

TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: For many years, a relatively cooperative Turkish Government has made incremental but uneven progress in addressing piracy. The shift to online and mobile media presents enormous opportunities for the emergence of legitimate distribution models, but also presents significant piracy challenges. Piracy of published materials remains serious. The software piracy rate remains 20 points higher than the global average, and the Turkish Government has yet to fully legalize its own software usage. While the Government has remained proactive against online piracy, they have been less helpful against book counterfeits and photocopying of textbooks near university campuses. Judges and prosecutors are becoming attuned to the challenges of online and mobile piracy, but the judicial system as a whole still remains non-deterrent, due to the perception that copyright infringement is not a significant criminal offense, and due to low-level and frequently postponed penalties, backlogs of cases, and recidivism. The Turkish Grand National Assembly (GNA) is considering legislation that would strengthen the Government's hand against Internet and mobile piracy and make other reforms, but has not completed its legislative work, and must ensure that the law finally enacted comports with Turkey's international obligations and global best practices.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Take continued steps to reduce the use of unlicensed software in enterprises, and ensure that Turkish Government agencies, employees, contractors, and grantees use only licensed software.
- Continue taking effective means against online and mobile piracy, and encourage greater Internet service provider (ISP) cooperation.
- Reduce illegal commercial photocopying, especially near universities, and shut down known book counterfeiters.

Legislation

- Pass legislation to amend the Turkish Copyright Law (Law No. 5846 on Intellectual and Artistic Works), including provisions enhancing ISP cooperation, and outlawing circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, software, devices, components, and services.
- Ensure amended Copyright Law does not run afoul of Turkey's international obligations, and, e.g., adheres to fair and transparent best practices with respect to collective management of rights.

PIRACY AND ENFORCEMENT UPDATES IN TURKEY

Prior IIPA reports on Turkey contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.²

Progress Seen Against Enterprise Software Piracy; More to be Done on Government Legalization: A key concern in Turkey remains the widespread use of unlicensed software by enterprise end-users. The software piracy rate in Turkey was 62% in 2011 (far higher than the global and European averages), representing a

¹For more details on Turkey's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Turkey's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

²See, e.g., IIPA, Turkey, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TURKEY.PDF>.



commercial value of unlicensed software use of \$526 million.³ Piracy is particularly bad in the industrial regions and cities where economic activities are more intensive, such as Istanbul, Ankara, and Izmir, and the industry has recently observed high levels of enterprise piracy in Bursa, Kayseri, and Gaziantep.

Enforcement against unauthorized use of software by enterprises improved in 2013. The software industry brought 80 civil and criminal actions (up from 60 in 2012). As such cases become more routine, they are better accepted by judges, prosecutors, and law enforcement officers. Additionally, the courts on the Asian side of Istanbul have been consolidated, and as a result, industry is now able to obtain search warrants in any location in the city. One problem remains the lack of *ex officio* actions by Prosecutors or Customs authorities in copyright-only actions. Although *ex officio* raids are available if there is a pending trademark or patent claim, pure enterprise end-user piracy actions involving only copyright infringements require formal complaints by right holders.⁴

The Turkish Government issued a Circular in 2008 for its agencies to legalize their software use,⁵ but due to low budgetary allotments and lack of transparency in the process, the Government has not implemented the Circular. The Government must allocate sufficient budgets, and each Ministry and public authority should follow the Circular by establishing its own software legalization procedures and budgets and instructing its sub-divisions, thereby setting a powerful example for businesses and consumers in Turkey.

Internet and Mobile Piracy Threat Increases: Turkey has tens of millions of Internet users, with approximately 7.9 million fixed Internet subscriptions (each subscription supporting multiple users), almost all of which are defined as broadband (according to the International Telecommunications Union). Turkey also boasts 67.7 million mobile subscriptions, 40 million of which reportedly have 3G wireless connections.⁶ As a result of these developments, the opportunities for legitimate Internet and mobile business models are enormous. Unfortunately, widespread Internet and mobile piracy harm right holders and have hindered the development of licensed services.⁷ Online piracy is carried out using cyberlockers, deeplinking sites, peer-to-peer (P2P) filesharing services, forums/blogs, and BitTorrent sites. The Entertainment Software Association (ESA) reports that in 2013, Turkey ranked eleventh in the world in terms of the number of connections by peers engaging in the unauthorized file-sharing of select ESA member titles on public P2P networks. The Radio and Television Supreme Council (RTÜK) and Telecommunication and Transmission Authority (TTA) have taken commendable steps to address online and mobile infringements, and some elements of a legislative framework for dealing with it are in place.⁸ However, many ISPs still do not cooperate with right holders, and obtaining needed data for enforcement has been close to impossible.⁹

The Prevalence of Trafficking in Circumvention Tools: Both trafficking in pirated materials for which the technological protection measures (TPMs) have been unlawfully circumvented, and in the circumvention technologies, devices, or components themselves, have increased. For example, online links enable downloading of software which has been hacked and stripped of TPMs, or downloading the necessary technology for circumventing

³Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁴There is a precedent for providing police with *ex officio* authority in the case of copyright materials sold in the market without banderoles, but the banderole requirement does not apply to software.

⁵*Circular on Legalization of Software Use in Public Entities*, No. 2008/17 (July 2008).

