

TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 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 situation in Turkey is evolving, with the upcoming copyright bill being rumored to include a number of proposals to improve copyright enforcement online. Although no official draft copyright bill has been published yet, the government has consulted with local stakeholders and a draft September/October proposal raises hopes that improvements are coming to Turkey, particularly in terms of addressing growing online piracy. Yet, some concerns remain with interim proposals which are discussed below; as an EU candidate country, Turkey is expected to converge its legislation with EU standards. In addition, piracy levels remain uncomfortably high for the publishing and software industries in particular. Piracy of published materials appears out of control with the Ministries of Justice and Education actually hampering efforts to stamp out book piracy rather than helping uphold the laws. Enforcement against book piracy waned, with serious problems including lack of enforcement actions and even threats by notorious pirates against local industry trying to protect publishers' rights. The software piracy rate remains high (62% in 2011) and has dropped only a small amount over the past few years, with unlicensed software still widespread among business enterprises. At the same time, considerable effort has been made by prosecutors in dealing with infringing websites, although more targeted enforcement tools, such as a notice and takedown system and measures to address decentralized forms of piracy, need to be added. The whole system is further weakened by burdensome court processes, long delays in adjudication of cases, and recidivism.

PRIORITY ACTIONS REQUESTED IN 2013

Legislation

- Swiftly pass legislation to amend Law No. 5846 on Intellectual and Artistic Works, in particular the provisions regarding Internet service provider (ISP) cooperation, taking into account comments and concerns noted in this submission.
- 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 enterprises.

Enforcement

- 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.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- Take significant steps to legalize large- and medium-sized businesses engaged in end-user software piracy.
- Ensure that Turkish government agencies, employees, contractors and grantees use only licensed software, including implementation of Circular No. 2008/17 (Prime Ministry Circular on Legalization of Software Use in Public Entities), and take an active role in driving local education, awareness and enforcement activities.
- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.
- 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.

¹For more details on Turkey's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



- Increase the number of specialized IP courts throughout Turkey, e.g., especially outside Ankara, Istanbul, and Izmir, 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., requiring proof of title), and rejection of search warrant requests due to unreasonably high evidentiary requirements for probable cause.
- Improve Customs' capacity, since Turkey is used as a gateway to transport counterfeit and pirated goods to Europe.

COPYRIGHT LAW AND RELATED ISSUES

Draft Amendments to Copyright Law: Law No. 5846, Law on Intellectual and Artistic Works 1951 (amended in 1983, 1995, 2001, 2004, 2008)² provides basic copyright protection in Turkey. The Turkish government has been preparing draft amendments to the Law for many years but no draft has been officially published since April 2010. Stakeholders were able to obtain access to an interim draft in October 2012, although they understand there may be yet a further draft. The draft amendment IIPA is aware of provides many positive features.³ Among the positive features of that draft are strong measures related to provisional measures, strong measures on obtaining information about infringements, infringers, and those involved with the infringement, including penalties for those not complying with an informational order, and *sui generis* database protection, breaches of which are subject to criminal penalties. However, IIPA remains concerned about a number of important provisions in the draft. For example, IIPA has recommended that 1) the Law 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 Law prior to the 2008 amendment; and 2) confirm that copying, distributing, or unlicensed use of all kinds of copyright materials can be considered a crime regardless of whether the defendant is proved to have had a commercial purpose. IIPA further points out generally that final legislation should achieve the following:

- **Protect Technological Protection Measures (TPMs):** Amendments should ensure that protection of TPMs (a welcome addition to the Law, since Turkey is already a member of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)), meet the requirements of those treaties, *inter alia*, by:
 - defining TPMs to include both access controls and copy controls (we understand the drafters intend to cover both, but this should be confirmed in the final drafting);
 - covering the act of circumvention of a TPM, the trafficking in circumvention technologies, devices, or components, or the provision of circumvention services;
 - providing for both civil and criminal remedies for violations involving circumvention of TPMs; and
 - ensuring that exceptions to the prohibition on circumvention of TPMs are narrowly tailored to preserve the adequacy and effectiveness of protection.

In each of these areas, interim drafting indicated some potential problems, some more serious than others, that need to be avoided as drafting proceeds toward a final bill.

- **Foster Effective Enforcement Against Online Infringements:** Although no text has been officially published yet, an interim draft released to local stakeholders does include a number of proposals to provide a framework for protection of copyright on the Internet. IIPA applauds the drafters for this attempt to give meaningful protection to copyright online and seeking to address both hosted and non-hosted infringements.⁴ It is important

²Last amended by Law No. 5728 (2008).

