



European Communities Trade Mark Association

11 January 2019

**ECTA POSITION PAPER**

**PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL ON COPYRIGHT IN THE DIGITAL SINGLE  
MARKET**

**COM(2016) 593 FINAL**

**INTERINSTITUTIONAL FILE: 2016/0280 (COD)**

**TRILOGUE PREPARATION PAPER**

**COMMENTS ON ARTICLE 2**

## **I. INTRODUCTION**

ECTA has analysed the text issued on 26 September 2018 by the Council of the European Union ("4-column document") in preparation of the trilogue proceedings (12513/18) regarding the draft Directive of the European Parliament and of the Council on copyright in the Digital Single Market (hereinafter - the "text"), focusing its attention particularly on Article 2 as approved by the European Parliament in its vote on 12 September 2018 (11520/18).

It has been ECTA's objective to understand and carry out an analysis which addresses whether the current text of Article 2 is primarily capable to reach the goal stated and what changes (if any) may be suggested to increase the likelihood that such rules may attain the results they aim to achieve.

## **II. ECTA'S COMMENTS**

The ECTA Copyright Committee, well aware of the controversies and discussions which surround the adoption of the new Copyright Directive, has decided to focus its attention on three "definitions" contained in the Art. 2 of the text as approved by the European Parliament, with view to offer a contribution of clarity and to promote some further thoughts before the final text is adopted.

The comments refer to the respective rows as set out in the 4-column document issued by the Council (12513/18) and focus on the wording as adopted by the European Parliament in its vote on 12 September 2018.

**Row 111: Art. 2, para 1, introductory part**

*'research organisation' means a university, including its libraries, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services:*

**ECTA's comments/proposed changes (underlined and in red):**

*'research organisation' means a university, including its libraries, a research institute, any other organisation or department, even whenever placed within an organization having statutory profit purposes, the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services".*

The rationale for the change is to ensure that ALL research organizations are granted the same exception rights.

**Row 125: Art. 2, para 4b (EP version)**

*'online content sharing service provider' means a provider of an information society service one of the main purposes of which is to store and give access to the public to a significant amount of copyright protected works or other protected subject-matter uploaded by its users, which the service optimises and promotes for profit making purposes. Microenterprises and small-sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC and services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories, shall not be considered online content sharing service providers within the meaning of this Directive. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive;*

**ECTA's comments:**

- "One of the main purposes of which is to store and give access"

ECTA is concerned with the requirement for the reference to "store", particularly in an era where the storage of data is less tangible, and where peer-to-peer storage and access is commonplace.

The term "give access" in relation to copyright is not presently defined in case law, whereas the term "communicate", may be more appropriate"

Alternatively, ECTA would suggest the term "to store and/or give/communicate".

- "significant amount of copyright protected"

The term *significant* is ambiguous. Further, as not all works are protected by copyright, the term significant may be hard to define, thus excluding certain providers from the definition.

Alternatively, ECTA would suggest the term “large amount of copyright protected”.

- “the service optimises”

It is not clear to ECTA what is meant by, or the reason for the term “the service optimises”. The phrase “uses for profit making purposes” may be more suitable. Further, rather than “profit making”, it may be more appropriate to use “commercial purposes”, which is consistent with the wording in the text.

- Is “authorisation” considered to be express (i.e. written authorisation) or implied?

ECTA believes that an unequivocal clarification may avoid that in the future questions may arise on whether implied or express authorisation may be needed or that during implementation national legislation may differ on this issue.

- “main activity is online retail of physical goods”

ECTA considers it might be appropriate to extend this to “services” in addition to the sale of physical goods.

#### **ECTA's proposed changes (underlined/lined out and in red):**

*‘online content sharing service provider’ means a provider of an information society service one of the main purposes of which is to store and /or give access/ communicate to the public to a large amount of copyright protected works or other protected subject-matter uploaded by its users, which the service optimises and promotes for commercial purposes. ~~Microenterprises and small-sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/364/EC and services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories, shall not be considered online content sharing service providers within the meaning of this Directive. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods/services, should not be considered online content sharing service providers within the meaning of this Directive;~~*

#### **Row 127: Art. 2, para 4d**

*‘automated image referencing service’ means any online service which reproduces or makes available to the public for indexing and referencing purposes graphic or art works or photographic works collected by automated means via a third-party online service.*

#### **ECTA's comments:**

ECTA does not have any specific change to suggest for this definition. However, while the definition of "automated image referencing services" *per se* does not seem to raise any particular observation, it is to be noted that, on the one side, images are not that



European Communities Trade Mark Association

different from other protected works of copyright (like music or movies or literary works) and thus it seems strange that this particular definition appears in the Directive, as it does not concern content uploaded by users, but content which the automated image referencing services find on the internet, thus by definition within the realm of what search engines do and their value to the public at large, i.e. to source the Internet and provide results. What the users do with those result is then what may or may not infringe. On the other hand, as there are on the internet objectively very few (if at all, except one) of such "automated image referencing services", this definition seems to target a specific and clearly identifiable subject (Google images) and as such any legislation which instead of addressing a plurality of subjects seemingly is aimed at regulating one single entity is considered with suspicion.

### **III. FINAL REMARKS**

ECTA hopes that the above comments are of help to you and can be considered. Should you need any clarification or further information on any of the points raised ECTA will be happy to provide such further input.

# ECTA

European Communities Trade Mark Association

ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world. ECTA brings together those practicing in the field of IP, in particular, trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.



The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- European Union Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.