

TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Turkey remain on the Watch List.¹

Executive Summary: The copyright system in Turkey continues to show incremental progress, but has not entirely kept pace with technological developments or been effective enough to significantly reduce most forms of piracy. The value of unlicensed software use in Turkey remains high, and rapidly expanding Internet piracy has stunted the growth of the music and other industries in Turkey. In addition, book piracy continues to hinder the development of the publishing industry, while physical optical disc piracy has seen slight declines year-on-year. One bright spot in the system remains good cooperation with Special IP Police units, especially in larger cities, in dealing with physical piracy. The whole system is weakened, however, by burdensome court processes, long delays in adjudication of cases, and overall lack of IP expertise within the judiciary. In addition, government agencies, enforcement authorities, and judicial officers are ill-prepared to deal with rapidly expanding Internet-based piracy, leaving enforcement against Internet piracy phenomena largely to industry self-help. Without a legal infrastructure in place, ISP cooperation is rare. New reported amendments to the Regulation of Publications on the Internet and Suppression of Crimes Committed² weaken certain aspects of dealing with online copyright infringements. Discriminatory hurdles have been placed in the way of right holders with respect to their participation in collecting societies, and the Turkish Government also fails to administer private copy levies in a way that fairly compensates right holders or otherwise benefits the enforcement of their rights in Turkey. Notwithstanding negotiations with the EU, and the Framework for Strategic Economic and Commercial Cooperation with the United States,³ copyright issues have not to date been successfully addressed, leading to significant harm to the copyright industries.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Increase the number of specialized IP courts throughout Turkey, e.g., especially outside Ankara, Istanbul, and Izmir,⁴ and address and eliminate hurdles experienced in the different IPR courts, including delays in the issuance of preliminary court injunctions, misapplication of the presumption of copyright ownership (e.g.,

¹For more details on Turkey's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Regulation of Publications on the Internet and Suppression of Crimes Committed, Law No. 5651.

³The EU accession process and the "Twinning Project" with EU Member State Governments have led to engagement on enforcement issues and an invigorated legislative process, and it had been hoped that this process would lead to legislation in 2011 to complete EU Directive implementation, including implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Meanwhile, it was hoped that the 2009 launch of the "Framework for Strategic Economic and Commercial Cooperation" would 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."

⁴In the Government of Turkey's submission in the 2011 Special 301 process, the government notes:

There are (11) eleven criminal courts and (12) twelve civil courts, in total (23) twenty three (*In Istanbul: 7 IPR civil courts, 7 IPR criminal courts; in Ankara: 4 IPR civil courts, 2 IPR criminal courts and in Izmir: 1 IPR civil court, 2 IPR criminal courts*) specialized IPR courts in Turkey. These courts are established in Ankara, Istanbul and Izmir, the cities chosen according to the level of infringements of IPR. ... General civil courts and general criminal courts are competent to deal with IPR cases where specialized IPR courts have not been established yet.

Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2011, A.2.1.1 (on file with IIPA).



requiring proof of title), and rejection of search warrant requests due to unreasonably high evidentiary requirements for probable cause.

- Speed criminal trial processes in appeals of copyright cases, and work to defeat recidivism by significantly reducing the number of suspended sentences and/or amnesties.
- Take a more active role in significantly reducing Internet piracy, by, *inter alia*, establishing a special division within the IP Police and educating judges and prosecutors on its technological aspects.
- Reconfirm through a formal circular that Police and Inspection Committee members have *ex officio* raiding authority against sales of copyrighted materials on the streets and banderole infringements.
- 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.
- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.

