focused on a major address in which he said his visit was a "statement about the importance of Turkey, not just to the United States, but to the world." See *Obama Reaches Out to Muslim World*, BBC News, April 6, 2009, at <http://news.bbc.co.uk/2/hi/7984762.stm>.

<sup>3</sup> United States Trade Representative, *Ambassador Kirk and Secretary Locke Welcome New Strategic Framework with Turkey*, December 7, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/ambassador-kirk-and-secretary-locke-welcome-new-s>. Ambassador Kirk and Secretary Locke indicated the Framework will "help enhance the already robust interaction that takes place between the two governments on economic issues," since the U.S. already work with Turkish counterparts in the economic arena through the bilateral Trade and Investment Framework Agreement and the Economic Partnership Commission, among other forums.

<sup>4</sup> On June 17, 2008, the EU and Turkey concluded their "5th meeting of the Accession Conference" in Luxembourg, at which, among other topics, Chapter 7 on Intellectual Property Rights, was agreed upon. See *EU and Turkey: 5th Meeting of the Accession Conference*, European Union @ United Nations, at [http://www.europa-eu-un.org/articles/fr/article\\_7959\\_fr.htm](http://www.europa-eu-un.org/articles/fr/article_7959_fr.htm).

<sup>5</sup> *Id.*



to implement the banderole regulations, but due to an ambiguity in the 2008 copyright law amendments, Police have been reluctant to run copyright infringement raids against street piracy or piracy in public areas for other industries on an *ex officio* basis as they had done in the past, curtailing the deterrent effect of Police enforcement in Turkey against these kinds of piracy. ISPs became more reluctant to provide cooperation on Internet-based piracy issues in 2009, leading to fewer takedowns in 2009. Turk Telekom, the biggest ISP in Turkey with market dominance of over 90%, is reluctant to provide IP data to right holders in court cases. The Turkish government has not yet followed closely the international trend in addressing Internet piracy and ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy. The courts remain the weak link in Turkey. While district court cases generally move at a reasonable pace in piracy cases, such cases are usually appealed, where they linger or become subject to amnesties. In addition, suspended sentences are the norm, although several important criminal convictions have resulted in jail time. As a result, recidivism in Turkey for most forms of piracy is the norm. Exacerbating the situation, some of the trained IP judges have been transferred back to regular courts. Right holders continue to suffer from the failure of the government to pay royalties for a private copy levy system established by the Ministry of Culture and Tourism (MOCT). These payments should accrue to right holders, not government coffers, and MOCT must become more efficient in collecting these royalties, since the record industry estimates US\$20 million has been left uncollected.

**Priority Actions Requested in 2010:** IIPA requests that the government of Turkey take actions to curtail piracy of all IIPA members' product in all forms, including the following actions, which would result in the most significant near-term commercial benefits to the copyright industries:

#### Enforcement

- Take significant steps to legalize businesses engaged in end-user software piracy, including large- and medium-sized businesses.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees.
- Take an active role in significantly reducing Internet piracy, including peer-to-peer file sharing, through strict application of the laws and cooperation by service providers with right holders to take down pirate materials and deep linking sites, and address infringements through P2P services, web bulletin boards, BitTorrent services, and cyberlockers. In this regard, policies and any regulations should provide incentives for ISPs to cooperate with right holders.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority as to piracy in public places and street piracy under the amended law.
- Speed criminal trial process in appeals of copyright cases, and work to defeat recidivism by significantly reducing number of suspended sentences and/or amnesties.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- Run market sweeps to clear the shelves of product with fraudulent banderoles, and permit rights holder associations to administer the banderole or, if they choose, to forego the use of banderoles as appropriate.

#### Legislation

- Amend copyright law further to fully implement the WCT and WPPT, make necessary amendments to ensure that copyright piracy is included among cybercrimes, and ensure that ISPs comply with notices to take down infringing materials and have in place effective and fair policies to address repeat infringers.
- Amend the laws and regulations to ensure that private copy levies are collected and fairly distributed to right holders; at present, all amounts accrue to the Ministry of Culture and Tourism, which does not collect efficiently or use the money that is collected for useful anti-piracy purposes or in ways helpful to right holders.

## PIRACY AND ENFORCEMENT CHALLENGES IN TURKEY

Previous reports have discussed the many piracy challenges faced in Turkey, including end-user piracy of business software,<sup>6</sup> hard-disk loading of software onto computers, Internet-based piracy, piracy of published materials (photocopy piracy and print piracy), mobile device piracy, pirate public performances of audiovisual works, and retail piracy in all forms, including CDs, DVDs and recordable discs with games, movies, music,<sup>7</sup> business software, and compilations of music.<sup>8</sup> The following sections provide brief updates to the piracy and enforcement situation, but failure to mention a specific issue does not indicate that the problem has been fully resolved.

