

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List in 2011.<sup>1</sup>

**Executive Summary:** The Government of Turkey continues to make incremental progress in the fight against piracy and the development of a modern IP system. Nonetheless, the value of unlicensed software use in Turkey is enormous, book piracy continues to hinder the development of the publishing industry, and Internet piracy has grown in recent years, on top of traditional physical (OD) piracy. The EU accession process and the “Twinning Project” with EU Member State Governments has led to engagement on enforcement issues and an invigorated legislative process. Legislation is expected in 2011 to complete EU Directive implementation, including implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Meanwhile, the 2009 launch of the “Framework for Strategic Economic and Commercial Cooperation” will hopefully lead to greater engagement between the United States and Turkey on important copyright and enforcement issues. 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.”

### Priority Actions Requested in 2011:

#### Enforcement

- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.
- Increase the number of specialized IP courts throughout Turkey in cities other than Istanbul, Ankara and Izmir, and address and eliminate hurdles experienced in the different IPR courts.
- Ensure courts issue preliminary court injunctions in a timely and effective manner.
- 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 an active role in significantly reducing Internet piracy by, *inter alia*, establishing a special division within the IP Police.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority against sales of copyrighted materials on streets and in public places as well as banderole violations.
- Take significant steps to legalize large- and medium-sized businesses engaged in end-user software piracy.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.

#### Legislation

- Amend the copyright law further to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (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.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees, including implementation Circular No. 2008/17.

<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/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



## PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Previous IIPA reports have discussed piracy and enforcement challenges faced in Turkey in detail. The following provides brief updates on piracy and enforcement issues over the past couple of years (failure to mention a specific issue does not signify that it has been resolved).

Enterprise End-User Software Piracy and Hard Disk Loading: Unauthorized use of business software by corporate end-users causes significant losses for copyright holders in Turkey. The preliminary estimate by research firm IDC (prepared for BSA) of the PC software piracy rate in Turkey in 2010 is 62%, only one point lower than in 2009, with the commercial value of unlicensed U.S. vendor software estimated to be \$235 million.<sup>2</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. A third problem noted in Turkey involves software such as serial crackers and key generators used to gain unlawful access to software. This is reportedly a common problem in Turkey, and a legislative fix to outlaw circumvention of technological protection measures or trafficking in circumvention devices is needed. Reductions in business software piracy would result in positive gains for Turkey’s economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Turkey by 10 percentage points over four years would generate \$783 million in GDP, \$154 million in additional tax revenues and 2,180 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield over \$1 billion in GDP and \$205 million in additional tax revenues.<sup>3</sup>

The business software industry reported generally good cooperation from the dedicated Special IP Police established in the larger cities to combat enterprise end-user software piracy. Business software right holders collaborate during raids, which are conducted on the basis of search warrants, against resellers of pirated software and enterprise end-users of unlicensed software. In 2010, approximately 50 raids were conducted against corporate end-users. Improving cooperation and awareness in the smaller cities and suburbs could increase efficiency and reduce end-user software piracy levels throughout Turkey.

Internet Piracy Explodes in Turkey, and Mobile Increases Dramatically: Over 41% of households in Turkey had Internet as of August 2010, and 43% of the population (roughly 33.5 million) use the Internet, according to the Turkish Statistical Institute.<sup>4</sup> Around seven million of those users had broadband access as of June 2010, according to the OECD. Mobile penetration in the country has also grown despite over-regulation, and the top mobile provider, Turkcell, reported it had six million 3G users accessing the Internet using their mobile phone services as of July 2010, so the overall number of mobile web users is undoubtedly higher.<sup>5</sup> As a result of these developments, Internet usage of copyright materials has begun to displace physical product in Turkey, and Internet piracy has significantly worsened. Internet piracy in Turkey takes on many forms, including illegal P2P filesharing, pirate video hosting sites, deeplinking sites to pirate materials, forums providing direct download links to pirate materials, cyberlockers hosting pirate content, and torrent sites (employing swarm technology for faster downloads of pirate material). All creative content owners – of music, movies, business and entertainment software, and books – are victims of Internet piracy. Sites (suspected of being hosted outside Turkey) make available for download pirated

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<sup>2</sup> BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Turkey. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>3</sup> Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Turkey*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_turkey\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_turkey_english.pdf).

<sup>4</sup> Turkish Statistical Institute, Prime Ministry, Republic of Turkey, *Information and Communication Technology (ICT) Usage Survey in Households and Individuals*, 2010, Press Release No. 148, August 18, 2010, at <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=6308>.