Legislation

- Amend copyright law consistent with the comments made in this submission, including, among other changes:
 - Fully implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
 - Making necessary amendments to ensure that copyright piracy is included among cybercrimes;
 - confirming/restoring *ex officio* authority to specialized IP units under the Ministry of Internal Affairs and Security General Directorate of the Police for street piracy and banderole infringements; and
 - Ensuring that ISPs comply with notices to take down infringing materials, have in place effective and fair policies to address non-hosted infringements and repeat infringers, and provisions to discourage web advertising and payment processors in association with infringing sites. Legislative amendments should establish a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent).
- Ensure liability for corporate entities so that companies and managers face consequences for infringements carried out by a corporation (e.g., in the case of end-user piracy of business software).
- Make copyright piracy a predicate offense in organized crime law that triggers remedies to deal with organized crime, including freezing assets implicated in criminal pirate enterprise.
- 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, disburse the monies to the proper right holders, or use the money that is collected for useful anti-piracy purposes or in ways helpful to those right holders.
- Amend the Collective Management Organization (CMO) Regulations to ensure that foreign right holders are permitted to participate in collecting societies (i.e., there should be no local establishment criterion), that they receive transparency, fair treatment, and efficiency, and that the laws do not create, e.g., through a registration requirement, a formality inconsistent with Turkey's international obligations under the Berne Convention and the TRIPS Agreement.
- Take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees, including implementation of Circular No. 2008/17 (Prime Ministry Circular on Legalization of Software Use in Public Entities).

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, Hard Disk Loading, and Government Legalization: Unauthorized use of business software by enterprise end-users causes significant losses for copyright holders in

Turkey.⁵ Piracy is particularly bad in the industrial regions and cities where economic activities are more intensive, such as Istanbul, Ankara, and Izmir. 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 circumvention 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 the circumvention of technological protection measures or trafficking (or servicing) 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.⁶

The business software industry continues to report generally good cooperation from the dedicated Special IP Police units 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 (obtained rapidly and with minimal cost), against resellers of pirated software and enterprise end-users of unlicensed software. In 2011 (as in 2010), BSA conducted approximately 50 raids against corporations suspected of using software without licenses (or under-licensing), with BSA members conducting many additional raids on their own. Improving cooperation and awareness in the smaller cities and suburbs could increase efficiency and reduce end-user software piracy levels throughout Turkey. There remain several problems with enforcement in Turkey, which are not singular to the software industries. For one, police take *ex officio* actions only if copyrighted material is sold in public places, so enterprise end-user piracy actions still require complaints of right holders. Another weakness remains the court system, since some judges and prosecutors remain unaware of the technical specifics of software copyright protection. Thus, right holders report difficulties in obtaining injunctions and search warrants from some courts.

Unfortunately, it also remains the case in Turkey that many public authorities, both central and local, use illegal software products. In 2008, the Prime Minister issued a *Circular on Legalization of Software Use in Public Entities*, Circular No. 2008/17 to address this issue. However, this Circular has not been widely implemented. The Turkish Government should take urgent action to legalize all use of software in the public sector by government agencies, employees, contractors and grantees.

Internet Piracy Explodes in Turkey, and Mobile Increasing Dramatically: Turkey has approximately 35 million Internet users as of mid-2010.⁷ The number of broadband subscribers skyrocketed to almost 13 million users in 2011. According to the largest ISP, TTNET, which did a survey on June 21, 2011 (the longest day of the year) of Internet usage patterns, video streaming was the most popular usage of subscribers, at 28.97% of the traffic, followed by P2P downloads at 13.80% of the traffic, and “web download” at 6.54% of the traffic. In all, just these three together accounted for about half (50%) of all web traffic in Turkey (see graphic reproduced just below).⁸ Mobile penetration in the country has also grown despite over-regulation, and the top mobile provider, Turkcell, reported it

⁵BSA’s 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers’ share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Turkey was 62% (down from 63% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$284 million (up from US\$228 million in 2009). These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

⁶Business 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.

⁷Over 41% of households in Turkey had Internet as of August 2010, and 43% of the population (roughly 33.5 million) used the Internet, according to the Turkish Statistical Institute. 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>.

⁸YouTube use was another 8.47%. Sahin Sen, *Stunning Data on Use of Internet in Turkey*, June 21, 2011, at <http://blog.ttnet.com.tr/turkiye%E2%80%99de-internet-kullanimiyila-ilgili-carpici-veriler/>.