**Lack of Clear Authority to Run Raids on an *Ex Officio* Basis, Urgent Issuance of Circular Needed:** In previous years, the specialized IP units established under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), which is a national and armed civil force, exercised their authority to conduct raids on an *ex officio* basis against street piracy and piracy in public places, leading to a decrease in street and retail piracy in Turkey. Under the Law on Intellectual and Artistic Works No. 5728 which went into effect in February 2008, the express *ex officio* language was removed, and after the amendment, some district's officers refused to run street piracy and open piracy raids on their own stating they are unsure whether the law provides them with such authority. Other districts have accepted that the Police retain *ex officio* authority as to piracy on the streets and in public places. IIPA urges the government to issue a formal circular confirming that the amendment did not change the law, thus confirming that Police may still exercise *ex officio* authority as to street piracy or piracy in public places. By contrast, under the banderole system, authorities are taking raids *ex officio* when materials do not bear the obligatory banderoles.

**Business Software Piracy, Both End-User Piracy and Hard Disk Loading, Harms Right Holders:** Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. The unauthorized use of business software in corporate settings requires a different approach from other forms of piracy, including campaigns aimed at ascertaining companies' use or licensing of software, inspections against companies evidencing unauthorized and/or unlicensed use, and hands-on programs to explain to the Turkish government and businesses the basics of software asset management. Reductions in business software piracy would result in positive gains for Turkey's economy. A study released in January 2008 by International Data Corporation and BSA demonstrated that a 10 point reduction in software piracy in Turkey from 2008 by 2011 (i.e., from 64% to 54%) would deliver nearly 1,894 new jobs, US\$80 million in tax revenues for the Turkish government, and US\$600 million in economic growth in Turkey.<sup>9</sup>

Another problem faced by the business software industry is hard disk loading, by which computers sold at retail are either pre-loaded with illegal software, or are sold "stripped" and later loaded with pirate software. Hard disk loading is used to increase sales volumes of hardware. Sometimes, consumers apply pressure to lower the price by loading the hardware with pirate software.

The business software industry reported generally good cooperation from the dedicated Special IP Police established in the larger cities to combat end-user piracy. Business software right holders appreciate collaboration

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<sup>6</sup> Losses due to business software piracy increased in 2009 to \$279 million, up from \$257 million in 2008. Piracy levels also went up from 64% in 2008 to 66% in 2009. Up until 2008, the publishers and record industry had reported losses totaling more than \$40 million each year. The methodologies used by IIPA member associations to calculate their respective estimated piracy levels and losses are described in IIPA's 2010 Special 301 submission at [www.iipa.com/pdf/2010spec301methodology.pdf](http://www.iipa.com/pdf/2010spec301methodology.pdf). BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Turkey. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.

<sup>7</sup> In 2009, MÜ-YAP, the local music and record industry group, reports that it was involved in 829 raids, resulting in seizures 17,345 pirate optical discs, 393 music cassettes, 3,761,217 VCDs/DVDs, and 12,897,685 inlay cards, compared with 983 raids, netting 67,602 pirate optical discs, 1,673 music cassettes, 1,267,998 VCD/DVDs and 5,516,365 inlay cards.

<sup>8</sup> See International Intellectual Property Alliance, *Turkey*, at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.pdf>.

<sup>9</sup> Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Turkey*, January 2008, at [http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc\\_studies/bsa\\_idc\\_turkey\\_final%20pdf.ashx](http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc_studies/bsa_idc_turkey_final%20pdf.ashx).

during raids, which are conducted on the basis of search warrants, against resellers of pirate software and end-user of pirate software. In 2009, BSA members conducted a number of raids against corporate end-user piracy targets, which resulted in seizures of pirated material, and financial settlements paid by infringers. Piracy levels and losses increased in 2009, but it is hoped that with continued cooperation, these numbers can be reduced once again in 2010.

**Business Software Legalization Circular Not Being Enforced:** IIPA welcomed the government of Turkey's issuance of the Prime Ministry's Circular No.2008/17 which was published in July 2008, ordering that government agencies should legalize their software use.<sup>10</sup> Unfortunately, the government has not implemented the Circular. Public sector administrators should train users to avoid the use of pirated software, but IT managers of public sector agencies complain that although they are required under the Circular to legalize software usage, they have not been allocated sufficient budgets to ensure that all software is licensed. The State Planning Organization (DPT) and Ministry of Finance must allocate sufficient budgets for such. By implementing the Circular, the Turkish government can set a proper example for businesses and consumers in Turkey.