<sup>5</sup> Ercan Ersoy, *Turkey’s Mobile Leader Blames Regulator*, Hurriyet, July 29, 2010, at <http://www.hurriyetaidailynews.com/n.php?n=turkey8217s-mobile-leader-blames-regulator-2010-07-29>.

copies of dictionaries, online journals, textbooks and grammar reference books, and are thus a threat to the English language teaching (ELT) market. The trading of hard goods and circumvention devices through websites, mostly auction sites, or through newsgroups, also remains of concern. During 2010, Entertainment Software Association vendors detected 1.26 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through Internet Service Providers located in Turkey.<sup>6</sup> Breakdowns by ISP show that Turk Telecom subscribers account for approximately 79% of this activity occurring in Turkey.

In previous years, IIPA members reported cooperation among service providers in fighting Internet piracy, as "Additional Article 4" of the Copyright Law (added in 2004) provides a basic structure for service provider cooperation.<sup>7</sup> The Government of Turkey, in its 2010 Special 301 Submission noted, "[a]ccess is blocked by court to 213 web sites regarding music which have breached the law. 766 denunciations in music have been made regarding copyright infringements. With the warning of the right owner collective societies, the works subject to infringement have been removed from the content."<sup>8</sup> While this continued enforcement cooperation is welcome, the main issue faced in enforcement of Internet piracy is identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them. More efficient and immediate cooperation should be established between law enforcement and ISPs to avoid infringers concealing their identity, and local ISPs should work together with law enforcement and not demand an official order or request of a prosecutor's office or a court before offering assistance. Legislation reconfirming ISP responsibility and fostering cooperation could be important to shift ISPs from their current tendency not to cooperate. 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.

Book Piracy 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, nonfiction, school books, college textbooks, supplements, dictionaries, ELT texts, and scientific, technical and medical (STM) materials. Illegal photocopying is especially prevalent on and around university campuses but law enforcement agencies remain reluctant to take action on campuses. 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 book piracy issues with the Ministry of Culture, the Ministry has not responded to these concerns. However, there has been greater cooperation with the Turkish Police Force resulting in raids against entities engaged in unauthorized photocopying activities.

Retail Piracy (Optical Discs), Mobile Device Piracy, "Mod Chips": Physical piracy remains a major hurdle to the growth of legitimate creative industries in Turkey, notwithstanding significant raiding and seizures of pirated products by the authorities. Past IIPA reports have detailed the migration to "burned" recordable discs<sup>9</sup> from imported factory discs (although these still can be found), and mobile device piracy, through which 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. IIPA has highlighted the decrease in street sales over the years due to the

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<sup>6</sup> These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>7</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 more than one week (to Turkish Telecom), and access to the sites in question is blocked.

<sup>8</sup> Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2010 (on file with IIPA).

<sup>9</sup> Shops 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. Illegal CD-R copies of music played at tourist hot spots, hotels, bars and clubs are sold "on the spot." Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads.

ban on illegal street stalls. One recent phenomenon noted is the increase in sale and servicing of “mod chips” installed into videogame consoles to play illegal games. Of course, the “mod chips” being installed would have little value without the pirated games, and there is continued evidence of imports of these into Turkey. The increase in “mod chip” circumvention highlights the need for a legislative fix prohibiting the act of circumvention of TPMs (like the handshake in consoles which is broken by mod chips), and the trafficking in circumvention devices (including the service of installing mod chips).

**Banderol Enforcement Results in Huge Seizures, But Authorities Otherwise Lack *Ex Officio* for Piracy in Streets and Public Places:** Enforcement against physical piracy has generally been strong in Turkey, with thousands of raids and seizures of millions of discs again in 2010. Most raids and seizures in Turkey are effectuated through the banderol system, which provides the only clear *ex officio* authority in the Police and Inspection Committee members, pursuant to Article 81 of the Copyright Law. IIPA has noted in past reports some concerns about the integrity of the system,<sup>10</sup> but also, the need for an automated system and for industry representatives to be able to participate in the administration of the banderol system. It seems that both these developments are occurring. In 2009, the Ministry of Culture and Tourism completed the virtual automation system enabling online applications for registration of banderols, obtaining banderols, and certifying them. In the Government of Turkey’s 2010 Special 301 Submission, they noted, “software regarding automation system has been received and the background of a common database has been established ... in order to establish an efficient rights chasing system; a system will be launched which would be open to the access of all stakeholders of the intellectual property system and will be using an electronic signature background, and all registration and banderole operations will have to be approved by the relevant collective society.”