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 by now.⁹ 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 services, cyberlockers hosting pirate content (and encouraging users or even paying them to share), BitTorrent sites (employing swarm technology for faster downloads of pirate material), pirate video hosting sites, deeplinking sites (to pirate materials), and forums providing direct download links to pirate materials. All creative content owners – of music, movies, business and entertainment software, and books and journals – are victims of Internet piracy.

For example, sites hosted in Turkey are making available for download pirated copies of dictionaries, online journals, textbooks, grammar, and reference books, and are thus a threat to the English language teaching (ELT) market. During 2011, the Entertainment Software Association (ESA) reports that Turkey placed 15th in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.¹⁰ In 2010, Turkey ranked twenty-first in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, indicating that the situation has gotten worse. Internet piracy is a main factor for the economic crisis in the Turkish music market: the availability of unlicensed content depresses prices at which music rights are valued and creates unfair competition for licensed services. As of 2004, there were only 400,000 broadband subscribers in Turkey and physical sales were at the level of 42 million units. Today there are roughly 13 million broadband users and physical sales are down to 10 million units. File sharing activities on the networks of universities are a severe problem. In addition to online piracy, the trading of hard goods and circumvention devices through websites, mostly auction sites, or through newsgroups, also remains of concern 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.¹¹ It is telling that in the Turkish Government’s 2011 Special 301 Report, unlike its 2010 report, there is no mention of any Internet enforcement activities.¹² Many key issues remain unresolved in the Turkish enforcement system to address Internet-based piracy. These include most notably: 1) the lack of a legal framework to ensure that ISPs comply with notices to take down infringing materials, and have in place effective and fair policies to address non-hosted infringements and repeat infringers, and to discourage web advertising and payment processors from supporting infringing sites; 2) the lack of a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent and offer assistance without demanding an official order or request of a prosecutor’s office or a court); 3) the lack of a legal framework establishing copyright piracy as a cybercrime; and 4) the lack of any mechanism for identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them.¹³

⁹Ercan 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>.

¹⁰ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹¹Additional 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.

¹²In its 2010 report, the Government of Turkey 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.” 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).

¹³Turkish judicial authorities assume that IP addresses of Internet users are personal data and under the protection of Section 9 of the Criminal Law. Therefore, such data cannot be shared with right holders without judicial findings even if there are clear-cut infringements of copyright. Thus, even if right holders and/or collecting societies monitor infringements occurring on the Internet, there is no way to find out the identity of infringers without applying to judicial authorities. According to the Turkish Copyright Law, in order to collect information on infringement and an infringer, it is necessary to make a complaint to the prosecutor who will then collect necessary information concerning the identity of the infringer, information regarding his/her address, etc. A prosecutor would

Legislation reconfirming ISP responsibility and fostering cooperation is critical to shift ISPs from their current tendency not to cooperate.

In the absence of an adequate legal framework and the necessary enforcement tools to make the system more effective for right holders, they must largely resort to self-help measures. For example, the music industry has an Internet enforcement team which detects illegal websites and sends notices to remove illegal content, with the commencement of a criminal complaint if the notice does not lead to relief. In 2011, over 1,600 websites were checked and notices sent to over 1,000 websites, and out of these, more than 300 websites have had illegal content removed or blocked pursuant to Turkish prosecutor involvement. Unfortunately, many ISPs still do not cooperate with right holders, creating a bottleneck to effective enforcement at the outset. In addition, when clear-cut piracy cases are mounted and brought to the courts, relief is difficult to obtain. In some cases, this is due to the fact that the website servers are located overseas, meaning that even if a court decision is issued to remove infringing material, it cannot easily be enforced.