**Internet Piracy a Growing Phenomenon:** Turkey boasts more than 25 million Internet users, amounting to a greater than 34% penetration rate, and there were 5.75 million broadband subscriptions in Turkey in 2008, according to the International Telecommunications Union.<sup>11</sup> Internet usage of copyright materials has thus begun to displace physical product in Turkey, and unfortunately, as a result, Internet piracy has significantly worsened. In 2009, it was estimated that 85% of all estimated Internet traffic in Turkey consisted of peer-to-peer file sharing.<sup>12</sup> Internet piracy takes on many forms, including such P2P file sharing, video hosting sites, deep linking sites, forums providing direct download links, cyberlockers, and torrent sites (employing swarm technology for faster downloads). All creative content owners – of music, movies, business and entertainment software, and books – are victims of Internet piracy. The trading of hard goods through websites, mostly auction sites, or through newsgroups, also remains of concern. The Entertainment Software Association has conducted a survey of several markets' P2P habits, and estimates that approximately 84,922 infringing copies<sup>13</sup> were made of select ESA members' computer and videogames through P2P file sharing by ISP subscribers in Turkey during December 2009 alone. Breakdowns by ISP show that subscribers of Turk Telecom were responsible for approximately 82% of this activity occurring in Turkey, or more than 70,000 downloads during the one-month period. These figures do not account for downloads that occurred directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

In previous years, IIPA members had reported cooperation among service providers in fighting Internet piracy.<sup>14</sup> "Additional Article 4" of the Copyright Law (added in 2004) was thought to be helpful, since it provides a

<sup>10</sup> The government of Turkey, in its submission to USTR in the Special 301 process, touted the Circular as an example of progress in 2008. See Republic of Turkey, Prime Ministry Undersecretariat for Foreign Trade, *Protection Of Intellectual Property Rights In Turkey*, February 2009, in which the government noted, "The Prime Ministry Circular on the Use of Licensed Software (No.2008/17) was published on the Official Gazette on 16 July 2008, with the aim of strengthening the rules on the prohibition of the use of unlicensed software by the public institutions."

<sup>11</sup> See ICT Statistics Database, at [http://www.itu.int/ITU-D/ict/eye/Reporting/ShowReportFrame.aspx?ReportName=AWTI/InformationTechnologyPublic&RP\\_intYear=2008&RP\\_intLanguageID=1](http://www.itu.int/ITU-D/ict/eye/Reporting/ShowReportFrame.aspx?ReportName=AWTI/InformationTechnologyPublic&RP_intYear=2008&RP_intLanguageID=1)

<sup>12</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) has steadily decreased while broadband connections have increased.

	ADSL SUBSCRIPTION	BANDEROLES
2004	450,000	43,934,423
2005	1,520,000	31,413,374
2006	2,800,000	25,801,106
2007	4,500,000	20,272,489
2008	6,000,000	14,612,952
2009	6.179.465 (June)	11.544.292 (November)

<sup>13</sup> This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

<sup>14</sup> In 2006, the Turkish government was one of the first in the world to facilitate blocking action against the "piratebay" website through Turkey's largest service providers, although users could still access the site through other means. In 2008, access to 287 websites was blocked upon the motion picture industry group AMPEC's applications based on the improved Copyright Law. An additional 1,600+ websites have been blocked following injunction proceedings initiated by the recording industry group MÜ-YAP since August 2005.

basic structure for service provider cooperation.<sup>15</sup> However, the article needs some amending and implementing “rules and procedures” to be issued by the Ministry to define specifically ISP responsibilities and end-user responsibilities. Unfortunately, in 2009, service providers became more reluctant to cooperate with right holders, notwithstanding that they still will cooperate with law enforcement when dealing with other online crimes, such as child pornography and narcotics sales. For example, due to lack of cooperation from ISPs, right holders cannot identify IP addresses of infringers, making enforcement and preparing cases for court extremely difficult. In 2009, local ISPs generally took action only upon an official order or request of a prosecutor’s office or the court.

More efficient and immediate cooperation should be established between right holders, law enforcement, and ISPs in Turkey. IIPA recommends that an IP cybercrime unit be developed and trained to handle cases specifically related to Internet-based piracy. IIPA also urges the government to amend the laws to provide for liability of ISPs as mentioned in Additional Article 4, and, if necessary, other laws, to foster more active cooperation of ISPs with right holders to prevent the use of networks for the commission of acts of copyright infringement, including but not limited to effective and fair policies regarding possible termination of accounts of repeat infringers. As an immediate first step to achieving this objective, the government should convene meetings of affected sectors to discuss ways to work cooperatively toward halting the transmission of illegal copyrighted materials on telecommunications networks.

