BASCAP
Promoting and Protecting Intellectual Property in Turkey
Executive Summary

We live in a fast-moving, technology- and information-based global society, where economic growth increasingly depends on innovation, invention and creativity.

To continue to grow, to compete and to deliver products and services to the marketplace, companies are increasingly investing in creativity, innovation and other forms of intellectual assets. These assets, generally called Intellectual Property or IP, become key drivers for creating brand value, jobs and overall business growth.

As economies evolve from traditional agricultural, mineral and low-value manufacturing activities, governments also have been investing in their national capabilities to innovate, create and build up intellectual property. They have increased their investment in university research and incubation centers and joint public-private R&D projects, and developed better services to help companies develop, register and commercialize trademarks, copyrights and patents.

The intangible nature of intellectual property – and its vulnerability to theft – has also driven many governments to upgrade efforts to protect it. Unfortunately, IP theft, as evidenced by the global proliferation of counterfeit and pirate products, drains economies of revenue and jobs and puts downward pressure on innovation, international trade and investment.

As a result, strong IP protection goes hand-in-hand with government policies to encourage investment in IP and the realization of the significant benefits of IP to a country’s growth and development.

The value of IP

This paper explains the value of intellectual property and why it is important to Turkey’s integration into the global economy. Section one explores the benefits of IP protection in strengthening national economies, driving innovation and technology, fostering new ideas, and enhancing society and culture:

- IP protection benefits the economy in terms of GDP, employment, tax revenues, development and competitiveness. IP rights (IPR) also promotes foreign direct investment (FDI) and technology transfers in developed and developing countries.

- IP protection promotes innovation, increases funding for R&D and helps firms realize more value from innovations.

- IP helps firms monetize their innovations, secure investment, grow market value, and develop new markets. Companies that use IPR generally succeed better and have a higher market value than those that do not.
• IP protection helps small and medium enterprises. SMEs that rely on IP of all sorts reported higher growth, income and employment than those that do not – in some cases as much as 20% more.

• IP protection benefits consumers and society, providing consumers with innovative products and services in virtually every area of life, driving solutions to many of society’s most important needs – from clean energy and reduced carbon emissions to health care – and helping protect consumers from inferior and dangerous counterfeits.

Just as adequate IP protection and enforcement mechanisms support the numerous societal, consumer and economic benefits described in this paper, inadequate IP protection and inadequate enforcement against IPR violations have the opposite effect.

What’s at risk?

Section two of this paper summarizes the findings of a new report describing the risks associated with IP theft and the impact on the Turkish economy. The analysis suggests that counterfeiting and piracy in Turkey is a US$ 5.7 to 9.6 billion business; the Turkish government loses over US$2.4 billion in lower tax revenues and higher welfare spending; and over 135,000 jobs have been destroyed by counterfeiting and piracy.

Time is right for action

Recognizing the potential benefits of stronger IP protection, Turkey has over the last years made progress in improving its IP protection and enforcement regime. Furthermore, Turkey has taken steps internationally through its commitments undertaken in the context of various international fora. In this respect, this paper suggests that the time is right for Turkey to continue strengthening its IPR systems in cooperation with established international channels and trading partners who stand ready to assist Turkey in proceeding with necessary policy and legal reforms.

A path forward

To reach the target of creating a robust IP protection and enforcement regime capable of generating and preserving the significant benefits that lie ahead in Turkey’s future, this paper provides a comprehensive set of suggested recommendations intended to help Turkey to address certain remaining challenges. This set of recommendations includes a wide range of policies and actions ranging from legal reforms and policy actions to technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices. An indispensable requirement for meeting this target is the effective and immediate implementation of such concrete suggestions. The establishment of a new IP authority
or the assignment of responsibility to an existing IP body with the task of putting the recommendations in place is of utmost importance in this regard.

Summary of suggested recommendations

**Legislative Recommendations**

- Extend and simplify *ex officio* actions.
- Improve action against internet infringements.
- Implement the WIPO Treaties fully.
- Improve and expedite civil enforcement procedures.
- Address deficiencies in criminal IP law and procedures.
- Improve border enforcement.

**Policy Recommendations**

- Improve cooperation among enforcement authorities in addressing counterfeiting and piracy.
- Establish effective dialogue and cooperation between Turkish authorities, rights owner associations and other stakeholders.
- Expand IP-related administrative and technical capacity building.
- Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm.

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ICC works to promote a balanced and sustainable system for the protection of intellectual property. It believes that IP protection encourages innovation and the development of knowledge-based industries, stimulates international trade, and creates a favorable climate for foreign direct investment and technology transfer.

**About BASCAP**

Counterfeiting and piracy have become a global epidemic, leading to a significant drain on businesses and the global economy, jeopardizing investments in creativity and innovation, undermining recognized brands and creating consumer health and safety risks. In response, the ICC launched BASCAP to connect and mobilize businesses across industries, sectors and national borders in the fight against counterfeiting and piracy; to amplify the voice and views of business to governments, public and media; and to increase both awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm.

Visit BASCAP on the web at: [www.iccwbo.org/bascap](http://www.iccwbo.org/bascap)
Section 1

Intellectual property is important to Turkey’s economic growth and development

Creativity and innovation are proven drivers for economic growth and competitiveness.¹ Research has shown that growth is closely related with the capacity of the economy to generate innovation and commercialize innovative products. Intellectual property rights (IPR) play an indispensable role in the formation, development and growth of innovative capacity. This is especially important as economies continue to evolve from traditional agricultural, mineral and low-value manufacturing activities. Intellectual assets have become strategic factors for value creation by firms and they are increasingly important in attracting investment, enabling productivity and efficiency gains, and fostering the growth of innovative sectors in the economy.

The effectiveness of a country’s IPR protection and enforcement regime is critically important in helping countries reach their technological, creative, economic and societal potential. Putting in place an effective IPR regime is one of the most concrete ways to release the potential of inventors and creators and empower them to turn ideas into high-quality products and services, jobs and economic growth.