³Among the positive features of the Draft are strong measures related to provisional measures, strong measures on obtaining information about infringements, infringers, and those involved with the infringement, including penalties for those not complying with an informational order, and *sui generis* database protection, breaches of which are subject to criminal penalties.

⁴IIPA understands that positive elements would include: 1) the possibility of secondary liability against an owner of a website that knows or has been given notice about infringement, had technical capabilities of stopping such an infringement, and fails to terminate the infringement, and 2) the possibility of directly applying to a Public Prosecutor for removal of infringing activity without a warning notice if the content provider's or the hosting provider's electronic contact addresses are not provided in the Internet medium or all of the activities of the related website are related with the infringement of the rights afforded by this law or in case of inconvenience that may result from any delay.

to ensure that any individual, and not just a collecting society, can avail themselves of the remedy with regard to online infringements. It is also important to ensure that:

- non-hosted infringements are included in coverage, such as one-click hosting sites that enable people to upload, download and access (through links) massive amounts of infringing materials, streaming sites, or deeplinking sites;
 - the time frames for removing content or disabling access to infringement must not be too long to address, e.g., pre-release piracy. The obligation to act and remove infringing content should always require the provider to act as soon as possible in the circumstances. In this regard it is also important to note that regarding takedowns of infringing content upon notification, a court order (or other formality) should not be required;⁵ and
 - the obligation to halt online infringements is triggered when the provider knows or has been given notice, or is aware of facts or circumstances from which the infringement is apparent.
- **Avoid Serious Concerns In Proposals Regarding Copyright Collective Societies (CCS):** The Turkish government is considering extensive proposals regarding the collective management of rights. IIPA strongly urges the drafters to keep the following goals in mind to achieve the best possible outcomes for collective management in Turkey:
 - remove restrictions on the ability of foreign music producers, or their foreign collective management organizations, to become full members of a collective management organization in Turkey, and ensure fair and proportionate voting rights and distribution of income for foreigners;
 - avoid mandatory single-window licensing or “joint” collective solutions and instead rely on voluntary cooperation between the right holders;
 - provide that a copyright management organization (CMO) should represent a single category of rights to avoid conflicts of interest between the different categories of right holders, while not precluding the possibility of voluntary cooperation in a number of areas, including in particular, collections;
 - ensure that the principles of good governance, fair participation, transparency, and accountability apply to the operation of any CMO, and in particular, to ensure that such an entity is run in a professional and effective manner, and any cost savings from voluntary joint administrative operations should benefit right holders and users;
 - ensure fair and proportionate voting power of the various collective management organizations voluntarily participating in any single-window or joint licensing entity;
 - ensure income is distributed according to international industry practices; and
 - improve mechanisms for the enforcement of collectively managed rights, by addressing the obligations of users (licensees) of collectively managed rights, including: a) putting in place effective dispute resolution mechanisms, which would encourage timely resolution of tariff disagreements; and b) putting in place an effective and dissuasive system of fines for unlicensed uses.
 - **Avoid Compulsory Remuneration Schemes:** IIPA understands the drafters have been considering a provision that authors or performers having assigned certain of their rights to a producer of phonograms or the film producer shall retain a right of remuneration which cannot be “waived.” These rights of remuneration would impinge on the ability to freely contract (in phonograms and audiovisual works in the case of Draft Article 23), and could upset longstanding contractual and commercial relationships.
 - **Ensure Personal Copy/Private Copy Levy Inures to Benefit of Right Holders:** IIPA has long noted that since the government of Turkey has chosen to implement a private copy levy, it is imperative that the levies are in fact collected and distributed to relevant right holders in full. It has been a longstanding concern of the copyright industries that private copy levies have been collected by the government, but have been retained and used as public funds under the authority of the Ministry of Culture and Tourism, rather than distributed in full to the

⁵In contrast to this, disabling an entire website through a disabling injunction would usually require a specific legal basis.

relevant right holders (i.e., those whose copyrights were subject to the private copy exception for which levies were collected). IIPA understands the interim bill includes a major improvement, i.e., a recognition that private copy income should be passed on to right holders. However, it remains unclear whether the bill will guarantee full income distribution. As these levies are provided for as compensation for certain private uses of copyright, the full income from those levies ought to be distributed to the relevant right holders. IIPA encourages the Council of Ministers to determine that the greatest percentage possible of the funds collected through the private copy levy should be distributed to rights holders.