**Speedier Adjudication of Appellate Court Decisions Sought, and Fewer Suspended Sentences:** IIPA notes positive developments in recent years with the establishment of 23 specialized IP courts,<sup>16</sup> and the establishment in Turkey of a special prosecutor’s bureau responsible for IPR investigations.<sup>17</sup> In addition, the Turkish government announced that the first annual meeting of “the Juridical Consultation Group for IPR” was held in Antalya, Turkey on November 22, 2008, with the participation of 56 judges and prosecutors from relevant civil and criminal divisions of the Supreme Court and specialized IPR courts, public prosecutors of the Supreme Court, public prosecutors assigned to investigate IPR infringements, public prosecutors charged with participation in trials in IPR criminal courts, and representatives of the Ministry of Justice. It is expected that these meetings will occur on a regularized basis, at least once a year. IIPA also notes several successful verdicts in recent years in copyright cases,<sup>18</sup> although too many cases have resulted in suspended sentences.<sup>19</sup>

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<sup>15</sup> Additional Article 4 of the Copyright Law No. 5846 specifically addresses the responsibilities of content and Internet service providers. In practice, 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 three days. If, after this period, infringement continues, a folder is assembled 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; and (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 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 also notes that Additional Article 4 provides for “rules and procedures” to be issued by the Ministry, but these rules and regulations still have not been completed.

<sup>16</sup> IIPA understands there are now 7 IPR Civil Courts and 7 IPR Criminal Courts in Istanbul; 4 IPR Civil Courts and 2 IPR Criminal Courts in Ankara; and 1 IPR Civil Court and 2 IPR Criminal Courts in Izmir. General civil and general criminal courts are competent to deal with IPR cases where specialized IPR courts do not exist.

<sup>17</sup> In the Government of Turkey IP Report, the government noted, “An announcement was made on “Specialization of Public Prosecutors Dealing with Preparatory Investigations of IPR Infringements” by the General Directorate for Criminal Affairs of the Ministry of Justice on November 7, 2008.

<sup>18</sup> Examples of past cases involved the Uçar CD Plant (2006) in which the defendant owner was sentenced to a term of imprisonment of 5 years, 7 months and 15 days, and was also fined approximately US\$120,000. Although the defendant appealed to the Supreme Court, his conviction and sentence sent a very important message to Turkey’s pirate community. In a second case, in March 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. In a third case, also in 2005, a street vendor was sentenced to 14 months imprisonment and a fine. In a fourth case, in September 2007, the owner of a shop called “The End” was sentenced to an unsuspended prison term of two years, four months by the Istanbul Specialized IP Court. The defendant had been raided 36 times by the motion picture association’s local group and the police (yielding cumulatively more than 130,000 pirate discs). The defendant was also ordered to pay attorney’s fees and costs. The defendant lodged an appeal. In a fifth case, after 25 raids on the pirate shop “Film Dunyasi/Gumus Dunyasi” operated by the Halilogullari family, in a landmark court decision at the Istanbul Specialized IP Court in 2007, the 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 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 more pirate product. The latest raid against the same shop was on December 18, 2008, and although the owner was in prison, the shop was full of pirate CD-Rs and DVD-Rs as well as covers. IIPA also notes that in the past several years, over 20 defendants sentenced to fines for copyright violations were sent to prison since they were unable to pay the fines.

<sup>19</sup> The current Copyright Law stipulates penalties ranging from 1 to 5 years imprisonment, or a judicial fine. The criminal IP courts tend to use their discretion not to imprison defendants, relying on Article 231 of the Criminal Procedural Law, which stipulates that the court can suspend the conviction if the penalty is for imprisonment of less than 2 years or a judicial fine. Although there are requirements for a suspension, e.g., the accused must not be a repeat offender for an intentional crime, courts frequently apply Article 231 to suspend sentences. Further, Article 51 of the Turkish Criminal Code stipulates that any penalty of

Notwithstanding these mainly positive developments, it is largely due to the very long appeal stage of copyright cases that recidivism remains the norm in Turkey. Due to continued court backlogs at the appellate 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. There are thousands of cases still under adjudication. In addition, some of the trained and experienced specialized IP judges have been reassigned to the regular courts.