IP benefits the economy

Economic, government and industry studies and statistics have confirmed that sectors that rely on IPR protection are substantial contributors to the economy. IPR generates substantial economic activity, employment and growth in developing as well as developed countries. IPR attracts foreign direct investment (FDI) and promotes R&D and technology transfer in developing countries, driving development and economic growth. And IPR is an important component of the overall health of an economy. For example, copyright-related industries generate substantial GDP and employment contributions in emerging and developing countries: 2-6% of GDP and 3-11% of employment in 14 developing countries and regions studied by WIPO in Latin America and Asia.

IP-based material developed in emerging and developing countries likewise has ‘substantial export potential’—copyright-related exports already having reached 1-2% of all exports in Mercosur and Chile.²

The OECD has found that the strength of a country’s patent rights is also positively correlated to inward FDI, holding other factors constant. “This relationship holds for all groups of countries – developed, developing and least developed.” OECD economists have found that a 1% increase in a country’s patent protection correlates to a 2.8% increase in FDI, and a 1% improvement in trademark and copyright protection increases FDI by 3.8% and 6.8%, respectively.³

Local studies, based on Turkey’s FDI of USD 120 billion, have estimated that a 10% increase in the country’s Patent Rights Index could potentially increase Turkey’s FDI inflow by USD 19.2 billion. Assuming this additional FDI inflow would go to the manufacturing industry, 150,000 jobs would be generated in Turkey, current export volume would increase by 12% or approximately USD 13 billion and national income would increase by 0.7% of GNP to USD 4.4 billion.⁴
IP promotes innovation

Effective IP protection increases research and development and innovation. It attracts venture-capital investment for R&D and for the commercialization of innovative products and services. IPR promotes cultural expression and diversity, promotes the dissemination of new technologies, and promotes development, including through technology transfers. For example: The OECD has found that a 1% increase in the strength of patent protection in developing countries correlates to nearly a 1% increase in domestic R&D (0.7% on average). A similar increase of trademark and copyright protection correlates to a 1.4% and a 3.3% increase in domestic R&D, respectively.

Firms can earn substantially more from innovations that are protected by IPR. On average the ‘patent premium’ for patented versus unpatented inventions is between 180% and 240%, depending on the industry. In other words, patents on average double the value of an invention. The more valuable a patent, the more R&D that takes place: A 10% increase in the patent premium leads to a 6% increase in business R&D expenditure.

A YASED study in Turkey has cited how a one point increase in the Intellectual Property Rights Index would increase the likelihood of international investors to invest in production, instead of sales and distribution operations, by 57%, creating a shift of FDI inflows from sales and marketing to production and R&D operations, thereby increasing local employment.

IP helps firms monetize their inventions and grow

Firms use IPR to help develop, create value, conduct trade in and benefit from their works and inventions. Firms that rely on IP generally succeed better than those that do not. Trademarks and other intangible IP assets can enhance a firm’s market value substantially. SMEs use IPR more extensively in many cases than large companies. SMEs that use IPR report higher growth, income and employment than those that do not. For example:

Greenhalgh and Rogers have demonstrated that, while there were some differences among industry sectors, “on average, higher … EPO patenting and UK trade marking (relative to firm size) all tend to increase market value.” With respect to trademarks in particular, they have found that not only were UK and EU Community trademarks positively associated with higher market values for UK firms that owned them, but also higher productivity (between 10% and 30% across all firms)—with bigger gains for both seen among firms in the services sector.

‘Intangible assets’ and goodwill often represent a much bigger part of an innovative firm’s market value than its current and physical assets, and the intellectual-property component of intangible assets is growing. With respect to trademarks in particular, the 2010 Interbrand survey found that the value of the IP in the brand alone for each of the top 10 brands world-wide exceeded US$25 billion. In Europe, the value of the top ten brands (i.e. those protected by trademarks and associated intellectual property protections) in each European Union country amounted to an average of almost 9% of Gross Domestic Product (GDP) per capita in 2009.

SMEs in the ICT sector in the EU that rely on IPR, reported 10% higher growth in each of the areas of turnover, market share and employment than those that had not used IPR.
IP benefits consumers and society

IPR supports the development of a continuous stream of innovative, competitive products and services that benefit consumers. IPR promotes consumer trust and more effective protection against counterfeit and pirated goods. IPR is helping to address many of society’s most important needs, from clean energy to health care to a truly ‘digital economy’. Poor IPR protections or enforcement, resulting in counterfeiting and piracy, simply undermine the economic and societal benefits of IPR. For example:

Copyrights provide the basis for the continuous stream of new music and films, ever-improving business and games software, books, magazines, newspapers and other published material, photography, and many other related activities. Patents facilitate many of the products and services that society relies on for health, energy, communication, transportation and many other human and commercial needs. Trademarks support the development of products and services that consumers want and depend on, from clothing and computers to foods and footwear, educational and entertainment products, services, scientific products and even sporting activities.

Consumers benefit from IP not only from the stream of innovative products and inventions and creativity that would not otherwise be created by firms, but also from the rights that protect the identities of well-known goods and services. Trademarks act as signposts of quality, preventing other firms passing off one make of good as being the same as another.

Patents, copyrights and trademarks underlie many of the innovations society needs for protecting the environment, improving health care, and delivering the ‘digital economy’. Studies have demonstrated how IPR is supporting ‘lively and competitive’ R&D in producing new carbon abatement and other green technologies – inventors are based in numerous countries and SMEs are leading the way.

Establishing and promoting an adequate IPR system also can have a significant impact on consumer health and safety, and consumer protection. Counterfeit goods, including medicines, auto and airplane parts, electrical components, toys, food and beverages and many others, can be dangerous and potentially harm or kill unsuspecting consumers. These products may contain harmful and untested ingredients, and provide no assurance of safety or efficacy. Effective IPR rules and strong enforcement of laws and regulations are crucial to protect health consumers while ensuring that the products are genuine and comply with required safety standards.
Section 2

Risks associated with counterfeiting and piracy in Turkey

The intangible nature of intellectual assets renders them especially vulnerable to theft, particularly through product counterfeiting and digital piracy. This illegal activity drains the Turkish economy of legitimate product and facilitates an “underground economy” that deprives the government of revenues for vital public services, dislocates thousands of legitimate jobs, undermines investment, raises costs for law enforcement and exposes consumers to dangerous and ineffective products. Overall, IP theft can have serious negative implications affecting a country’s economic growth, citizen’s health and safety, and public order and security.

