

ANNEX: TURKEY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. Digital piracy—via the Internet, mobile phones, peer-to-peer (P2P), BitTorrent and linking and “topsites” (i.e., high speed servers used covertly to share content)—permeates the marketplace. Some of the copyright industries reported that the nature and levels of piracy remained the same in 2017. However, satellite TV channel infringement has gotten worse in the past year, and the Turkish laws need to be amended to explicitly address satellite piracy. There is a need for numerous improvements in the law, including proper implementation of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as well as improvements in enforcement to help Turkish markets grow for copyrighted content.

The Government of Turkey published a draft Copyright Amendments Bill in May 2017; it is expected to be considered by the Parliament in 2018. The draft bill includes provisions to address: (1) online infringement and Internet Service Provider (ISP) liability (and a “graduated response” mechanism against repeat infringers to slow their Internet connections); (ii) the formation and operation of collective management organizations (CMOs)—but, the legislation would leave the details of CMO operations to future regulations which fails to address long-standing practical problems impacting American and other music producers; (iii) providing the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases; (iv) enforcement against the making, selling or trafficking in anti-circumvention devices or software; and (v) establishment of specialized digital piracy task forces with dedicated and specially-trained prosecutors.

The goal of changes to the liability and responsibility of ISPs, should be to ensure that the law is properly tailored to incentivize all online intermediaries, including technical, automatic and passive intermediaries, whose services are used for infringing activities, to cooperate with copyright owners to stop copyright infringements on their services. The May 2017 draft bill fails to meet this objective. It would instead require “content or hosting providers” to remove infringing content within 24 hours of a takedown notice. First, the bill should be clarified to limit the takedown scheme only to technical, automatic, and passive online intermediaries. Content providers, including user upload content platforms, that go beyond merely providing users with technical facilities, should not benefit from the takedown procedure because they are primarily liable for copyright infringing content on their sites or services. Additionally, IIPA recommends that the obligation be revised to require that content be removed “expeditiously, but no later than 24 hours.” Infringing content under the draft bill can also be removed subject to a court order, but the legislation does not clarify the timeframe for removal; the bill should clarify this provision. The proposed penalties for noncompliance with takedown notices or court orders, include administrative fines and civil law damages.

The governance and management of CMOs has been a long-standing problem in Turkey. Currently, foreign rights holders face discriminatory policies that prevent foreign producers from being fully participating members of Turkish CMOs. As a result, they do not have voting rights or the ability to engage in the management and decision-making of music-related CMOs. Because of this, the monetary distribution rules and practices are discriminatory and are not transparent to non-management rights holders. The draft legislation would be an improvement, but it does not address the fundamental problem of banning non-Turkish producers from participation in or management of the CMOs. There are also concerns about the draft’s lack of clarity regarding extended collective licensing which potentially could result in the collective management for rights in American recordings without authorization from rights holders. Additionally, the draft legislation does not clearly grant rights holders with an ability to opt out of this licensing. If so enacted, this would create serious problems for rights holders, including producers (and performers) of sound recordings. In addition, the draft bill does not clearly prevent the discrimination that is now prevalent in CMOs. The draft bill would also mandate formal registration and a “stickering” (banderole) procedure for CMO representation, both of which should be eliminated since these are relics of physical copy distributions, not digital



ones, which now predominate. Where mandated, these requirements have proven onerous and burdensome, especially for foreign rights holders. Some improvements in CMOs that are foreseen by the new law (if enacted), include improvements in digital tracking of the usage of works and online payment systems.

One loophole in the draft law would allow Turkish collecting societies to screen motion pictures in theaters without an authorized license, and subject them only to a collecting society-determined remuneration. This exception to the public performance right, if enacted, would be a violation of international treaties and norms, and should be corrected before the adoption of the Copyright Amendments Bill.

Another related concern in Turkey is that judicial decisions have incorrectly interpreted the right of communication to the public, specifically, the right of public performance, in violation of the Berne Convention, the WCT, and the WPPT. These interpretations have meant that so-called “indirect” performances—such as the playing of a sound recording on a radio, a television or other indirect manner in a bar, hotel or other public place—do not require a public performance license and are exempted from collections. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed. This fails to distinguish between the use and licensing of a sound recording to broadcasters, and the use and licensing in public performance venues, which are separate and distinct uses and markets for licensing music. IIPA urges the Government of Turkey to correct the misinterpretation of public performances to capture “indirect” performances, as is required by Turkey’s obligations under the international treaties and the Copyright Law of Turkey.

Some courts and prosecutors are reluctant to treat IPR offenses as a priority, and will not order the confiscation of pirated materials or grant injunctive relief. And, the reorganization of the courts, beginning in 2016, has further exacerbated the workload of specialized courts dealing with IP cases. There have, in the past, also been prosecutorial delays (or indifference) especially to takedown notices with ISPs or actions to remove links to pirate sites. It is hoped that the draft law, if enacted, would improve compliance. One additional improvement has been the Access Providers’ Association which has worked as a clearinghouse, in lieu of individual ISPs, to receive notices. This has helped to funnel and streamline notices and responses (including takedowns). By one estimate, approximately 70% of takedown notices now are responded to with a removal of material.

Current law provides a legal basis for direct infringer injunctions to block infringing websites (and many such sites, including *Grooveshark*, have been blocked in Turkey). However, there is no legal basis for injunctions against third parties, such as third party intermediaries. There are no changes in the draft Copyright Amendments Bill to revise these procedures. The Government of Turkey should provide a civil law-based injunction against third parties, such as intermediaries (e.g., access providers), whose services are used by direct infringers or those assisting them. Such a legal basis exists in EU law (Article 8(3) of the EU Copyright Directive, Article 11 of the EU Enforcement Directive) and in many other countries around the world, and is a key tool for rights holders to enforce their rights in the online copyright environment.

In its April 2017 Special 301 Report, the U.S. Government noted that Turkey needed to make significant improvements to the copyright law, including WIPO Internet Treaty implementation, and to address enforcement that suffered from “insufficient penalties and a backlog of cases.” The problems relating to collective management were also identified by the U.S. Government.

IIPA last filed a country report on Turkey in 2014. At that time, IIPA recommended that Turkey be placed on the Watch List. Turkey is currently on the Watch List.