Right holders continue to experience some difficulties related to court processes in Turkey. These include the following:

- **Criminal Search Warrants:** Search warrants for criminal raids are difficult to obtain due to procedural rules requiring them to be obtained not from the specialized IP courts but from an ordinary criminal judge. Some right holders find it easier to obtain search warrants and decisions in shorter time periods from the specialized IP courts. Public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case in some districts.
- **Presumption of Ownership:** The courts in small cities with relatively untrained judges often fail to apply a presumption of ownership of copyright to rights holder claimants, and impose burdensome documentary requirements on right holders to prove ownership. For example, 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. The notaries in Turkey charge inordinate fees. These requirements appear to be inconsistent with Article 15 of the Berne Convention.
- **Evidence collection:** The process of collecting evidence should be eased, including, if necessary, legal provisions to grant private sector experts the competence to identify infringing materials, rather than leaving this to external experts appointed by the civil courts; to the extent this is currently impossible under Turkish procedures, they should be changed to allow for it, since it will greatly ease adjudication of copyright piracy disputes.<sup>20</sup>
- **Disposition of Seized Goods:** Over the years, Police and Istanbul Inspection Committee warehouses have become filled with pirate materials. This situation impedes the Police's willingness to take more actions. This problem has been discussed with representatives of the Ministry of Culture and they leased a bigger warehouse to store pirate materials. In addition, the new Director of the Istanbul Inspection Committee has also promised to secure a larger warehouse for storage, so it appears the situation is headed in the right direction. IIPA understands that a new amendment concerning the destruction of pirate materials is in the preparatory stages, which would be a helpful development. In a related matter, in some cases, prosecutors, especially outside the major cities, have not accepted large quantities of evidence, resulting in pirate copies and evidence being left behind at raid sites with the accused.

**Book Piracy Problems Remains Severe:** While Turkey should be a good market for English language teaching (ELT) materials and a growing market for higher education textbooks, continuing illegal commercial photocopying and print piracy hampers the growth and further development of the legitimate market. Virtually all types of books are affected, including fiction, non fiction, school books, college textbooks, supplements, dictionaries, ELT texts, and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent in and around university campuses but law enforcement agencies do not have the authority to go into campuses to take action. It is thus left to university administrators to address book piracy, but to date, there have been no actions directed against infringing activities occurring on campuses. Though the Turkish Publishers' Association has raised

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imprisonment of less than 2 years can be suspended. IIPA urges the courts to rely on these provisions less in order to provide deterrence in Turkey against ongoing infringements and reduce piracy levels, but also recommends an amendment the Copyright Law to provide for both imprisonment and a fine.

<sup>20</sup> In line with the Twinning Project's goals, such changes would bring Turkey's practice into line with similar practices adopted in the European Union.

book piracy issues with the Ministry of Culture and the Turkish Police Force, neither agency has responded to these concerns. Even where a right holder does initiate an infringement complaint with the authorities to raid a suspected book seller, the authorities refuse to take action absent what they consider to be “solid” evidence of pirate activity. All too often, by the time the so-called “solid” evidence is gathered, it is too late to conduct the raid. Online piracy is also a growing concern. Sites hosted in Russia are making available for download pirated copies of dictionaries, online journals, textbooks and grammar reference books, and is thus a threat to the ELT market.

**Banderol System Undergoing Needed Changes:** With the current uncertainty regarding *ex officio* raiding authority, the banderol system currently provides the only clear *ex officio* authority in the Police and Inspection Committee members, pursuant to Article 81 of the Copyright Law. Some strengthened provisions were introduced in the 2001 copyright law, including the possibility of criminal penalties for unauthorized uses of banderols or dealing in works without banderoles. If the system is going to work, Article 81 needs to be fully enforced, the system has to be automated, and right holder associations such as MÜ-YAP and others must be permitted to administer banderols. The good news is that in 2009, the latter two of these developments appear to be coming to fruition.

The Ministry of Culture and Tourism finally completed the virtual automation system enabling online applications for registration of banderols, obtaining banderols, and certifying them. This system, however, has not worked for the music and motion picture industries thus far.<sup>21</sup> IIPA hopes this automated system, if used as a tracking mechanism to ensure that those who are not in compliance are subject to enforcement, will not subject right holders to formalities hindering enforcement. Second, while IIPA is pleased that the government agreed that “professional societies will be authorized to grant banderoles” under the terms of Circular No.2008/7 of the Prime Minister for Fighting Piracy dated January 12, 2008, there has not been any progress concerning the administration of banderol system by right holder associations.