⁶See *Turks Are the Highest Mobile Internet Users in Europe*, Sabah, November 29, 2012, at <http://english.sabah.com.tr/economy/2012/11/29/turks-are-the-highest-mobile-internet-users-in-europe>.

⁷Several websites identified by IIPA as notorious for piracy in its notorious markets filing to USTR in October 2013 are among the top 100 sites accessed in Turkey, while some, like *turbobit.net* (the 89th most accessed site in Turkey), *fullhdfilmizle.org* (105th), and *divxplanet.com* (111th) seem peculiarly popular in and/or targeted toward Turkey. This list does not include numerous sites with “TV” in the title, many of which appear to provide access to live or near-simultaneous retransmission of broadcasts, with a focus on sporting events.

⁸For example, through the *Law on Content Published on the Internet No. 5651*, a right holder may apply to an Internet content provider (ICP) and request content to be taken down, subject to a court order if the ICP fails to do so. “Additional Article 4” of the Copyright Law has also encouraged some positive practices between right holders and ISPs when infringement occurs.

⁹Turkish 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.

a TPM (e.g., key search programs). The same is true for pay TV, with infringers trafficking in decoder programs to break passwords on encrypted channels or signals. The Copyright Law amendments as proposed would be helpful in addressing these problems.

Book Piracy Situation Remains Serious: As documented in detail in prior IIPA reports, unauthorized commercial photocopying and counterfeit books hamper the growth and further development of the legitimate market for publishers in Turkey. Local publishers report that illegal photocopying is “out of control” on and around university campuses. Two notorious and organized pirate book counterfeiting operations conduct an estimated 90% of all piracy of foreign language books in Turkey. The Government should take actions to close them down, and to legalize use of published materials at universities. Publishers report that universities interpret Article 34 of the Copyright Law to allow free copying of textbooks, which is also harming the academic textbook market in Turkey for local and foreign publishers. Article 34 should not be interpreted in this way or should be amended so that such an interpretation is no longer viable.

Hard Disk Loading, Retail Piracy, Mobile Device Piracy, “Mod Chips”: Physical piracy has decreased in Turkey, but hard disk loading of software onto computers at the point of sale, as well as other problems previously documented by IIPA (e.g., “burned” recordable discs, imported factory discs, mobile device piracy, through which music, audiovisual works, software, and published materials are loaded onto any portable device, the sale and servicing of “mod chips” installed into videogame consoles to play illegal games) remain visible in the marketplaces in major cities.

COPYRIGHT LAW AND RELATED ISSUES

Draft Amendments to Copyright Law: The *Law on Intellectual and Artistic Works 1951, No. 5846* (last amended by Law No. 5728, 2008) provides the basis for copyright protection in Turkey. The Turkish Government has been preparing draft amendments to the Law for many years, and while IIPA reviewed an interim draft in October 2012, there may be a further draft. All indications are that the GNA plans to push the amendments forward. IIPA has commented in detail on the draft in prior filings.¹⁰ In brief, IIPA recommends swift passage of modernizing amendments to the Copyright Law, noting, among other things, the following:

- Criminal penalties should include imprisonment “and” a judicial fine.¹¹
- Copying, distributing, or unlicensed use should be criminalized regardless of whether the defendant undertook the acts with commercial purpose.
- The Law should provide: 1) a legal framework of effective and fair policies to address non-hosted infringements and repeat infringers, and to discourage web advertisers and payment processors from supporting infringing sites; 2) a clear obligation on ISPs to cooperate expeditiously¹² (i.e., without demanding a court or prosecutor’s order) when they know or are aware of facts and circumstances from which infringement is apparent; and 3) a means for identifying perpetrators who often use privacy services to hide their activities.¹³
- The Law should ensure the TPMs provisions follow the interim draft and fully meet the requirements of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), to which Turkey is a party.
- The Law should: 1) avoid restrictions on the ability of foreign music producers or their foreign collective management organizations (CMOs) to become full members of a CMO in Turkey; 2) ensure fair and proportionate voting rights, distribution of income for foreigners, and principles of good governance, fair participation, transparency, and accountability in the operation of any CMO; and 3) avoid mandatory “single-window” licensing or “joint” collective solutions.

¹⁰See, e.g., IIPA, *Turkey*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301TURKEY.PDF>.

¹¹Both remedies are provided for in the Trademark Decree and in the Law prior to the 2008 amendment.

¹²The time frames for removing content or disabling access to infringement must not be too long to address, e.g., pre-release piracy.

¹³An interim draft released to local stakeholders includes a number of proposals to provide a framework for protection of copyright on the Internet. IIPA 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, all of the activities of the related website are infringing, or in case of inconvenience that may result from any delay.

- 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, and not retained and used as public funds under the authority of the Ministry of Culture and Tourism.
- The Law should (and reportedly does) retain the banderole system for physical piracy enforcement.
- The Law should avoid overly broad exceptions and limitations or compulsory licenses.¹⁴
- The Law should avoid mandating recordal and registration of copyright materials which could amount to a prohibited formality under the Berne Convention and the TRIPS Agreement.
- The Law should ensure that the rights of authors and the rights of producers of phonograms and performers coexist independently (i.e., that there is no hierarchy of rights, thus remaining consistent with the Rome Convention and WPPT Article 1).

¹⁴IIPA understands many new exceptions and some compulsory licenses are being considered; these must be measured against Turkey's international obligations under TRIPS, the Berne Convention, the WCT and the WPPT. In addition, IIPA 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.