However, since counterfeiting operates outside the law, estimating the exact level of counterfeiting and the harm it brings is extremely challenging. Illegal businesses do not report any information on their activities to any government agency, and therefore any measures of the size of illegal businesses, such as total illegal sales or the income earned by these businesses, must be estimated by indirect methods.

As a result, economists have had to examine the issue and develop methodologies to estimate economic and social impacts. For example:

- A report by the Chamber of Commerce of Ankara indicates that Turkey is the second-largest counterfeit product market in the world, and knock-off goods can be found in most of the country’s major cities.  

- The 2010 IDC report on the economic benefits of reducing software piracy found that 63% of software installed on personal computers in Turkey was pirated – a commercial value of USD 415 million. Further, a reduction of the PC software piracy rate in Turkey by 10% over a two year period would deliver USD one billion in new economic activity; 2,180 new IT jobs; and USD 205 million in additional tax revenues.

- The 2010 EU Customs report on Counterfeit and Piracy found that Turkey was one of the top 5 countries of origin for infringing products, and was the lead country of origin for some product categories, notably foodstuffs. Turkey also regularly ranks high in several other categories of counterfeit products such as “body care items”, “sportswear” and “electrical equipment”. The risks to public health and consumer safety incurred by frequently unaware purchasers are of great concern. These risks of harm and danger are especially important in Turkey where 58% of consumers are reported to have purchased counterfeit brands regularly.

- In March 2010, Dr. Sükrü Kizilot of Gazi University in Ankara reported the number of contraband and counterfeit cigarettes seized by Customs increased by 300% from 2009. Police data indicates that the number of contraband cigarettes seized during the first two months 2010 increased by 370% over the previous year. According to the Contraband Economy Report published by the Ankara Chamber of Commerce, every year 25,000 tones of cigarettes enter illegally into Turkey. While the number of contraband and counterfeit cigarettes confiscated at customs increased by 300% in 2009, the consumption of illicit cigarettes continues to rise. According to industry studies, roughly one out of five cigarette packs consumed in Turkey has illicit origin.
New findings from Frontier Economics

Frontier Economics, working with the International Chamber of Commerce, has recently completed a new and comprehensive assessment of the the impacts of counterfeiting and piracy in Turkey. The report develops estimates of both the magnitude of counterfeiting and piracy in Turkey, and the economic and social impact that such activities have in terms of losses to government and consumers. The report builds on the empirical work begun by the OECD, in their 2005 report, and has added on new modules, using publicly available data.

- In terms of magnitude, Frontier estimates that the total economic value of counterfeiting and piracy in Turkey is as much as $10.8 billion every year, more than 1% of Turkish GDP. Every year between $3.5 billion and $4.4 billion of counterfeit products are imported into Turkey and consumed by Turkish consumers. Domestic production and consumption accounts for between $2.6 billion and $5.2 billion, while digital piracy accounts for between $400 million and over $1 billion.

- The production and consumption of counterfeit and pirated goods does not just harm businesses. It has direct social costs; by diverting consumer spending from the legitimate regulated economy, counterfeiting and piracy reduces government tax revenues and increases welfare spending, destroys legitimate jobs and exposes consumers to dangerous and unregulated products. Frontier also examined these impacts in their study and at the national economy level, the results of the analysis show that counterfeiting and piracy:
  - Results in direct losses to the government of $2.4 billion;
  - Results in the destruction of 135,000 jobs.

The report also considered the potential costs arising from consumers being exposed to such dangerous unregulated products. Unfortunately, every year a number of consumers die as a result of their consumption of counterfeit products. Particular causes for concern relate to fake drugs and counterfeit alcohol, food and beverage products. For example in terms of the most high-profile examples, in 2011 a number of Russian tourists died after consuming counterfeit whiskey. In 2009, in Turkey it was estimated that 11 people died and a number of others were injured as a result of the consumption of counterfeit alcohol. Similarly in 2005, 23 people died as a result of the consumption of counterfeit alcohol, while many others were made seriously ill and required hospitalization.

Using global data on the value of life and the value of disability-free life, Frontier estimated that the potential costs to consumers in Turkey in terms of death and injury could be as much as $340 million per year, not including the costs of the health services required to care for those requiring treatment following exposure to unsafe counterfeit products.

Finally, drawing on work commissioned by YASED, even small improvements in IPR protection could lead to substantial increases in FDI with positive knock on effects on exports, employment and national income.

The Table below summarizes the the findings of the Frontier report in what we refer to as the complete picture.
Table 1. Summary of the wider impacts of counterfeiting and piracy

<table>
<thead>
<tr>
<th>Category of impact</th>
<th>Estimated impact (US$)</th>
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**Magnitude of counterfeiting and piracy in Turkey**¹

<table>
<thead>
<tr>
<th>Category of impact</th>
<th>Estimated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imports of counterfeit products</td>
<td>$3.5 – $4.4 billion</td>
</tr>
<tr>
<td>Domestically produced and consumed</td>
<td>$2.6 – $5.2 billion</td>
</tr>
<tr>
<td>counterfeit products</td>
<td></td>
</tr>
<tr>
<td>Digital piracy</td>
<td>$0.4 – $1 billion</td>
</tr>
<tr>
<td>Total</td>
<td>$6.5 – $10.6 Billion</td>
</tr>
</tbody>
</table>

**Direct costs to government and consumers**²

<table>
<thead>
<tr>
<th>Category of impact</th>
<th>Estimated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax losses and welfare payments</td>
<td>$2.4 billion</td>
</tr>
<tr>
<td>Health costs</td>
<td>$340 million</td>
</tr>
<tr>
<td>Employment</td>
<td>135,000</td>
</tr>
</tbody>
</table>

**Impact of improving IPR**³

<table>
<thead>
<tr>
<th>Category of impact</th>
<th>Estimated impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>FDI inflows</td>
<td>$1.9 billion</td>
</tr>
<tr>
<td>Export growth</td>
<td>$1 billion</td>
</tr>
<tr>
<td>Employment</td>
<td>15,000</td>
</tr>
<tr>
<td>National income</td>
<td>$440 million</td>
</tr>
</tbody>
</table>