For most industries, the banderol (sticker) system simply does not function well as an anti-piracy tool. There have to date been very few cases against the unauthorized use of banderols. All industries have reported at one time or another that some plants have had on hand unnecessarily large quantities of unused banderols, which were not secured adequately. This situation has eventually led to legitimate banderols leaking from the system and being applied to pirate product. Some of that product remains in circulation today. Publishers note that the banderole system does not work for books at all, in that it does not curtail piracy and creates additional burdens and costs associated with doing business in Turkey. The government has suggested possibly removing the banderole requirement as to published materials only, and IIPA would support such a change. It should also be noted 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>22</sup>

**Retail Piracy, Mobile Device Piracy Optical Disc “Burning,” Imports:** Pirate physical media remains an issue in Turkey, although the problems of physical piracy have been curtailed in part by the growth of Internet piracy. In recent years, there have been essentially three forms of pirate optical discs found in the Turkish market: local burning of pirated works onto recordable media, imports of pirate optical discs produced elsewhere (IIPA understands that while borders are better patrolled now, it remains easy for pirates to bring goods to Turkey from Iran

<sup>21</sup> It has been reported that the information regarding copyrighted materials and intellectual property right owners will be collected in a new database to be established for the purpose of tracking and protecting intellectual property rights. The data base will be available for the Ministry of Justice, the Ministry of Interior and the Undersecretariat of Customs.

<sup>22</sup> The following tracks banderole issuance in Turkey between 2005 and 2009:

Banderole Issuance in Turkey 2005-2009					
	2005	2006	2007	2008	2009
Local CD	12,526,294	13,558,571	13,495,433	10,358,441	9,869,386
Local Music Cassette	15,806,517	9,010,990	4,557,232	1,917,200	747,370
International CD	1,780,370	1,788,003	1,452,421	1,951,869	1,907,044
International Music Cassette	637,707	300,510	41,200	6,600	10,000
<b>TOTAL</b>	<b>30,750,888</b>	<b>24,658,074</b>	<b>19,546,286</b>	<b>14,414,110</b>	<b>12,533,800</b>

on the Eastern border, but with some discs also likely emanating from Asia), and to a lesser extent locally produced factory discs. Shops also have in recent years capitalized on Internet connectivity to engage in CD-R burning of content downloaded from the Internet, as well as burning compilations on-demand to CD-Rs.<sup>23</sup> Mobile device piracy harms right holders in Turkey. Typically, music, audiovisual works, software, and even published materials are loaded onto MP3 players, mobile phones, PDAs, iPods, portable hard drives, and the like, with stores uploading illegal content, including content illegally downloaded from the Internet, directly onto customers' mobile devices.

According to information provided by the Police, in 2009, 2,594 retail raids were conducted, resulting in the seizure of roughly 26 million pieces of pirated materials. In one very positive development, the Turkish Police, with much cooperation from the local industry, succeeded in dissolving an organized crime ring engaging in the sale of physical pirated product, much of which was sold or distributed through Internet sites requiring the use of codes and keywords.<sup>24</sup> The Turkish Police anti-piracy operations acted against the four organized criminal syndicates starting in May 2009, effectively resulting in their collapse due to the numbers of arrests made and amounts of illegal product seized.<sup>25</sup>

On January 16, 2009, the General Directorate of Security organized a meeting with police chiefs of all 81 cities of Turkey, to discuss ways of improving the fight against all forms of piracy. Police officials complained of ineffective stipulations in the laws and problems with the judicial process. Subsequent to that meeting, a decision was made to have discussions with the Ministry of Justice to make processes more efficient and speed up the judicial process, especially at the appellate level.

## TRAINING AND PUBLIC AWARENESS

**Trainings in 2009:** As in 2008, copyright owners continued organizing regular trainings and participated in other events in Turkey in 2009. As examples, the music industry provided the following ongoing training activities in 2009:

- Provided training with the Ministry of Culture and Tourism for the Istanbul Inspection Committee on the disposal of seized goods.
- Participated in a seminar in Antalya, Turkey, on enforcement of IPR on October 11 and 12, 2009, for police authorities from 81 cities, prosecutors, judges and collecting societies.
- Participated in a seminar organized on Alternative Dispute Resolution In Intellectual Property Law Disputes by FISAUM (Intellectual Property Rights and Research Center) and the Italian IPR Protection Desk on October 16 and 17, 2009 in Istanbul.
- Participated in a training program on anti-piracy enforcement for Bursa police authorities, in Bursa, Turkey.