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 unauthorized commercial photocopying and print piracy hampers the growth and further development of the legitimate market. Various 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 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 (PA) has raised book piracy issues with the Ministry of Culture, the Ministry has not responded to these concerns. However, there has been greater cooperation in recent years with the Turkish Police Force resulting in raids against entities engaged in unauthorized photocopying activities. In 2011, the Turkish PA conducted a number of raids and awareness raising exercises with university administrators and lecturers, urging against the use of unauthorized copies of text books at centers of higher education.¹⁴

More Specialized Courts Needed in Underserved Areas: IIPA commends the Government of Turkey for its establishment of 23 specialized IP courts, and the establishment of a special prosecutor's bureau responsible for IPR investigations.¹⁵ Right holders 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 Government of Turkey, in its 2011 Special 301 Submission, still fails to contain updated court case information.¹⁶ The Government's statistics identify some other glaring problems, most notably, delays in adjudication (of three to five years) and the lack of overall deterrence in results.¹⁷ Other problems include 1) most criminal cases end in suspended sentences

provide an order to the police who would in turn investigate the IP address and forward that to the service provider. Only then would the service provider give the identification information, address, etc. to the prosecutor. This procedure takes a very long time and has not proven to be an efficient way to struggle with the Internet infringements.

¹⁴In 2011, the Turkish Publishers' Association aided law enforcement in a number of raids around university centers that resulted in seizures of 4889 books, several photocopying machines, external hard disk storage devices and computer hardware.

¹⁵In its 2011 Special 301 Submission, the Government noted, "There are specialized prosecutor bureaus especially on important subjects in the felony courts, juvenile courts, commercial and IPR courts, in the big cities like Istanbul, Izmir and Ankara." See *supra* note 4.

¹⁶Court statistics are provided for 2007 and 2008, and even then, 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 actually growing. 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. See *supra* note 4.

¹⁷For example, in 2007, of the 6,484 criminal cases under Law No. 5846, from which 6,793 (changed from "6,693" in the 2010 report) were accused, almost one-third of the cases resulted in acquittal or dismissal. Of the convictions, over 2,700 resulted in imprisonment and almost 2,000 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.

which encourages recidivism;¹⁸ 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;¹⁹ 5) in some cases the presumption of ownership is not properly applied;²⁰ 6) private sector experts can submit reports to the Courts, however, the Courts are not bound by such reports and if they deem necessary they can instruct external experts for determination of pirate materials;²¹ and 7) there remain difficulties in storing of large amounts of pirate materials.²²

Retail Piracy (Optical Discs), Mobile Device Piracy, “Mod Chips”: Physical piracy has decreased somewhat in Turkey over the years but still remains prominent in big cities, representing along with other forms of piracy a major hurdle to the growth of legitimate creative industries in Turkey.²³ This situation persists notwithstanding significant numbers of raids run and seizures in the tens of millions of pirated products by the authorities.²⁴ Past IIPA reports have detailed the migration to “burned” recordable discs²⁵ from imported factory discs (although these still can be found), and mobile device piracy, through which music, audiovisual works, software, and published materials are loaded onto any portable device, including phones, MP3 players, 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 ban on illegal street stalls, and for the most part, this is where *ex officio* enforcement action becomes possible (to enforce the Banderole requirement). 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).

Banderole Enforcement Results in Huge Seizures, But Authorities Otherwise Lack *Ex Officio* Authority: Enforcement against physical piracy has generally been strong in Turkey, since *ex officio* raids and seizures by the Police and Inspection Committee members in Turkey can be effectuated through the banderole

¹⁸The 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 to the Copyright Law to provide for both imprisonment and a fine.

¹⁹In 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.

²⁰IIPA 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. These requirements may hinder the right holder from being able to exercise its rights and thus may collide with Article 15 of the Berne Convention.

²¹In 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.

²²Over 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, 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.

²³The legitimate physical music market has decreased approximately TL75 million (US\$40.7 million) from 2004 to the end of 2010. In part this may be due to an increase in digital sales (estimated to compensate for roughly 10% of the lost revenue); the remainder is due to piracy. One indicator of the shrinking physical market is the decrease in the number of banderoles being requested year-on-year. In 2011, while broadband subscriptions rose to roughly 12.8 million in Turkey, the number of banderoles decreased for the eighth straight year (since industry has been calculating), down from almost 44 million banderoles in 2004, to just about 11.8 million in 2011 (this number is down approximately one million from the 2010 number).