- **Avoid Weakening Protection Against Unauthorized Imports of Works:** The current law provides an importation right, i.e., against not only piratical imports but also against parallel imports. The government is apparently considering removing this right, thereby weakening protection. Controlling parallel imports assists in the administration of commercial relationships in various territories, permits price differentiation (which helps developing countries enjoy greater availability and accessibility to creative products), and is an important counter-measure to piracy since piratical imports often mask as, or are often hidden in shipments of, parallel imports.
- **Retain Banderole System for Physical Piracy Enforcement:** While hard goods piracy is somewhat waning with the growth of the online/digital marketplace, the banderole requirement, which is not usually favored by IIPA,⁶ has actually helped in Turkey, in large part due to the fact that enforcement by the Police and Inspection Committee members in Turkey has occurred against street piracy on an *ex officio* basis to address product in violation. In 2012, the General Directorate of Security reported seizures of 2.29 million traditional hard goods piracy pieces without banderoles. Industry has noted in recent years 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.⁷ Indications are that the system will be retained in the amendments.
- **Avoid Overly Broad Exceptions and Limitations or Compulsory Licenses:** IIPA understands that the Turkish government is considering a number of changes to the law which would either expand exceptions and limitations in certain areas or would impose new compulsory licenses limiting right holders' exclusivity. The government is apparently considering the following changes to exceptions/new exceptions: 1) expansion of the exception for distance learning;⁸ 2) a proposed digital archive exception;⁹ 3) an exception for ephemeral

⁶IIPA has noted in past reports some concerns about the integrity of the system. Over 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.

⁷In 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."

⁸Apparently, interim drafts revealed the distance learning provision in Turkish law would be altered by removing the phrase "face-to-face" thereby allowing published works to be freely performed for "the purpose of education and scientific research" as long as it is done "without pursuing any direct or indirect commercial purpose." In order to comply with its international obligations under the Berne Convention and TRIPS, this exception must be re-drafted to expressly include the second and third parts of the Berne Convention/TRIPS Article 13 three-step test, namely that the exception only applies, provided, that in no case shall the use conflict with a normal exploitation of the published work or unreasonably prejudice the legitimate interests of the right holder.

⁹Apparently, interim drafts reveal a digital archive exception which would provide for free reproduction of any work "kept in publicly accessible libraries, museums, educational institutions and public archives" by converting them to digital files, as long as it is done for archiving purposes and not "pursuing any direct or indirect economic or commercial purposes." The exception would also allow the free "mak[ing] available to the public the digital archives produced as such for research purposes by means of terminals dedicated for archival use on the premises of the publicly accessible libraries or educational establishments and public archival buildings." Such a provision must be very carefully weighed or it may run afoul of Turkey's international obligations. It is well recognized that current exceptions (such as those in Section 108 of the U.S. Copyright Act as to libraries and archives) may be in need of modernization to address the digital age and expectations of users for access to digitized materials. Yet, there are complex issues associated with making such dramatic changes, such as 1) eligibility criteria to avail oneself of the exception, 2) what kind of works can be subject to the exception, i.e., limited to text-based works, 3) limitations on the number of copies, 4) whether archiving should be limited to unpublished works, or if not, whether published works must be "at risk" to be eligible for an archival copy, 5) liability principles if archived digitized copies are further reproduced without authorization, and 6) the application of technological protection measures. The Turkish government is encouraged to consult with experts and consider carefully the re-crafting of this provision to ensure that, while addressing the intended purpose of the provision to meet the legitimate needs of archives, that Turkey also meets its international obligations, e.g., under the Berne Convention and the TRIPS Agreement.

recordings;¹⁰ and 4) a database use exception.¹¹ The government is also considering certain compulsory remuneration provisions such as: 1) a “partial reproduction” compulsory license;¹² 2) a compulsory lending remuneration;¹³ and 3) an orphan works provision.¹⁴ IIPA also encourages the Turkish government to address the harm that is befalling academic publishers due to the overly broad language in Article 34 of the current Law. Publishers report that universities interpret Article 34 to allow free copying of copyrighted texts, which has reduced and will continue to reduce the size of the academic textbook market in Turkey for local and foreign publishers. IIPA recognizes that Article 34 includes language similar to the three-step test to try to ensure that the legitimate interests of right holders are not negatively impacted. Specifically, the current language states that “this freedom may not be used in a way which would prejudice the legitimate interests of the author without good reason.” This is not the appropriate standard under Berne/TRIPS Article 13 and should be changed to ensure that “this freedom may not be used in a way which would prejudice the legitimate interests of the rights holder or conflict with the normal exploitation of the work.” Moreover, the exception in general should be narrowed to comport with the EU Directive 2001-29 Article 5(3) allowing “use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.”