The Government of Turkey indicated in its 2010 Special 301 filing that in 2009, out of more than 3,600 raids, 1.3 million non-banderoled CDs and VCDs were seized (a downward trend from previous years), and that 1.7 million non-banderoled DVDs were seized (more than three times as many as in 2007). The biggest change in 2009 was the increase in seizures of suspected pirate books, which topped 1.9 million in 2009 (compared with just 243,000 in 2007 and 577,000 in 2008). These numbers are impressive, but they also indicate the continued size and scope of physical piracy in Turkey. Confirming *ex officio* authority in the specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), for street piracy and piracy in public places, would complement the Police and Inspection Committee members’ current activities under the banderol system.<sup>11</sup>

**Specialized Courts Working, More Needed in Underserved Areas:** IIPA commends the Government of Turkey for its establishment of 23 specialized IP courts,<sup>12</sup> and the establishment of a special prosecutor’s bureau responsible for IPR investigations.<sup>13</sup> IIPA members would be greatly served by the establishment of specialized courts in other areas, i.e., in cities other than Istanbul, Ankara and Izmir. IIPA has noted several successful verdicts in recent years in copyright cases in previous submission; nonetheless, we note some continuing problems. The

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<sup>10</sup> Over the years, IIPA has raised concerns about leaks of banderols, and has questioned whether the system functions well as a deterrent. There have been very few cases against the unauthorized use of banderols, and 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. The Government of Turkey in its 2010 Special 301 Submission notes, “The Ministry of Culture and Tourism published a circular for the Provincial Culture and Tourism Directorates in order to enable the proper assessment of the banderole and certificate applications and eliminate the inconsistencies. In the circular, a number of measures were involved, including the rules that “[a]ll the copies of the work shall be physically inspected before the banderoles are given,” and “[f]or the suspected banderole applications, the General Directorate shall be informed and the Inspection and Certificate Commission shall be activated.” See *supra* note 8.

<sup>11</sup> 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 were unsure whether the law provided them with such authority. Other districts 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, i.e., that Police may still exercise *ex officio* authority as to street piracy or piracy in public places.

<sup>12</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>13</sup> In its 2010 Special 301 Submission, the Government noted, “a special bureau responsible for IPR investigation has been established in the public prosecutor’s offices of seven cities (Adana, Bakirkoy, Beyoglu, Kadiköy, Kartal, Istanbul, Izmir) where annual number of investigations on IPR is more than 500,” and that “[i]n 234 public prosecutor’s offices, one or more than one public prosecutors have been assigned for IPR investigations (There are totally 707 public prosecutor’s offices in Turkey).” See *supra* note 8.

Government of Turkey, in its 2010 Special 301 Submission, noted court statistics for 2007 and 2008. The 2008 case disposition statistics show clearly that, other than Istanbul and one court in Izmir, the backlog of both civil and criminal cases is growing.<sup>14</sup> The Government's statistics identify some other glaring problems, most notably, the lack of overall deterrence in results.<sup>15</sup> Other problems include 1) most criminal cases end in suspended sentences which encourages recidivism;<sup>16</sup> 2) many sentences are reversed on appeal which encourages recidivism; 3) preliminary court injunctions are difficult to obtain (this is a general problem experienced in Turkish courts); 4) obtaining a criminal search warrant in some districts is difficult;<sup>17</sup> 5) there is no Berne-compatible presumption of ownership;<sup>18</sup> 6) private sector experts are not permitted to identify pirate materials (at present, external experts are appointed by the civil courts);<sup>19</sup> 7) there remain difficulties in storing large amounts of pirate materials.<sup>20</sup>

## COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Turkey derives from Law No. 5846 (1951), which was last amended by Law No. 5728 (2008). The Government of Turkey's 2010 Special 301 Submission indicated, "[t]echnical study regarding the Draft Law Amending Certain Articles of Law No: 5846 have been completed in order to accomplish full harmonization with the EU Acquis. Draft Law will be presented to the opinions of relevant institutions and collective societies in the following period."<sup>21</sup> Some IIPA members' industry comments have already been provided to the government,<sup>22</sup> and apparently a new consultation process has begun with a Ministry of Culture draft, which is expected to be considered in 2011.<sup>23</sup> There are several points which the new law (or related regulations, circulars, etc.) should address in

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<sup>14</sup> For example, the Istanbul courts are dealing with the backlog through disposing of criminal cases at almost a 2:1 ratio, but they are still transferring many thousands of cases to the next year's docket. Other courts in Ankara, Izmir, and elsewhere did not fare as well. Of course, disposition of large numbers of cases does not result in deterrence but hopefully over time may lead there.

