

# ANNEX: TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

For over a decade, the Government of Turkey has promised to modernize the Copyright Law (1951), last amended in 2014, to fully implement the obligations of the WIPO Internet Treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Turkey acceded to the Internet Treaties in 2008, but has yet to fully implement the treaties, including by providing proper remedies against the circumvention of Technological Protection Measures (TPMs) and protecting Rights Management Information (RMI).

The law of Turkey does not currently provide proper incentives for cooperation between rights holders and ISPs. The current Copyright Law (Article 4*bis*) does have notice and takedown provisions. Turkish law (No. 5651) treats service providers as intermediaries who are only required to respond to rights holders' notices, or actions taken by rights holders in the courts to block access to infringing websites. Failure to comply with takedown notices or requests to block access to known infringing sites is punishable only by administrative fines imposed by the Ministry of Transportation. The ISPs do have responsibility to act if, after a court injunction, an infringing website fails to remove infringing content. The Internet Law does not include any criminal penalties for copyright violations.

Recent draft proposals, including one in 2018, would have revised the responsibilities of Internet access and hosting providers. 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 passive and neutral intermediaries, whose services are used for infringing activities, to cooperate with copyright owners to stop copyright infringements on their services. For services engaging in copyright infringement, or inducing or encouraging infringement, there should be no safe harbors. The 2017 and 2018 draft bills, if enacted, would not have met this objective. One proposal would only have required “content or hosting providers” to remove infringing content within 24 hours of a takedown notice. As in the past, IIPA recommends that any legislation include secondary liability principles and limit the takedown scheme only to passive and neutral online intermediaries. Additionally, IIPA recommends that the obligation be revised to require that content be removed “expeditiously” (and to clarify a time period in regulations or best practices). In addition, penalties for noncompliance with takedown notices or court orders should include both administrative fines and civil law damages.

While efforts to draft new laws have stalled (including promised 2019 revisions), piracy issues continue to plague the Turkish marketplace, undermining economic opportunities for Turkish and American creators alike. Digital piracy—via stream-ripping, cyberlockers, BitTorrent and other peer to peer (P2P) linking sites, and “topsites” (i.e., high speed servers used covertly to share content)—is widespread and has stifled the legitimate market. The copyright industries report that the nature and levels of piracy remained the same in 2019.

One change that was made to the Civil Code in 2019 requires all copyright complainants seeking monetary damages to first try to settle disputes via mediation before court proceedings can commence. Proponents of the legislation hope that smaller infringement claims will be expedited, because of otherwise burdensome procedural issues and delays in the courts.

The motion picture industry reports that satellite TV channel infringement continues and that the Turkish laws need to be amended to explicitly address satellite piracy.

The Government of Turkey withdrew the 2018 draft Copyright Amendments Bill in 2019, and there are reports that no new legislation will likely be considered in 2020. Separately, an Act on Evaluation, Classification and Promotion of Cinema Films, after review by the Ministry of Culture and Tourism, was adopted by the Parliament in 2019. This legislation is intended to create investment incentives for foreign film producers to shoot their films in Turkey, including



by funding 30% of production costs for these foreign producers or for Turkish co-producers who work with them in Turkey.

The Copyright Bill (the 2018 draft) included provisions for the formation and operation of collective management organizations (CMOs), referred to as Collective Licensing Societies. The 2018 proposal would have created four such CMOs—one each for literary works; music; film; and works of the visual arts. There are reports that even though the larger Copyright Law amendments legislation might not be ready in 2020, the CMO legislation might move in separate legislation in 2020. It is not clear whether the legislation would address the long-standing discrimination against foreign members of CMOs. The other part of the CMO legislation would establish a Copyright Arbitration Committee to resolve tariff price negotiation disputes (with fees initially proposed by the CMOs); but, those Arbitration Committee decisions could be appealed to the courts for final resolution.