- **Avoid Prohibited Formality Through Recordal and Registration Requirement:** IIPA understands that the Turkish government is considering a provision to mandate recordal and registration for the purpose of proving ownership and tracking the authority to benefit from financial rights. IIPA strongly opposes a mandatory recordal and registration system, and notes that it must not deny copyright protection such that it would amount to a prohibited formality under the Berne Convention and the TRIPS Agreement.
- **Ensure No Hierarchy of Rights in Works/Related Rights:** IIPA understands there is a provision which could be misinterpreted to give authors an advantage over owners of related rights. The government should ensure that the rights of authors and the rights of producers of phonograms and performers coexist independently, consistent with the Rome Convention and WPPT Article 1.

PIRACY UPDATES IN TURKEY

Enterprise End-User Software Piracy, Hard Disk Loading, and Government Legalization: The software piracy rate in Turkey was 62% in 2011, representing a commercial value of unlicensed software use of \$526 million.¹⁵

¹⁰IIPA understands the interim draft includes an “ephemeral” fixation exception, but that it is not limited to a single copy, and there is no destruction provision (within six months) if the program is not “of an exceptional documentary character.”

¹¹From what IIPA has heard about the proposed database exception, it aims to respect the rights of copyright owners by ensuring that the exception applies only to appropriate uses of databases by legitimate users. IIPA encourages the Turkish government to make sure that any relevant terms such as “legitimate user,” “any of the acts required,” and “copy of a database” are clearly defined to ensure that the exception is appropriately narrow and provides guidance to legitimate database users as to what exactly the exception allows.

¹²Publishers are concerned about the possibility of a “partial reproduction” exception or compulsory license provision, and want to ensure that any person or entity that photocopies or otherwise creates a partial reproduction of a work must pay equitable remuneration, regardless of whether the purpose is for direct, indirect, or no economic gain.

¹³IIPA is concerned by apparent proposals to provide for the free lending of the original or reproduced copies of a work by publicly accessible enterprises as long as equitable remuneration is paid. In order to protect against further unauthorized electronic distribution of copyrighted works, this lending provision should only be applicable to hard copies, in the case of reproductions and the originals referenced in the provision. The Turkish government must ensure it narrowly defines “publicly accessible enterprises” so that its law can remain consistent with EU discipline in this area.

¹⁴IIPA is generally supportive of the Turkish government addressing the issue of orphan works in relation to Turkish works, and notes that whatever the government decides to do, it should not be out of step with the EU Orphan Works Directive. There is some concern that the Turkish government is considering allowing the applicability of the provision if the user cannot “reach” the author. If the author is known but cannot be reached, the provision should not apply.

¹⁵BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Turkey was 62%, representing a commercial value of unlicensed software of US\$526 million, a significant increase over the previous year. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers

The rate of software piracy has only dropped modestly over the past few years (from 65% to 62% from 2007 to 2011). A key concern remains the widespread use of unlicensed software by enterprise end-users. 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 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 the legislative fix in the draft amendment to the Copyright Law to outlaw violations involving the circumvention of technological protection measures (with changes noted herein) will be welcome. Reductions in 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% 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.¹⁶

IIPA welcomed the Turkish government’s issuance of the Prime Ministry’s *Circular on Legalization of Software Use in Public Entities*, No. 2008/17 (July 2008), ordering that government agencies should legalize their software use. Unfortunately, the Turkish government has not widely implemented the Circular. Some IT managers of public sector agencies have complained 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. Another issue is lack of transparency and publicly accessible data on how many resources have been allocated for legalizing software use in governmental agencies. As the Prime Ministry Circular is a high-level regulatory document, one issue raised is that it is not easy to reach each Ministry. An alternative and more effective approach has been suggested, namely, each Ministry should issue a Circular for the institutions under their authority. As an example, the Ministry of Health issued a Circular based on the Prime Ministry Circular. By implementing the Circular and legalizing all use of software in the public sector by government agencies, employees, contractors and grantees, the Turkish government can set a powerful example for businesses and consumers in Turkey.