<sup>15</sup> For example, in 2007, of the 6,484 criminal cases under Law No. 5846, from which 6,693 were accused, over one-third of the cases resulted in acquittal or dismissal. Of the convictions, over 2,700 resulted in imprisonment and almost 2,000 of which resulted in a fine, but of those, we know that most sentences were suspended or were appealed. It is telling that of the over 200 civil cases under Law No. 5846, there were only four settlements, but over 100 dismissals or other negative dispositions. The Government of Turkey's Submission also notes that the Supreme Court upheld 40 copyright case decisions, but reversed 30 copyright case decisions, but this information is practically of little use without knowing the specifics of these cases.

<sup>16</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 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>17</sup> In some districts, public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case. In those districts, search warrant applications must be made to standard criminal courts (via prosecutor's offices). The criminal courts in some instances have been reluctant to grant search warrants without substantial evidence, which can only be obtained via the raid, hence, a Catch 22 situation is encountered.

<sup>18</sup> Article 75 of the Copyright Law requires submission of documents that prove ownership. IIPA members have reported burdensome documentary requirements, such as the demand on U.S. publishers that notarized translations of original contracts between the author and publisher be produced in order to prove copyright ownership for each title, at quite substantial fees. Article 75 and these requirements in practice appear to hinder the right holder from being able to exercise its rights and thus may collide with Article 15 of the Berne Convention.

<sup>19</sup> In line with the EU Twinning Project's goals, such changes would bring Turkey's practice into line with similar practices adopted in the European Union.

<sup>20</sup> 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 located a bigger warehouse to store pirate materials. In addition, as we reported in the 2010 report, the 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 an 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.

<sup>21</sup> See *supra* note 8.

<sup>22</sup> Industry comments focused on the following issues, among others:

- 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 right holders" 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>23</sup> From our local counsel: The Ministry of Culture shared a draft law amendment with the right holder associations in 2010 to collect their views, but this may not be the final one. The current status is that the draft is at the Ministry; waiting to be delivered to the Parliament for initiation of the enactment process. Due to the approaching general elections, the draft law amendment may not be passed by the Parliament in the first half of 2011)

particular, including the following:

- Fully Implement the WCT and WPPT: Turkey joined the WCT and WPPT effective November 28, 2008. The law should be amended to fully implement those treaties, including strong and effective protection against circumvention of technological protection measures (defined to include access controls and controls on the exercise of exclusive rights), and prohibitions on the trafficking in circumvention devices and technologies or providing circumvention services.
- Confirm *Ex Officio* Authority as to Street/Public Place Piracy: The government should confirm *ex officio* authority for street and public place piracy to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police), e.g., by issuing a formal circular, so they can combat copyright such piracy without need of a complaint.
- Availability of 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.
- Foster Effective Enforcement Against Online Infringement: The enactment of Additional Article 4 in 2004, along with Law No. 5651 Regarding Regulation of Publications on Internet and Combating Crimes Committed Through Such Publications (2007), provided what was thought to be a basis for notice and takedown in Turkey. Article 9 of Law No. 5651 provides that persons who claim their rights were infringed may apply to a content or hosting provider for removal of the content, with takedown within 48 hours, and judicial review upon a refusal to takedown (this is a weakness since most notice and takedown systems call for automatic takedown upon the filing of a proper notice). However, infringement of intellectual property rights was not explicitly included. IIPA 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 repeat infringers.
- Criminalize Infringement Without Regard to Commercial Intent: 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.
- Reinstate Manager/Shareholder 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>24</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.

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<sup>24</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).

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. Unfortunately, the government has not implemented the Circular. Public sector administrators should train users to avoid the use of pirated software. Some 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 powerful example for businesses and consumers in Turkey.

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>25</sup> Unfortunately, the Regulation suffers from two major weaknesses: 1) the certification authority is overly broad, veering into legitimate businesses with legitimate business models (in sectors where the risk of piracy is low), and which in the Internet environment will be burdened by the certification requirement while those engaged in online piracy will ignore it;<sup>26</sup> and 2) 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.<sup>27</sup>

RTÜK (Radio and Television Supreme Council of Turkey)<sup>28</sup> Failure to Enforce Licensing As Pre-Condition to Broadcast: The 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. RTÜK has not enforced against broadcasters who broadcast without a license.<sup>29</sup> Under the Law, the failure to sign licensing agreements with collecting societies should be subject to administrative fines from TL125,000 (US\$78,700) up to TL250,000 (US\$157,420) and closure of the radio or TV station.

