

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Turkey remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** 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).

In 2018, the Government of Turkey circulated a comprehensive Copyright Law reform bill, but that draft was withdrawn in 2019, in large part because of disagreements about the collective management organization (CMO) provisions. Reports are that a new smaller package of amendments is being prepared by the Government of Turkey, in part modeled on European Union laws, for consideration in 2021. Unfortunately, in the interim, 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 motion picture industry reports the most common forms of piracy of motion picture and television materials are streaming websites, piracy apps and via illegal Internet Protocol TV (IPTV) activities. Overall, the copyright industries report that the nature and levels of piracy remained the same in 2020.

Currently, Turkish laws do not provide proper incentives for cooperation between rights holders and Internet Service Provider (ISPs). The current Copyright Law (Article 4*bis*) does have notice and takedown provisions, but without sanctions for ISPs that do not comply. In addition, the current takedown requirements do not remove infringing content expeditiously (the existing timeframes—allowing material to stay up for a week—are too long). One prior draft law would have mandated takedowns within 24 hours of a notification. IIPA recommends that the obligations should be revised to require that content be removed “expeditiously” (and to clarify a time period in regulations or best practices).

The Internet Law sets out broad liability exceptions which are inadequate to incentivize ISPs to address infringements on their sites or by those using their services. The law provides that service providers are not liable for third party content unless “it is clear that [the provider] adopts the content to which it provides a link and that the user intends to access that content.” The definition of a provider is unclear, but apparently includes services other than intermediaries carrying out activities of a merely technical, automatic and passive nature. The law should be clarified to define who is, and is not, eligible for the limitation on liability, and the liability limitation should only apply to passive and neutral intermediaries that do not contribute to infringing activities. Also, the liability exemption, unlike in most countries, is a complete exemption, so denies the ability of a rights holder to obtain injunctive relief, which also should be corrected.

Current law provides that a service provider should remove notified infringing content within a week of a notification. This is not a condition for the liability exemption and, as noted, there are no sanctions for not removing infringing content. If a service provider does not remove the infringing content, the rights holder’s only option is to seek a court order for its removal, and the service provider is only liable if it fails to comply with the court order. The penalties include administrative fines imposed by the Ministry of Transportation. Instead, penalties for noncompliance with

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<sup>1</sup>For more details on Turkey's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Turkey's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



takedown notices or court orders should include both meaningful administrative fines and civil law damages. IIPA recommends that notice and takedown should be a condition (but not the only one) for the liability exemption. Even the most effective takedown procedures and processes to disable access to infringing content can only slow piratical activities. To have lasting deterrence, digital enforcement needs to rely on criminal, not civil, measures, and especially those directed at operators and owners of sites engaging in infringing content.

Amendments to the Internet Law pertaining to social media (Amendments to the Regulation of Internet Broadcasts and the Prevention of Broadcast Crimes, Law No. 5651) entered into force on October 1, 2020. The new provisions: (i) set out procedures for removing infringing content; (ii) define a “social network provider”; (iii) require appointment of a contact (local) representative in Turkey for service providers; (iv) require user data to be retained in Turkey; and (v) require regular (six month) reports from each provider. In these semi-annual reports, the providers are required to provide statistical and categorical information on the removal of content, and the blocking of access, to the Information Technologies and Communications Authority.

Also under the Internet Law, if after a notice from a rights holder, a content provider (i.e., a website) does not remove infringing content from its website, the rights holder can, apparently, directly contact ISPs and hosting providers to seek to block the content provider’s website. However, local counsel report that while this is hypothetically possible, there is a current legal disagreement about whether an Internet Law violation is also an infringement under the Turkish Copyright Law, and thus can be used to block infringing content. There have, reportedly, been a few instances where websites were blocked by hosting providers in this manner, but this is difficult because hosting providers are not required to provide contact information.

Turkey is considering further amendments to the Civil Code to address online infringement and ISP liability. Recent draft proposals, including one in 2018, would have revised the responsibilities of Internet access and hosting providers. Any future proposals should include the recommendations above, as well as clearly deny the safe harbors to services that are either direct infringers or those who are inducing or encouraging infringement by third parties.

The current Internet Law does not include any criminal penalties for copyright violations. It does include eight specific crimes and offenses, and should be further amended to add “copyright” as the ninth specific category. There are procedures in the Criminal Code for siteblocking, applicable only to URL takedowns. However, these procedures require rights holders to file an application for each (newly infringing) uplink which is burdensome and very time consuming for rights holders.

The Copyright Law (Article 4(3)) also provides a basis for civil injunctions against third parties (i.e., intermediaries) either assisting infringers, or whose platforms or services are used to infringe copyright materials by third parties (i.e., direct infringers). Unlike criminal proceedings, civil court orders are not limited to URL takedowns and can cover an entire infringing service. However, applications for civil injunctive relief are complicated, costly, take a long time (often requiring the appointment of experts), and can only be directed against specifically identified infringers. They can, however, result in damage awards, but only after a lengthy and burdensome process.

IIPA recommends amendments to the Civil Code provide certainty for injunctive relief. These injunctions should be available against third parties without a prerequisite of the filing of an infringement claim, since many infringers are anonymous or difficult to identify. Additionally, remedies should not be limited to takedowns of specific content (as is the case for criminal proceedings) and should cover new media and platforms, including stream-ripping sites, whether hosted in Turkey or abroad.

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 recent 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 in the past two years. Partial data from 2020 shows that there were 107 enforcement operations carried out, 440,882 pirated items seized, and 1,297 websites were either blocked or shut down by enforcement authorities. In 2019, the Board of Judges and Prosecutors increased the number of judges in the Civil Courts for copyright, trademark and patent cases, helping to reduce a backlog (and resulting in the appointment of one additional judge assigned to each court).

Since 2019, the criminal courts no longer accept 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.

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 hoped that smaller infringement claims would be expedited, because of otherwise burdensome procedural issues and delays in the courts. There have been no industry reports to date on whether this has or has not worked as intended.

The 2018 draft amendments to the Copyright Act included provisions for the formation and operation of CMOs, referred to locally 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, but this legislation stalled and will have to be re-introduced. The prior CMO legislative drafts did not 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). Last, the draft would allow those Arbitration Committee decisions to 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 2020 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 to subject them only to a compulsory license with a collecting society-determined remuneration. This statutory license of an exclusive public performance right, if enacted, would interfere with the freedom to contract by the copyright owner and 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.

In 2019, Turkey adopted a formal registration and “stickering” (banderole) procedure for hard copy goods. These provisions were 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 an era of physical copy distribution, not the digital distributions that now predominate the marketplace, 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 a 2017 draft, but not the 2018 draft. IIPA members continue to encourage the establishment of such task forces.

There are other concerns with the 2018 Copyright Law Bill which should be corrected in any future draft legislation. The 2018 draft bill concerns included: (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.

Also adopted in 2019 was a law (Act on Evaluation, Classification and Promotion of Cinema Films) intended to create economic incentives for foreign film producers to shoot films in Turkey. It included provisions to finance 30% of production costs for foreign film producers or Turkish co-producers who produced and shot their films in Turkey.

To encourage practical training in all IP services and law, including copyright law, an Intellectual Property Academy was established by the Government of Turkey in November 2019 to organize training programs, conferences and related activities for IP protection, enforcement, and investment. It is hoped by the Government of Turkey, that after the pandemic ends, the work and training of the Academy will re-launch in earnest.