²⁴The Turkish Government’s 2011 Special 301 Report indicates over 24 million “pirated materials” confiscated. See *supra* note 4.

²⁵Shops 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.

system (pursuant to Article 81 of the Copyright Law).²⁶ IIPA has noted in past reports some concerns about the integrity of the system,²⁷ but also, the need for an automated system and for industry representatives to be able to participate in the administration of the banderole system. It seems that both these developments are occurring. In the Turkish Government's Special 301 submission in 2011, they reported, "Online inquiry of banderole of books through the 'Banderole Automation System' is being initiated. In this context, mobile modems are allocated to Provincial Inspection Commissions in order to identify the pirated materials online without any loss of time."²⁸ The Government of Turkey indicated in its 2011 Special 301 filing that in 2010, out of more than 3,700 raids, 1.27 million non-banderole CDs and VCDs were seized (a downward trend from previous years), and that more than 1.7 million non-banderole DVDs were seized (an increase from 2009). Seizures of suspected pirated books remained large, at 1.4 million in 2010 (down from 1.9 million pirated books in 2009). These numbers are impressive and they also indicate the continued size and scope of the physical piracy problem in Turkey. Restoring *ex officio* authority to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police) would complement the Police and Inspection Committee members' current activities under the banderole system.

COPYRIGHT LAW AND RELATED ISSUES

Law No. 5846, Law on Intellectual and Artistic Works 1951 (amended in 1983, 1995, 2001, 2004, 2008)²⁹ provides basic copyright protection in Turkey. The Government of Turkey's 2011 Special 301 Submission does not indicate (as the 2010 report did) that the government is ready to move on draft amendments to Law No. 5846.³⁰ The Ministry of Culture, which is in charge of amending the copyright law, has apparently completed a draft, but this law is not a priority of the Government/Parliament at present. IIPA hopes the process of amending the law will be accelerated in 2012. There are several points which the new law (or related regulations, circulars, etc.) should address in particular, among 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 (both access and copy controls), and prohibitions (with availability of both civil and criminal remedies) on the trafficking (or servicing) in circumvention technologies, devices, or components.

²⁶According to Article 81 of the Copyrights Law, those reproducing, putting into the market, selling, distributing or commercially purchasing or accepting works in violation of the banderole obligations or without any banderoles are criminally liable for up to one to five years imprisonment and a fine of up to five thousand days (with the maximum range being from TL100,000 to TL500,000, according to the Turkish Government).

²⁷Over the years, IIPA has raised concerns about leaks of banderoles, and has questioned whether the system functions well as a deterrent. There have been very few cases against the unauthorized use of banderoles, and all industries have reported at one time or another that some plants have had on hand unnecessarily large quantities of unused banderoles which were not secured adequately.

²⁸In 2009, the Ministry of Culture and Tourism completed the virtual automation system enabling online applications for the registration of banderoles, obtaining banderoles, 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."

²⁹Last amended by Law No. 5728 (2008).

³⁰The Turkish Government'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."³⁰ Some IIPA members' industry comments have already been provided to the Government, 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 authorises 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.

- **Confirm/Restore *Ex Officio* Authority:** The Government should confirm/restore *ex officio* authority 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 piracy without need of a complaint.
- **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.
- **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. 5651³¹ 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, but allowing for a 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 possible termination of accounts of repeat infringers. The laws should provide for a mechanism to obtain information on infringing users to effectively address Internet piracy and prevent infringements. IIPA understands there is a study on possible amendments to the Law No. 5651, which do not help significantly in dealing specifically with online copyright infringements; industry has reportedly raised its concerns regarding the amendments.
- **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.
- **Ensure Exclusive Rights in Sound Recordings Are Not Abused:** Currently in Turkey, those employing sound recordings, e.g., for broadcasts, abuse the system by refusing to pay for sound recordings at all or paying only nominal sums and refusing to negotiate in good faith. This problem is made worse by court precedents treating a sound recording producer’s exclusive broadcast right as if it was a remuneration right, i.e., not enabling the right holder to exercise its exclusive right by prohibiting use. Especially when dealing with a CMO, it is extremely important that right holders enjoy safeguards to proceeds, for example, users should have an obligation to pay to the CMO either the undisputed amount or a reasonable interim rate set by the court, with the difference paid into escrow pending the dispute resolution/court decision.³²

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, despite current regulations concerning the usage of levies in Article 44 of the Law, 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

³¹Regulation of Publications on the Internet and Suppression of Crimes Committed, Law No. 5651 (which provides a takedown mechanism that can act as guidance for the copyright context).