## TRAINING AND PUBLIC AWARENESS

Prior years' IIPA reports have detailed descriptions of IIPA members' involvement in training and public awareness activities in Turkey. In the Government of Turkey's 2010 Special 301 Submission, they reported training and capacity building activities, both domestic programs<sup>30</sup> and those run in conjunction with the EU Twinning

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<sup>25</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>.

<sup>26</sup> The Regulation covers "[m]ovie theatres and similar places undertaking public display and transmission of cinematographic films," "[p]remises ... importing, distributing or selling empty fixing materials," "[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," and companies engaging in Internet distribution. This broad certification authority undercuts the purpose of the legislation, since legitimate businesses will be burdened 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 the optical disc plants to register.

<sup>27</sup> The remedies for operating an optical disc plant without certification should 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.

<sup>28</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>29</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.

<sup>30</sup> Domestic programs reported by the Government of Turkey included:

Project.<sup>31</sup> In 2010, IIPA members continued offering training programs for judges, public prosecutors and police, and frequently work together with competent authorities through organizing law enforcement operations, attending seminars, sponsoring awareness activities, etc.

## GENERALIZED SYSTEM OF PREFERENCES (GSP)

The GSP statute expired on December 31, 2010. In the past, Turkey enjoyed preferential trade benefits under the program. One of the criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2010, almost US\$793 million worth of Turkish goods entered the U.S. under the duty-free GSP code, accounting for almost 19% of its total imports to the U.S. Turkey needs to endeavor to meet the adequate and effective test under the statute to remain eligible, once it is reauthorized, to continue to receive favorable treatment under the GSP program.

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- “Enforcement Problems on Fight against Intellectual Property Right Frauds,” organized in cooperation with the Ministry of Culture and Tourism in Antalya, in October 2009, including a total of 168 participants, including DG Copyright and Cinema, 110 police chiefs, prosecutors, judges, Municipality Police and Inspection Commission members.
  - IPR awareness training in Istanbul, İzmir and Bursa, including 173 police chiefs and 458 police officers.
  - Police and three judges participation in TAIEX Training Seminar on the fight against Intellectual & Property Right Frauds organized in Athens/Greece in June 2009.
  - Police participation in Fifth INTERPOL IP Crime Training Seminar in Ostia, Rome, Italy in November 2009.
  - Police participation in Inter-Regional Symposium on Enforcement of Intellectual Property Rights (WIPO, State Office of Industrial Property of Republic of Macedonia (SOIP)), in Macedonia/Skopje in October 2009.
  - Police participation in Europol Working Group meeting on Intellectual Property Rights Infringements, in Europol/Hague in October 2009.

<sup>31</sup> The Twinning Project's 2009 program, “*Support to Turkish Police in Enforcement of Intellectual and Industrial Property Rights*” (TR.06.03.08-TR061BJH05) was reportedly conducted in order to “strengthen the administrative and technical capacity of the Turkish National Police in the enforcement of intellectual and industrial property rights and improve cooperation with other enforcement bodies and right holder associations, in line with European Union legislation and practices.” The institutions involved in the Project included the Turkish National Police (State Security Department, Anti-Smuggling and Organized Crime Department and Criminal Police Laboratory Department), the Ministry of Justice (General Directorate of the European Union), the Ministry of Culture and Tourism (General Directorate of Copyright and Cinematographic Works), Undersecretariat of Customs (General Directorate of Customs) and the Turkish Patent Institute. The Project included twenty activities and involved 702 participants. Included among the components of the program were “Strengthening the capability of the police in the fight against piracy and counterfeiting (including Assessment of current awareness and capacity improvement needs on IPR of different provincial police units, judiciary and selection of adequate trainees.” Also included were “train the trainer” programs and “specialist training seminars” involving police chiefs, judges, prosecutors, Customs officials, police from the “Provincial Directorates State Security Divisions,” and police from “IPR Offices of Adana, Ankara, Bursa, Diyarbakır, İzmir and Istanbul Provincial Directorates,” and six training seminars for Police through an “Intellectual Property Crimes Specialist Training” program for 193 police officers from 81 Provinces.