¹ Based on Frontier Economics analysis
² Based on Frontier Economics analysis
³ Based on findings from Yased research report, impacts reported relate to a 1% increase in the Patent Rights Index
Section 3
Time is right for Turkey to further improve its IP regime

Time is right for Turkey to further improve its IP regime. In order to realize the economic and societal value of its intellectual property, Turkey has for the last decade undertaken improvements in its IPR enforcement regime through a variety of actions, including participation in the Customs Union Agreement, the EU accession process, the Twinning projects with EU Member State Governments, and US-Turkey Strategic Economic and Commercial Cooperation. Engagement in these programs with willing international trading partners has created a golden opportunity for Turkey to further improve its IPR regime. And, these efforts have yielded good results – for example the 2009 EU IPR Enforcement Survey found better public awareness, an increase in the number of trained officials and judges and introduction of some new pieces of IP legislation. The EU’s 2010 Progress Report, which evaluates Turkey’s harmonization with the EU legislation, states that overall alignment of Turkish legislation with the EU acquis in the field of IP is relatively high. And the US government’s “301 Report” in 2011 shows that Turkey has made tangible progress by establishing specialized IPR courts in three major cities, increasing public awareness and undertaking IPR training initiatives.

Turkey’s goal of joining the European Union has led to several actions to improve its current IPR practices. Turkey and the EU opened negotiations on IPR Chapter 71 in June 2008, and both sides are continually evaluating progress on these commitments. Amongst the short term priorities, delineated in the Accession Partnership document of February 2008, is “addressing piracy.” The latest National Program of Turkey, therefore, highlights piracy and calls on the Ministry of Culture and Tourism to set up a common database for monitoring and protecting intellectual property rights; training for the staff of the 81 Provincial Directorates of Culture and Tourism on banderols, certification and the fight against piracy; and preparing spot films focusing on the fight against piracy.

Overall, alignment of the legislation with the acquis is relatively high, although implementation and enforcement are reported to still be problematic. Turkey’s decision to agree to establish an IPR working group with the EU is a positive development addressing a key element of the accession negotiations. Adoption of crucial updated draft laws regulating industrial property rights, including deterrent criminal sanctions, is pending. Closer coordination and cooperation between the IPR-related public bodies and specialized IPR enforcement units will also be very important. IPR holders should be better represented in public IPR platforms. Greater public awareness of the risks which counterfeit and pirated goods pose to consumer safety, public order and health should also be a priority. Inconsistencies in practices between the different IPR courts and discrepancies between TPI and court decisions persist, and reliable statistics are still not available.

Turkey is also committed to aligning its IPR legislation in accordance with the European Customs Union Agreement. The Customs Union Agreement (Decision 1/95) contains the following IPR related provisions: (a) Article 31 explicitly refers to IPR and the importance that both sides attach to it, and (b) Article 2, Annex 8 reads “(...) Continue to improve the effective protection of intellectual, industrial and commercial property rights in order to secure a level of protection equivalent to that existing in the European Community, and shall take appropriate measures to ensure that these rights are respected”.

In addition, Turkey has undertaken direct engagement with EU Member State Governments in what has been termed the Twinning Project. The project aims to “contribute to the efforts of the Turkish
Government in strengthening the capacity in legal, institutional, technical and investment matters related to intellectual rights protection in line with the relevant *acquis communautaire* and with a special emphasis on the fight against piracy*. Under this initiative, Turkey is anticipated to complete its legislation implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2011, through amendments aimed at strengthening protection of technological measures and rights management information.

In addition, the US Government and Turkey have established a “Framework for Strategic Economic and Commercial Cooperation” to promote trade and investment by enhancing bilateral economic linkages and reducing barriers. Established under the Framework is a Working Group on Intellectual Property Rights charged with assisting cooperation on issues involving the protection and enforcement of IPRs.

The EU Council Decision on principles, priorities and conditions in the Accession Partnership with Turkey provides the following principles with respect to IPR: “improve the capacity of police, customs and the judiciary to enforce intellectual property rights, including strengthening coordination between these bodies; address, in particular, the counterfeiting of trademarks and piracy.”
Section 4

Suggested Recommendations

Turkey's international trading partners have noted the progress that Turkey has made in recent years to improve the country's IPR regime – through enacting better legislation and increasing the number of raids, arrests and prosecutions for IP crime. In addition, Turkey has made progress by establishing specialized IPR courts in three major cities, increasing public awareness of IPR issues and by undertaking IPR training initiatives. However, there remain a number of challenges that need to be addressed.

To respond to these challenges, Turkey should take further action to improve its IPR protection and enforcement regime. This paper provides a set of specific legislative and policy recommendations, many of which are drawn from recommendations made elsewhere.

- The following legislative recommendations address issues requiring further legislative reforms related to IP enforcement.
- The policy recommendations include various measures, actions and initiatives aimed at supporting the implementation and enforcement of IP legislation.
- Establishing a new IP authority or assigning responsibility to an existing IP body such as the Turkish inter-ministerial Intellectual and Property Coordination Board could be extremely effective. This Board was referenced in 2008 National Program as one of the bodies to ensure strengthening of coordination between all agencies responsible for the enforcement of intellectual property rights. Assigning such a body the task of putting these recommendations in place would establish needed coordination among relevant agencies to develop joint strategic enforcement plans that have the support of all such agencies.

Legislative Recommendations

1. Extend and simplify ex officio actions.

The Law on Intellectual and Artistic Works No 5728 which came into force in 2008, was later amended to remove the express language permitting ex-officio IPR actions by law enforcement officials. After this amendment, some law enforcement officers refused to conduct street piracy and open piracy raids on their own initiative, arguing that they were unsure whether the law provided them with such authority.\(^{21}\) It is reported that conducting ex-officio raids against pirated products is very difficult due to lack of a common understanding of the legislation on the part of enforcers and the complicated wording of the rules on banderol system.\(^{22}\) The rules and procedures for the fight against piracy need simplification. In particular, adoption of the pending package of amendments to the Law on intellectual and artistic works is crucial.