³²This solution is used e.g., in the German Copyright Management Law, s.11, paragraph 2.

media.³³ 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 well over US\$20 million could have been collected on this basis. The amounts that are collected are not used for 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. IIPA also understands that the Turkish Government has just passed a new regulation on this topic, but it unfortunately failed to address the distribution of levies to right holders. This is highly unfortunate.

Collective Management Organizations (CMOs) Should Permit Foreign Right Holder Participation, Provide for Transparency, Fair Treatment, No Formalities: There are several critical problems in the current Collective Management Organization (CMO) Regulations. First, Article 10 contains membership criteria, including the requirement that the individual or entity have an “establishment” in Turkey and local “production” (evidenced by registration with MOCT) in order to become a Full Member of a CMO. This provision discriminates against U.S. and other foreign right holders on the basis of establishment. Second, current practice suggests a lack of transparency in the administration of rights and a lack of fairness in the process, particularly as to foreign right holders. Finally, the requirement to register repertoire potentially creates a formality inconsistent with Turkey’s international obligations under the Berne Convention and the TRIPS Agreement. The laws should also be amended to provide the representatives of the appropriate collecting society with authority to collect evidence regarding infringement.

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 widely implemented the Circular. Public sector administrators should train users to avoid the use of unlicensed 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.³⁴ 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;³⁵ and 2) while the Regulation calls for “administrative

³³The 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).

³⁴The 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>.

³⁵The 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.

finer” 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.³⁶

(Radio and Television Supreme Council of Turkey)³⁷ 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.³⁸ 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. Further, in respect of other royalty payments due, the independent film and television industry sector (IFTA) reports that they are not receiving any royalties due to them pursuant to Article 43 of the Copyright Law.

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 2011 Special 301 Submission, they reported many training and capacity building activities, both domestic programs and those involving international organizations or foreign governments.³⁹ In 2011, IIPA members also 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. The Business Software Alliance (BSA) together with BIYESAM (local software owners association) and several other associations and NGOs joined an initiative called the “National Software Movement.” Further, BSA Turkey also cooperated with Turkish Police to place public awareness ads in metro stations. The local recording industry group organized seminars for its affiliates about Internet protection and enforcement.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

The GSP program, designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories, expired on December 31, 2010, but on October 21, 2011, President Obama signed legislation to reauthorize the program through July 31, 2013. GSP trade benefits became effective 15 days after the President signed the bill (November 5, 2011) and apply retroactively from January 1, 2011. Turkey has been a beneficiary of the GSP program. During the first eleven

³⁶The 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.

³⁷The 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.

³⁸The 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.

³⁹The Twinning Project’s 2009 program, “*Support to Turkish Police in Enforcement of Intellectual and Industrial Property Rights*” (TR.06.03.08-TR06IBJH05)” 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, Diyarbakir, Izmir 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.

months of 2011, more than US\$815.8 million in imports to the U.S. from Turkey enjoyed duty-free treatment under the GSP Program, or more than 17.0% of Turkey's entire imports into the U.S.⁴⁰ Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). It is essential to the continued growth and future competitiveness of these industries that our trading partners, including Turkey, provide free and open markets and high levels of protection to the copyrights on which this trade depends. Turkey must live up to its end of the bargain by providing adequate and effective protection for intellectual property rights of U.S. creators, and equitable and reasonable market access to U.S. creative products and services.

⁴⁰During 2010, more than US\$792.9 million in imports to the U.S. from Turkey enjoyed duty-free treatment under the GSP Program, or almost 19% of Turkey's entire imports into the U.S.