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<sup>23</sup> On-the-spot music piracy remained a serious concern, especially in Turkey's tourist hot spots: hotels (including well known international hotels), bars and clubs. In this form of piracy, illegal CD-R copies of the music played at such venues are sold "on the spot." Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads.

<sup>24</sup> International Federation of Phonographic Industries, *Police raids hit four pirate gangs in Turkey*, June 17, 2009, at [http://www.ifpi.org/content/section\\_news/20090617.html](http://www.ifpi.org/content/section_news/20090617.html).

<sup>25</sup> The first operation on May 7, 2009 targeted 83 addresses in 17 cities throughout Turkey, resulting in the arrest of 29 people and the seizure of more than seven million pirate and counterfeit items. The second operation on June 1, 2009 saw 84 different sales points in Istanbul raided simultaneously. More than two million pirate or counterfeit items were seized and 46 people were suspected of infringing the Copyright Law. Eleven suspected gang leaders were arrested by the Police. Officers also raided production centers seizing molds and other equipment. The total estimated value placed on the seizures out of these raids by Turkish Police is more than US\$102 million. As a result of these operations, the main pirate network was disrupted and it is believed its most important members were arrested. In addition, police believe the biggest pirate market, the Tahtakale, has been weakened and the pirate market is diffused.

## COPYRIGHT LAW AND RELATED ISSUES

**Copyright Law and Related Laws Provide Mostly Adequate Protection, Including ISP Provisions:** Copyright protection in Turkey derives from Law No. 5846 (1951), which was last amended in 2008 by Law No. 5728. The 2001 amendments (Law No. 4630) brought Turkey's copyright regime considerably closer to international treaties standards and implemented many of the requirements of the WCT and the WPPT, and Turkey joined those Treaties effective November 28, 2008. IIPA understands that the Ministry of Culture and Tourism is working on a draft amendment to the Copyright Law and that some industry comments have been provided.<sup>26</sup>

IIPA hopes that the government will amend the law soon to protect technological protection measures against circumvention, circumvention services, and trafficking in circumvention devices. Pursuant to the annual program of the Prime Ministry State Planning Organization (DPT) and Turkey National Program on Undertaking *Acquis Communautaire*, the government plans to amend the Copyright Law further, to comply with Turkey's commitment of harmonizing its legislation with EU Directives. As mentioned above, Turkey is in the midst of its accession negotiations to the European Union. Chapter 7 of the accession package obligates Turkey to fully implement EU directives on copyright and related issues.<sup>27</sup>

**Laws Related to Enforcement Need Enhancement:** There are several areas in which the laws in Turkey still need enhancement so that the laws can be adequately enforced. These changes are necessary to ensure that Turkey can meet its international obligations, including its commitments to the EU in its accession negotiations. These commitments include ensuring that "enforcing bodies dispose of sufficient administrative capacity to enforce the rights concerning the fight against piracy and counterfeit," and ensuring "a satisfactory track record of investigations, prosecutions and judicial treatment of violations and an improved performance concerning the effective enforcement of Intellectual Property Law, including a substantial reduction in the volume of counterfeited and pirated goods exported to the EU." Recommended improvements include, but are not limited to, the following issues:

- **Ex Officio:** As noted above, IIPA hopes the government will issue a formal circular confirming that the February 2008 amendment (Law No. 5728, February 2008) did not remove *ex officio* raiding authority from the Police as to piracy in public places and street piracy.
- **Mandate Imprisonment "and" a Judicial Fine as in the Law Prior to the 2008 Amendment:** The Copyright Law should also be amended to provide criminal penalties including imprisonment "and" a judicial fine as is the case in the Trademark Decree and as was the case in the Copyright Law prior to the 2008 amendment.

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<sup>26</sup> For example, industry comments have focused on some of the following issues:

- **Private copy levies:** Industry has noted that a private copy exception is described in Article 38 but the wording appears to be inconsistent with international treaties due to the fact that it doesn't include the condition of "fair compensation of the rightholders" in exchange for availing oneself of the exception. Meanwhile, Article 44 authorizes the MOCT to collect fees from reproduction equipment but this amount is not distributed to right holders and is controlled by MOCT.
- **Realignment of retransmission rights:** Industry has noted that Article 80 is unclear and should be rewritten. Particularly, definitions of retransmission, cable retransmission, and retransmission by satellite should be added to the current law, and legal arrangements should be made which will ensure that all categories of organization dealing with retransmissions, such as cable operators and digital platforms, must be subject to licensing activities.
- **The responsibilities of ISPs:** Industry notes that the existing law gives ISPs minimum responsibility with respect to copyright infringement, but the Internet Law authorizes prosecutors to act to prevent certain designated illegal activities. Copyright infringement should be designated under that statute.