With respect to physical goods, book piracy - including unlicensed publication and illegal photocopying – seems to remain widespread. A “banderol” system does exist by which publishers of both Turkish and imported books must buy holograms to place on each copy of a book to demonstrate that it is genuine. The banderol system provides the only clear basis on which the
Police and Inspection Committee members can effectuate raids and seizures *ex officio*, although, even regarding this ex officio authority, there is a requirement for complaint of the right holder in order for the criminal process to carry on (as long as the procedure in the law stating that the relevant crime is subject to complaint is not amended). However, there are some concerns that the banderol system does not seem to function well as an anti-piracy tool as there is a large number of products with fraudulent banderols on the market, stolen and pirated, making it very difficult to identify a pirated book by this system.

It also has been reported that enforcement bodies are not empowered to conduct ex officio raids if industrial property rights are violated.\(^{23}\) Therefore, Turkey’s legislation provides for such an authority only with regard to copyright but not with regard to industrial property rights. Consequently, companies often have to investigate on their own to identify illegal or counterfeit products and only afterwards, police raids will be conducted. In addition, most of the technical means to collect evidence are not available under the current legislation for counterfeiting cases.

**Recommendations:**

A. Introduce an implementing regulation or issue a circular to accompany the law conforming *ex officio* authority for street and public place piracy to specialized IP units under the Ministry of Internal Affairs, Security General Directorate of the Police (Special IP Police) against sales of copyrighted materials on streets and in public places as well as banderol violations.

B. Speed up the legislative process for completing the adoption of the draft law amending certain articles of law No 5846 in order to secure legal certainty.

C. Amend the relevant laws governing industrial property rights by explicitly introducing *ex officio* action for enforcement authorities (Police officers).

D. Amend the law by introducing clearer rules regarding the availability of technical tools to collect evidence.

2. Improve action against internet infringements

As in many countries, digital piracy in Turkey takes numerous forms, including pirate hosting sites and forums, on-line sales of infringing physical goods, and illegal P2P file sharing and torrents. In relation to digital piracy, the “Additional Article 4” of the Copyright Law No. 5846 provides a basic structure for internet service provider (ISP) cooperation.\(^{24}\) While this continued enforcement cooperation is welcome, the main issue remains the identification of infringers who use ISPs’ services. Moreover, ISPs are becoming increasingly reluctant to cooperate in addressing piracy (e.g., in providing IP data to rights holders in court cases), and sometimes even demand an official order or request of a prosecutor’s office or a court before offering assistance (most takedown systems elsewhere involve routine takedown upon the filing of a proper notice).
Recommendations:
A. Amend the copyright law to ensure that ISPs comply with notices to take down infringing materials and have in place effective and fair policies to address repeat copyright infringers.

B. Make clear that rights owners can secure the identity of internet infringers expediently through court orders.

C. Promote more active cooperation of ISPs with right holders to prevent the use of networks for acts of IP infringement.

D. Coordinate with ISPs to include a clause in their subscriber agreements providing for account access restrictions or termination in appropriate circumstances as a sanction for repeat infringements. This can be implemented in coordination with Information and Communication Technologies Authority and Ministry of Culture and Tourism.

E. Work with the Telecommunications Presidency to send a notification to ISPs that operate as hosting providers in accordance with Law no 5651 to inform them about piracy and the relevant sanctions against it.

3. Implement the WIPO Treaties fully

Turkey joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in 2008, but important elements of these two WIPO Treaties have still to be implemented. Furthermore, the Turkish law implementing the WIPO Treaties’ requirement to protect technical measures that are used with copyright works, Article 72 of Law No 5846, is unduly narrow. Although Article 72 purports to put into force Article 6 of 2001/29/EU Directive, Article 72 scope is much more narrow than the Directive mandates. An amendment to widen the scope of Article 72 would be useful to cover other types of copyrighted works and other techniques for circumventing technical measures. The scope of this article should be widened to cover all kinds of copyrighted works, performances, and productions instead of merely computer programs; to cover other exclusive rights instead of merely copying (reproduction); to cover other circumvention activities besides merely producing, offering for sale, selling or holding circumvention technologies (for example, to include importing, distributing, renting, marketing, promoting, trafficking and the like); and to cover all kinds of technology, programs, software, signals, badges, marks, and other means of technical protection, instead of merely computer programs and technical hardware.

Recommendations:
A. Amend the copyright law further to fully implement the WCT and WPPT including strong and effective protection of technological protection measures against circumvention, circumvention services, and trafficking in circumvention devices.

B. Amend Article 72 of Law No 5846 on preparatory acts to circumvent
Protection programs to widen its scope to include other types of works, rights, technical protections and circumvention activities, in line with the EU Directive 2001/29.

4. Improve and expedite civil enforcement procedures

The main deficiency in this area is the duration of judicial procedures which is considered to be lengthy: a final decision takes on average three to four years while preliminary injunctions are sometimes decided within three or four months. Although there has been progress in increasing the number of specialized courts, they still deal with a too many cases compared to their capacity, which results in judicial procedures remaining too long and losing their effectiveness.

Another shortcoming relates to preliminary injunctions, which are difficult to obtain in IPR infringement cases, especially patent cases. There are very burdensome evidence requirements for obtaining preliminary injunctions and search warrants. In line with the EU IPR Enforcement Directive, courts should require only reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that a preliminary injunction should be granted. In addition, reports by expert witnesses are required unnecessarily in some cases where the judge’s legal and professional expertise should suffice to resolve particular evidentiary issues. This common practice makes IP enforcement very lengthy and costly.

**Recommendations:**

A. Speed trial process and ensure courts issue preliminary court injunctions in a timely and effective manner.

B. Introduce a preliminary injunction provision similar to the one referred to in Article 9 of EU Enforcement Directive 2004/48 EC.