Internet and Mobile Piracy Rapidly and Dramatically Increases in Turkey: Turkey has approximately 35 million Internet users as of 2012.¹⁷ There were almost 19 million fixed broadband subscriptions in Turkey by the third quarter of 2012, and more than 11 million mobile Internet users.¹⁸ According to the largest ISP, TNET, 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.¹⁹ As a result of these developments, Internet usage of copyright materials continues to displace physical product in Turkey, and Internet piracy continues to devastate right holders and hinder the development of licensed services.

Internet piracy in Turkey takes on many forms, including illegal P2P filesharing services,²⁰ cyberlockers hosting pirated content (and encouraging users or even paying them to share), BitTorrent sites (employing swarm

or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

¹⁶BSA 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.

¹⁷European Travel Commission, NewMedia TrendWatch, *Turkey*, December 2012, at <http://www.newmediatrendwatch.com/markets-by-country/10-europe/87-turkey>.

¹⁸International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

¹⁹YouTube use was another 8.47%. Sahin Sen, *Stunning Data on Use of Internet in Turkey*, June 21, 2011, at <http://blog.tnet.com.tr/turkiye%E2%80%99de-internet-kullanimiyla-ilgili-carpici-veriler/>.

²⁰Turkey ranked 14th in the “Top 60 Countries Ranked By Total Unique Downloads During 2012/1Q” (1,763,755 units).

technology for faster downloads of pirate material),²¹ 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 2012, the Entertainment Software Association (ESA) reports that Turkey placed 13th 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, continuing its unfortunate rise in the rankings from 21st in 2010 and 15th in 2011.²²

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.²³ 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. In 2012, publishers report that photocopying at universities has increased and photocopying at state schools is “out of control,” and that full color “print piracy” (off presses) remains a major problem. In addition, online piracy of textbooks, supplements, reference books, and trade books is a growing problem. Furthermore, there are two notorious pirate book counterfeiting operations that are very organized and conduct an estimated 90% of all piracy of foreign language books. Publishers have brought numerous cases against these two pirate operators with little success. For example, they have their own printing houses and their machines were supposed to be sealed under a court order but remain in operation.

Retail Piracy (Optical Discs), Mobile Device Piracy, “Mod Chips”: Physical piracy has decreased somewhat in Turkey over the years, in part due to a shift to online forms of piracy, and in part due to significant numbers of raids run and seizures in the tens of millions of pirated products by the authorities.²⁴ Past IIPA reports 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. One recent phenomenon noted has been the increase in the sale and servicing of “mod chips” installed into videogame consoles to play illegal games.

ENFORCEMENT UPDATES IN TURKEY

Book Piracy Enforcement Efforts Disappointing: Publishers continue to be disappointed by efforts from the Turkish government in 2012 to address their issues. As in 2011, the Turkish Publishers’ Association (PA) again conducted a number of raids (self help) and awareness raising exercises in 2012. The Turkish PA has also raised book piracy issues with the Ministry of Culture, but the Ministry has not responded to these concerns. There has been greater cooperation in recent years with the Turkish Police Force resulting in some raids against entities engaged in unauthorized photocopying activities. However, law enforcement agencies have remained reluctant to

²¹According to the “Musimetric Report” of September 2012, Turkey ranked 28th in the “Top 50 Countries for Total BitTorrent Downloads During 2012/1Q Ranked by Volume” (2,568,942 units).

²²ESA’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.

²³Piracy concerns have been raised repeatedly by NGO’s such as YAYBIR (Publishers Copyright and Licensing Society), BASYAYBIR (Professional Union of Press and Publishers), YAYFED (Publishers Associations Federation) and individual publisher representative.

²⁴The Turkish Government’s 2011 Special 301 Report indicates over 24 million “pirated materials” confiscated. See Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2011 (on file with IIPA).

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.

take actions 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, with only the occasional copyright awareness message but no serious willingness to stop piracy on campuses. Remarkably, the Ministry of Education has actively worked against publishers. For example, in 2012 the Ministry of Education banned the use of any supplementary materials in K-12 education,²⁶ especially targeting international publishers and recommended that schools purchase photocopiers to produce what they needed for students. In addition, schools usually charge students a fee for these school-made copies, resulting in students being charged more than if legitimate copies were purchased. Some limited raids have been initiated by the government to protect local language trade books, but not foreign language or academic books during their peak sales season (September/October), when international publishers generate an estimated 80% of their annual sales revenues. Additionally, there have been some reports of threats of violence against those who are trying to protect their works by undertaking raids.