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 (with full voting rights and management and decision-making authority). Because of this, the monetary distribution rules and practices are discriminatory to foreign rights holders, and there is no transparency for non-management rights holders. The prior drafts of CMO legislation (including the 2018 draft) would not have addressed the fundamental problem of banning non-Turkish producers from full participation in or management of the CMOs. The discriminatory treatment of foreign rights holders that is now prevalent in CMOs was an issue noted in the April 2019 Special 301 Report by the U.S. Government. It recommended, and rights holders agree, that any future CMO revisions should permit “fair, transparent and non-discriminatory procedures” for CMO governance of all rights holders’ rights.

One loophole in the 2018 draft law would have allowed Turkish collecting societies to license theaters to screen motion pictures without authorization from film producers, and subject them only to a collecting society-determined remuneration. This statutory license of the public performance right, if enacted, would be a violation of international treaties and norms, and should not be adopted in any CMO law (or Copyright Law) revision.

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 treat “indirect” performances of sound recordings—i.e., the public performance of a recording on radio, television, or by another indirect manner in a bar, hotel, or other public place—as a use not requiring a public performance license and exempt from collections. The “logic” of this interpretation, contrary to international law, is that these recordings have already been licensed to broadcasters. This fails to distinguish between the use and licensing of a sound recording to broadcasters for broadcasting, and the use and licensing of a sound recording 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.

One change that did occur in 2019 was the adoption of a formal registration and “stickering” (banderole) procedure for hard copy goods. These provisions are now being implemented by the Ministry of Culture and Tourism. Unfortunately, although well intended, experience in other countries has shown that banderole requirements have proven to be onerous and burdensome, especially for foreign rights holders. The 2018 legislative proposals would have also extended this requirement to musical recordings and tied them to CMO representation for digital music services. Banderoles are relics of physical copy distributions, not digital ones that now predominate, and should not be required for foreign rights holders.

Another piece of the 2018 draft Copyright Bill would have provided the Turkish National Police (TNP) with *ex officio* authority to commence IPR cases. It would also have included provisions to more fully implement the Internet Treaties’ TPM obligations regarding enforcement against the making, selling or trafficking in anti-circumvention devices or software. These reforms should be incorporated into any new draft law.

IIPA members have also encouraged the Government of Turkey to establish specialized digital piracy task forces with dedicated and specially-trained prosecutors; provisions to do this were in the 2017 draft, but not the 2018



draft. Separate from the Copyright Law reforms, Turkey has been considering amendments to the Civil Code to address online infringement and Internet Service Provider (ISP) liability. No legislation, however, was advanced in 2019.

There are other concerns with the 2018 Copyright Law Bill which should be corrected in any future draft legislation. The 2018 draft bill concerns include: (i) a broad exception to the right of reproduction, including for reprography and digital education; (ii) loosening the right of distribution for imported copies with authorization, making it more difficult for rights holders to prevent the distribution of pirated copies; and (iii) limiting the private copy levy royalty rate to rights holders to 37.5%, with the remainder going to the Government 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. The reorganization of the courts that began 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. One additional improvement has been the Access Providers' Association that 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). Additionally, the training of judges has yielded results. By one estimate, approximately 70% of takedown notices now are responded to with a removal of material. The copyright industries reported that there were many websites taken down in the past few years (over 2,500 sites between 2005 and 2018), but these actions slowed considerably in 2019.

One change in criminal cases in 2019 was the courts no longer accepting registration documents to prove ownership of rights. Instead, the courts (including the Criminal Supreme Court) require all documents showing a full chain of title and all assignments and transfers—this is very cumbersome for both local and foreign rights holders (in fact, a burden almost impossible for foreign rights holders to meet). In the past, copyright notices or registrations were sufficient for presumptions of ownership; this system should be reinstated in the courts.

Current law provides a legal basis for direct infringer injunctions to block infringing websites (and some major sites, including *Grooveshark*, have been blocked in Turkey). Current law (Article 4(3)) also provides a legal basis for civil-law injunctions against third parties, such as intermediaries, whose services are used by direct infringers or those assisting them.

IIPA last filed a country report on Turkey in 2014. At that time, IIPA recommended that Turkey be placed on the Watch List. IIPA recommends that Turkey remain on the Watch List in 2020.