<sup>27</sup> Turkey participated until late 2007 in a European Commission "twinning partnerships" in which funding is given to Member States to work on institution building (legislation, administration, and implementation), and in respect of intellectual property rights, Turkey entered into a twinning partnership with Greece. 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, 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. Among the issues raised in the Information Society Directive implementation work area were 1) provisions on technological protection measures which would effectively implement the WCT and WPPT and ensure harmony with the Directive; 2) a reproduction right that is made expressly applicable to related rights; 3) provisions on exceptions, including an express provision stating the three-step test shall be applied to all exceptions and limitations, and narrowing other exceptions to meet international standards; and 4) ensuring provisions on private copy levies are in line with international standards, and in accordance with EC Directive 2001/29, to provide, *inter alia*, for the direct distribution of the relevant remuneration to right holders.

- **Criminalize Copying Without Regard to Commercial Intent:** After the 2008 amendments, it has become uncertain whether or not copyright infringements (e.g., unauthorized reproduction or distribution or other unlicensed use) committed without a commercial intent are subject to criminal penalties. An amendment to the Copyright Law should confirm that copying, distributing, or unlicensed use of all kinds of copyright materials can be considered a crime regardless of commercial purpose.<sup>28</sup>
- **Include Copyright Infringement in Law on “Internet” Publications, and Issue Long-Awaited Regulation to Supplement Additional Article 4, to Help Foster Greater Service Provider Responsibility:** The enactment of Additional Article 4 in 2004, along with Law No. 5651 Regarding Regulation of Publications on Internet and Struggle With the Crimes Committed Through Such Publications in 2007, provided what was thought to be a very strong takedown provision to which service providers must adhere. However, infringement of intellectual property rights was not explicitly included. Additional Article 4 foresaw the introduction of a new regulation in this field, but so far, nothing has been put forward.
- **Reinstate Secondary Liability:** The provision in the old Copyright Law prior to its amendment in 2008 should be reinstated, such that liability can attach to company managers and shareholders who do not take necessary precautions to prevent infringement.

**Private Copy Levy System:** Since Turkey has chosen to implement a private copy levy, it is imperative that the levies are in fact collected and fairly distributed to right holders. Unfortunately, right holders do not receive any of the levies collected. Instead, the Ministry of Culture and Tourism collects and keeps the fees paid for recording equipment and blank media.<sup>29</sup> Moreover, MOCT has been inefficient at best at levy collection. The recording industry estimates on the basis of import statistics from the Turkish Statistics Institute that over US\$20 million could have been collected on this basis. The amounts that are collected are not 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 international conventions and EU Directives. IIPA understands that the EU experts in the EU accession consultation process have determined that MOCT must provide the private levies to right holders, but this still has not occurred.

**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” (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.<sup>30</sup>

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

<sup>28</sup> In the United States, Section 506 of our Copyright Law provides that it is a crime to infringe a copyright willfully regardless of intent under prescribed circumstances.

<sup>29</sup> The current system is organized pursuant to the Ministry of Culture and Tourism “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” (April 13, 2006).

<sup>30</sup> The positive elements of this Regulation have been noted in previous IIPA reports, e.g., International Intellectual Property Alliance, *Turkey*, at <http://www.iipa.com/rbc/2009/2009SPEC301TURKEY.pdf>.

proved to be the case, since back in 2005, MOCT could not get all the optical disc plants to register. One category of operators having to be certified is companies engaging in Internet distribution. We underscore that legitimate businesses with legitimate business models in the Internet environment will be burdened by this certification requirement, while 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 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, including individual liability to pierce the veil of the company engaging in production without a certificate.

RTÜK (Radio and Television Supreme Council of Turkey)<sup>31</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. This is so since it has not enforced against broadcasters who broadcast without a license.<sup>32</sup> Under the Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$82,000) up to TL250,000 (US\$164,000) and closure of the radio or TV station.

## **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, including that the country provide “adequate and effective” copyright protection. Turkey enjoys enormous benefits under this program. In 2008, \$916.7 million worth of Turkish goods, or almost 19.8% of Turkey’s total imports into the U.S. enjoyed duty-free GSP treatment. In 2009, \$645.5 million worth of Turkish goods, or almost 17.7% of Turkey’s total imports into the U.S. enjoyed duty-free GSP treatment. Turkey must meet the discretionary criteria for adequate and effective copyright protection under the GSP statute in order to continue to qualify for this duty-free benefit.

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<sup>31</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>32</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 royalties.