5. Address deficiencies in criminal IP law and procedures

Address deficiencies in criminal IP law and procedures particularly as to pending draft laws regulating industrial property rights, criminal sanctions, lack of overall deterrence in court rulings and the issue of criminal search warrants. In 2008, the Turkish Constitutional Court annulled the relevant criminal provisions of the Decree Laws on trademarks, patents, utility models, industrial designs and geographical indications. The transitional period for adopting new legislation (with exception of trademarks) seems to have expired on 10 June 2010. This seems to mean that as of 10 June 2010 patents and design owners, for example, cannot initiate a criminal action against infringers. Accordingly, it may well not be possible to request the seizure of the infringing products in Turkey.

A significant number of court cases for trademarks infringements were affected by the decision of Turkey’s Constitutional Court to revoke certain criminal provisions of Trademark Decree 556, and by the subsequent delay of the Turkish parliament in adopting the new trademark law within the prescribed period of time. A subsequent decision of the Supreme Court of Turkey ruled that
defendants charged under the repealed criminal provisions of Trademark Decree 556 should be acquitted. These developments led to orders for the restitution of seized counterfeit goods to the acquitted defendants since they were no longer charged with a crime.

Furthermore, on 21 January 2009 new provisions were enacted (Trademark Law 5833), which constitute the current legal basis for criminal sanctions regarding manufacturing and selling of counterfeit goods and should apply to new cases brought after 21 January 2009. However, there is some uncertainty and concern about how these new provisions were implemented and how judicial authorities will interpret them. In addition, following enactment of the new provisions, maximum punishments are now lower than those provided by Decree Law 556, which results in a weakening of the deterrence value of penalties on IP infringers. The period of imprisonment previously established as from 2 to 4 years was reduced to from 1 year to 3 years, with monetary fines of up to TRL20,000. Since no lower limit of monetary fines is specified, and considering the general rule that unless there is an extreme case courts in Turkey impose fines on the basis of the lower limit, very low monetary fines are typically imposed in such cases (e.g. TRL 80 or TRL 100). In this respect, monetary fines are far from being deterrent to counterfeiting and piracy. As for imprisonment, while prison terms in principle start at 1 year, this can be decreased to 10 months if there is legal or discretionary mitigation, and judgments can be postponed or suspended.  

Overall, most criminal cases end in suspended jail sentences or small fines which encourage recidivism. Criminal IP courts tend to use their discretion not to imprison defendants, relying on Article 231 of the criminal procedural law, which states that the court can suspend the conviction if the penalty is for imprisonment of less than 2 years or a judicial fine. It seems that courts frequently apply Article 231 to suspend sentences in IP cases. Further, Article 51 of the Turkish criminal code provides that any penalty of imprisonment of less than 2 years can be suspended. Moreover, difficulties are encountered in some districts with obtaining warrants for criminal raids due to procedural rules that require the approval of an ordinary criminal judge. In some districts, public prosecutors require warrants from judges to approve any search in anticipation of a criminal case. In those districts, the search warrant application must be made to standard criminal courts. These courts in some instances have been reluctant to grant search warrants without substantial evidence, which of course may only be available via a raid. Moreover, the evidence that may be available to seek a search warrant often is not readily apparent in experts’ reports, and is often not accepted by the courts.

Recommendations:

A. Speed up the process by adopting pending legislation of criminal sanctions covering patents, utility models, industrial designs and geographical indications.

B. Introduce legislative or technical administrative measures that will prevent the restitution of counterfeit goods seized within the scope of actions conducted under Trademark Decree 556.

C. Enhance the deterrent effect of penalties under the Trademark Law 5833 by introducing higher maximum fines.

D. Carry out training, particularly among judicial authorities, to ensure accurate
E. Increase criminal penalties for intellectual property offences.

F. Recommend that courts rely less on Article 231 of the criminal procedural law and Article 51 of the Turkish criminal code in order to ensure that court rules permit the deterrence of IP crime; reduce the number of amnesties and suspended sentences (particularly against repeat offenders); and ensure the prompt issuance of search warrants on the basis of a reasonable showing from available evidence that a crime may have been committed.

6. Improve border enforcement

Improve border enforcement in particular by addressing deficiencies in border enforcement procedures such as lack of substantial control at borders, short deadlines, and a lack of a centralized customs authority. Based on the EU Customs 2010 report on enforcement of IP rights, Turkey is the first source of suspect goods detained at EU borders regarding foodstuffs. Turkey ranks second in categories such as body care items and ready-to-wear clothing and third in electrical equipment. Therefore, it is apparent that the effectiveness of export controls would need to be improved.

There are also concerns regarding the short deadline (10 days) within which the right holders must obtain court recognition of a seizure of infringing goods and file suit against an infringer to maintain the seizure in force until the final decision of the court. It is obvious that this short deadline of 10 days is not at all sufficient for obtaining a final decision from the court. It would more appropriately apply to a requirement simply to file suit, for example.

In addition, right holders have to file separate applications with related customs directorates and to deposit security for each seizure respectively. Therefore, Turkish customs lack a centralized organization enabling all customs authorities of the country to take action simultaneously. Moreover, under the new Customs regulation which came into force on 7 October 2009, it is not very clear who will bear the storage costs of storing seized goods. Such lack of clarity may raise some questions among enforcement authorities over how to proceed and invariably hampers IPR enforcement actions.

Furthermore, with respect to the “simplified procedure” (meaning quick destruction procedure) under the new Customs regulation, rights holders can seek the consent of the owner of the goods that the goods be destroyed. Such consent needs to be received within 10 working days of notification of the initial detention (extendable for a further 10 working days). This is a similar procedure to that provided for in the EU Customs Regulation. Unfortunately, silence from the owner of the goods does not suffice to allow destruction. In the absence of affirmative consent to destruction, the rights holder must commence a civil action and obtain a cautionary attachment (interim injunction) within the 10 (plus 10) day deadline. Otherwise, the goods will be released. This is a backwards step even from the previous procedure under which it was sufficient for a rights holder to have initiated a criminal complaint.
Recommendations:

A. Amend the Customs regulation by stipulating that the 10-day deadline will be for filing the suit and not for obtaining a final decision from the court.

B. Amend the Customs regulation by introducing a provision similar to the one referred to in Article 5 of European Regulation 1383/2003 EC as regards the “application for action”.