Improvement Needed to Bolster Enforcement Against Software Piracy: The 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. 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 2012, the software industry collaborated in around 60 criminal raids against end-user commercial enterprises (not including reseller raids), based on leads, and the raids produced official evidence to be used in prosecutions. Internet piracy of software is much more difficult to detect and it is very hard to identify individual pirate users as they use techniques such as proxy servers to remain anonymous. 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 industry. 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. The criminal procedure law contains mechanisms such as suspension and postponement of convictions, and courts regularly impose suspensions, postponements, and minimum sentences (one year in prison, usually suspended), and issue judicial fines without imprisonment. The result of all these problems is recidivism.

Internet Enforcement Efforts: 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 on notices to take down infringing materials and effective and fair policies to address non-hosted infringements and repeat infringers, and 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); and 3) the lack of any mechanism for identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them.²⁷

In the absence of an adequate legal framework and the necessary enforcement tools, right holders have resorted to self-help and seeking disabling of infringing materials. For example, the music industry has an Internet enforcement team which detects illegal websites and sends notices to remove illegal content, with the

²⁶Ministry of Education officials have denied signing the memo banning the use of supplementary materials, but a promised memo correcting the position has never been issued.

²⁷Turkish 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. 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 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.

commencement of a criminal complaint if the notice does not lead to relief. In 2012, over 2,300 websites were checked and notices sent to over 900 websites. Out of these 900 sites, more than 500 websites have had illegal content removed and more than 280 websites have been disabled pursuant to Turkish Public 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 aggravated by 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.

More Specialized Courts and Increased IP awareness in Courts of General Jurisdiction Needed: Lack of deterrence and recidivism continue to plague the court processes in Turkey. Prison sentences are rarely issued in criminal cases (with judges being particularly lenient on first-time offenders), and most of the time such sentences are suspended. Right holders continue to report certain problems in court procedure, including delays in adjudication (of three to five years) and the lack of overall deterrence in results.²⁸ Other problems include 1) most criminal cases end in suspended sentences which encourages recidivism;²⁹ 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), especially for infringement done by well-known companies (such as infringing internet users of media groups); 4) obtaining a criminal search warrant in some districts is difficult (often because search warrants are requested from the lowest level criminal courts which are not IP law specialists);³⁰ 5) in some cases the presumption of ownership is not properly applied;³¹ 6) there remain difficulties in storing of large amounts of pirate materials with police warehouses full, onerous costs on right holders for storage, all hindering police willingness to bring more actions; 7) there remains a general lack of IP expertise and experience on the part of the judiciary and Public Prosecutors, although the music industry reports good cooperation from Public Prosecutors in a number of online music piracy cases; and 8) lack of information about international jurisprudence and legal developments. IIPA commends the Turkish government for its establishment of 23 specialized IP courts in select cities, and the establishment of a special prosecutor's bureau responsible for IPR investigations.³² 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. At the same time, the IP Courts are not the problem, but rather, the courts of general jurisdiction are the most problematic part of the judiciary.

Ensure Exclusive Rights in Sound Recordings Are Meaningful: Currently in Turkey, those using 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. It is extremely important that right holders enjoy safeguards to proceeds, for example, users should have an obligation to pay to the collecting society either the undisputed amount or a reasonable interim rate set by the court, with the difference paid into escrow pending the dispute resolution/court

²⁸For 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.

²⁹The current Copyright Law stipulates penalties ranging from one to five 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 two 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 two 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.

³⁰In 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.

³¹IIPA 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.

³²In 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 24.

decision.³³ Also, preliminary injunctions should be effectively applied to unlicensed broadcasters (some well known channels have not had voluntary agreements since 2001).

GENERALIZED SYSTEM OF PREFERENCES (GSP)

Turkey enjoys significant preferential trade benefits under the Generalized System of Preferences trade program. 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). In 2011, more than \$894 million worth of Turkish goods entered the U.S. under the duty-free GSP code, accounting for 17.25% of its imports into the U.S. In the first eleven months of 2012, almost \$1.05 billion of Turkey’s exports to the U.S., or more than 18.1% of its total exports to the U.S., received duty-free treatment under the GSP code. Turkey needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

³³This solution is used e.g., in the German Copyright Management Law, s.11, paragraph 2.