C. Amend the Customs regulation by introducing a provision similar to the one referred to in Article 11 of European Regulation 1383/2003 EC as regards the “simplified procedure”.

D. Provide clarity as to who bears the costs of storing seized goods.

Policy Recommendations

The remaining recommendations are aimed at the need to take some broader measures, actions and initiatives to support the more specific implementation and enforcement of IP legislation as recommended above.

- As a starting point, Turkey needs a national IP action plan covering the full range of legal and policy reforms, technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices.

- In addition, the effective and immediate implementation of the legislative and policy recommendations could benefit considerably from the establishment of a new IP authority or the assignment of responsibility to an existing IP body (e.g. the Turkish inter-ministerial Intellectual and Property Coordination Board) with the task of implementing the recommendations. Such an authority/body would have a broad responsibility to oversee the coordination of relevant agencies, develop and implement joint strategic enforcement plans and report to the Turkish government on specific performance indicators. In fact, the Intellectual and Industrial Property Coordination Board which was established by a Prime Ministry Circular in 2008 with the aims of establishing strategies for intellectual and industrial property rights, enhancing coordination and cooperation between related institutions and providing efficiency in their application. The main goal was to establish a “National Strategy Document for intellectual and industrial property” and an “action plan” according to this strategy. Workshops and similar works have been initiated but no clear result has been obtained yet regarding the strategy document. The same issue has also been highlighted in Turkey’s 2011 Industry Strategy for 2011-2014. The Industry Strategy states that the National Intellectual and Industrial Property Strategy will be issued in that period.

7. Improve cooperation among enforcement authorities in addressing counterfeiting and piracy, including among the police, Customs and the judiciary.

An important aspect of enforcement is the cooperation and coordination among and between the law enforcement authorities. In Turkey, this would include the Ministry of Justice, the Turkish
police, the Ministry of Culture and Tourism, Under-secretariat for Customs and Turkish Patent Office. While there is already cooperation between these bodies, the level of cooperation needs to be improved. The establishment of sound cooperation and coordination structures is particularly important in the area of border measures, as customs authorities have to cooperate with other national agencies as well as foreign customs authorities and international agencies in order to effectively combat global counterfeiting and piracy.

Recommendations:

A. Foster administrative cooperation and coordination amongst domestic enforcement authorities through seminars, workshops and conferences.

B. Improve cross-border cooperation between Turkish law enforcement authorities and international agencies or IP offices of foreign governments.

C. Encourage customs and policy authorities to participate more fully in developing and using existing technical tools to collect and share information. Share information with the competent customs authorities including relevant information to better identify and target for inspection shipments suspected of containing infringing goods.

D. Improve Customs’ risk assessment tools. For example, given the great differences in prices between authentic and counterfeit products, a system should be set up to flag up any imports of certain products that fall below a certain declared value.

E. Promote internal coordination among, and facilitate joint actions by competent authorities responsible for the enforcement of IPR.

F. Upgrade technical infrastructure and develop on-line network to allow competent authorities involved in the enforcement of IPR to rapidly exchange information on enforcement issues, including real time alerts information on suspect products, manufacturing sites, distribution routes and key sale points.

G. Research and make information available on technical tools and systems for prevention and investigation purposes (including tracking and tracing systems which help to distinguish genuine from counterfeit products).

H. Develop databases to collect, store and analyze data on the scope and impact of IPR infringements and national case law on such infringements and systems to enhance access of public authorities and private stakeholders to information.

I. Issue documents for the implementation of IP rights such as handbooks and manuals and make them available to the law enforcement authorities.
8. Establish effective dialogue and cooperation between Turkish authorities, rights owner associations and other stakeholders

Effective cooperation between private and public authorities is a key element in combating counterfeiting and piracy. While industry has the primary responsibility for protecting its intellectual property, government plays a critical role in ensuring there is an effective IPR protection regime in place and enforcing the relevant laws and regulations. Rights holders have the technical expertise to distinguish counterfeits from original products and know the supply chain involved in manufacturing, distributing and selling their products, and can assist government in investigations and enforcements actions.

**Recommendations:**

A. Promote the establishment and maintenance of formal or informal mechanisms such as advisory groups that would facilitate engagement between the Turkish authorities and rights holders and other relevant stakeholders including organizers of trade fairs, transport and logistics companies, retailers and payment service providers.

B. Undertake cooperative actions together with private sector to build strategies and to promote and spread successful private sector strategies.

C. Cooperate with private stakeholders to build an electronic information exchange and an early warning system on counterfeit and pirated products.

D. Enhance pre-seizure information sharing with rights holders about samples of products and packaging to aid Customs in determining whether goods are infringing.

E. Enhance information sharing with right holders about technological protection measures and circumvention devices seized, and provide samples to right holders of circumvention devices seized in order to allow right holders to alter the technological measures to render the circumvention devices ineffective. Encourage and facilitate dialogue between right holders and other stakeholders to exploit the potential of collaborative approaches and to place more emphasis on joining forces to combat IPR infringements. The focus on common interests should allow voluntary arrangements to be fostered that would supplement the legislative framework.

F. Consider the creation of a Turkish Observatory on Counterfeiting and Piracy, with membership constituted of representatives from relevant government, industry and other stakeholders. Such an Observatory could serve as platform to join forces and build coalitions between representatives from national authorities and other stakeholders for mutual assistance. The tasks and activities of such an Observatory could include responsibility for helping to put effective policy recommendations in place and assisting the Turkish public authorities in their policy, legal and enforcement work.
9. Expand IP-related administrative and technical capacity building.

A country's effectiveness in protecting IP rights is in significant measure dependent upon its capacity to enforce them. Therefore, in addition to prescriptions for better legislation and stronger enforcement, methods for improving knowledge, enhancing training, and developing skill capacities and competences, should be put in place.

**Recommendations:**

A. Enhance the knowledge on best public and private sector practices to protect IPR.

B. Enhance the expertise of persons involved in the enforcement of IPR by providing an on-line inventory of available, relevant training programs and initiatives offered and organized at international level.

C. Expand cooperation with international organizations with a view to enforcement authorities such as police, prosecutors and customs participating in seminars organized by specialist IP enforcement representatives from the World Customs Organization, Interpol, Europol and UNICRI (United Nations Inter-regional Crime and Justice Institute). These enforcement seminars will secure a more sustainable flow of knowledge and learning throughout Turkish enforcement agencies.

D. Organize more domestic programs and maximize the use of available funds offered at international level by participating in technical assistance projects with foreign governments (such as the EU Twinning projects\(^{45}\) and TAIEX\(^{46}\)) to support the implementation and enforcement of IPR.

E. Increase the number of specialized IP courts and prosecution offices throughout Turkey in cities other than Istanbul, Ankara and Izmir. Increase the number of security units in the police organization particularly in highly populated provinces where industrial and commercial activities are also intensive, such as Bursa, Gaziantep, Antalya, and train the staff working in these units on investigation methods with respect to diverse types of counterfeiting and piracy.

10. Increase public and political awareness of counterfeiting and piracy and the associated economic and social harm.

There is a need to increase public and political awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm. It is important for consumers, rights holders and government officials to be aware of the counterfeiting problem, to understand the economic and social effects, and to know what concerned parties can do to combat counterfeiting and piracy activities.
Recommendations:

A. Promote the adoption of measures to create and strengthen public awareness of the importance of respecting IP and the detrimental effects of IPR infringements.

B. Develop an overall communication strategy on enforcement-related activities including the use of new communication channels such as social networks and the design and development of an exclusive enforcement related website.

C. Design nation-wide awareness campaigns which will educate the public and decision makers on the harms and costs of counterfeiting and piracy and raise awareness especially among young people to enable them understand what is at stake in IP.

D. Work with international organizations, such as the ICC’s BASCAP to adapt globally tested awareness models to Turkey’s needs.

Conclusion

Combating counterfeiting and piracy is an important but challenging task that cannot be accomplished in isolation. Protection of IPR should not solely remain as a priority of state authorities but needs to be considered as a goal shared broadly by all sectors of society. As a result, public officials, international governmental organizations, industry and even consumers need to work together more closely to develop more creative and effective methods to fight this economic and societal problem.

The benefits which a more advanced intellectual property regime could generate for country’s economy are undeniable. It is an established fact that there is a close correlation between the effectiveness of IPR protection and a country’s economic performance. IPR systems significantly affect every country’s growth, FDI, employment capacities, innovation and overall competitiveness, and enable productivity and efficiency gains. Putting in place a solid IPR protection and enforcement regime is thus critically important for a country to reach its prosperity potential. The ICC/BASCAP stands ready to do its part to help the Government of Turkey achieve these important goals.

Notes

1 The following sections and many of the included examples of the benefits that intellectual property provides for innovation and the economy are summarized from ICC, Intellectual Property: Powerhouse for Innovation and Economic Growth (2011), http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf
2 Indeed, effective IP protection and compliance can also help support a country’s export of other products and services as well, as some jurisdictions have begun to condition market privileges on such compliance. See: Baker & McKenzie, New U.S. State Law Impacts Manufacturers Worldwide that Use Stolen or Misappropriated Information Technology (Aug. 2011).
Developing Countries, OECD Trade Policy Working Paper No. 62 (25 Jan. 2008), analysis recognised that the four sectors chosen for the analysis may be more susceptible to counterfeiting than other sectors, and so applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty in order to satisfy themselves with a sufficient degree of certainty.


26. Source: http://www.cnbce.com/business/1107/konuid=7.asp. With respect to recently adopted legislation, Mr. Bendevi Palandokan, President of the Confederation of Turkish Tradesmen and Craftsmen (retail association), criticized the Procedure and Principles Related with the Sale and Display of Tobacco Products and Alcoholic Beverages published in the Official Gazette by the Tobacco Authority ("TAPDK") on January 7, which came into effect on July 7, 2011. According to Mr. Palandokan, consumer’s interest in counterfeit and contraband products would increase when they cannot see the product they want to buy. He also warned that some counterfeit and contraband products became most sold consumer goods in a few cities. The fast increase of contraband and counterfeit products in the market would only raise revenues of smugglers, terror organizations and organized crime. See: http://www.haberciniz.biz/pilandokenden-tutun-ve-alkollu-urun-satisina-iliskin-yonetmelige-tepki-1059195h.htm.


40 See: http://www.iprights.com/content.output/727/727/Resources/Alerts/Alert%20343%20Europe%20-%20New%20%20Turkish%20%20Customs%20%20Regulation.mspx.
41 Source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0007:0014:EN:PDF. In accordance with the Regulation 1383/2003, each Member State designates the customs department competent to receive and process so-called "applications for action", i.e. applications for border measures. After that, the decision granting the application for action is forwarded to all authorities who might be concerned by the goods in question.
42 See: Art. 11 Where customs authorities have detained or suspended the release of goods which are suspected of infringing an intellectual property right in one of the situations covered by Article 1(1), the Member States may provide, in accordance with their national legislation, for a simplified procedure, to be used with the right-holder's agreement, which enables customs authorities to have such goods abandoned for destruction under customs control, without there being any need to determine whether an intellectual property right has been infringed under national law. To this end, Member States shall, in accordance with their national legislation, apply the following conditions: that the right-holder inform the customs authorities in writing within 10 working days, or three working days in the case of perishable goods, of receipt of the notification provided for in Article 9, that the goods concerned by the procedure infringe an intellectual property right referred to in Article 2(1) and provide those authorities with the written agreement of the declarant, the holder or the owner of the goods to abandon the goods for destruction. With the agreement of the customs authorities, this information may be provided directly to customs by the declarant, the holder or the owner of the goods. This agreement shall be presumed to be accepted when the declarant, the holder or the owner of the goods has not specifically opposed destruction within the prescribed period. This period may be extended by a further ten working days where circumstances warrant it.
43 Source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0007:0014:EN:PDF. In accordance with the Regulation 1383/2003, each Member State designates the customs department competent to receive and process so-called “application for action”, i.e. application for border measures. After that, the decision granting the application for action is forwarded to all authorities who might be concerned by the goods in question.
44 See: Turkish Industry and Business Association (TUSIAD), http://www.tusiad.org.