



Comments of **MARQUES**, the European Association of Trade Mark Owners on the 2nd Additional Protocol to the Budapest Convention on Cybercrime

Introduction to **MARQUES**

MARQUES is the European association representing brand owners' interests. The **MARQUES** mission is to be the trusted voice for brand owners. **MARQUES** unites European and international brand owners across all product sectors to address issues associated with the use, protection and value of IP rights, as these are vital to innovation, growth, and job creation, which ultimately enhance internal markets.

MARQUES membership crosses all industry lines and includes brand owners and trademark professionals in more than 80 countries representing billions of dollars of trade annually. The trade mark owners and practitioners represented by **MARQUES**, together, own more than three million domain names and advise organisations of all sizes on rights protection in the domain name system. These domain names are relied upon by consumers across Europe as signposts of genuine goods and services.

More information about **MARQUES** and its initiatives is available at www.marques.org.

MARQUES' comments on the 2nd Additional Protocol to the Budapest Convention on Cybercrime

MARQUES welcomes the opportunity to provide its comments to the Council of Europe on the proposed 2nd Additional Protocol to the Budapest Convention on Cybercrime.

MARQUES notes the various aims and intents of the Budapest Convention set out in the Preamble, including in particular the need to pursue "a common criminal policy aimed at the protection of society against cybercrime, inter alia, by adopting appropriate legislation and fostering international co-operation", and recognising "the need for co-operation between States and private industry in combating cybercrime and the need to protect legitimate interests in the use and development of information technologies".

MARQUES also notes the intent of the proposed 2nd Additional Protocol to "further enhance cooperation on cybercrime and the collection of evidence in electronic form of any criminal offence for the purpose of specific criminal investigations or proceedings" and that, in recognising the need for co-operation between States and the private sector "greater clarity or legal certainty is needed for service providers and other entities regarding the circumstances in

which they may respond to direct requests from criminal justice authorities” based in other territories “for the disclosure of electronic data”.

In the Explanatory Report to the 2nd protocol, at paragraph 5, various examples of cybercrimes are identified. Offences relating to intellectual property rights, including copyright and trademark offences, are not referred to. Europol reports that the international trade in counterfeit products (based on 2013 data) represents up to 2.5 % of world trade, or as much as EUR 338 billion, and that the impact is particularly high in the European Union, where counterfeit and pirated products make up to 5 % of imports, or as much as EUR 85 billion¹. Whilst we appreciate that the examples in the Explanatory Report are, by their context, non-exhaustive, **MARQUES** considers that intellectual property crime ought to be specifically identified.

Further, the Budapest Convention itself, in its text, identifies offences related to infringements of copyright and related rights at Article 10, but criminal offences related to trade mark rights are not specifically identified. Whilst many of the provisions of the Budapest Convention are not limited to the criminal offences that are set out in Articles 2-11, but also apply to “other criminal offences committed by means of a computer system; and the collection of evidence in electronic form of a criminal offence”, nevertheless it would be preferable for trade mark-related offences to be specifically identified in order to demonstrate the seriousness with which such offences are viewed and are to be treated. The proposed 2nd Additional Protocol should be an opportunity to rectify this.

MARQUES supports the intent behind Article 6 of the 2nd Additional Protocol to assist in the disclosure of domain name registration data by those entities that hold this data (domain name registries, registrars, and domain resellers) for the purposes of the pursuit of criminal investigations and proceedings. Since the focus of the Budapest Convention is to provide co-operation for law enforcement authorities when pursuing criminal investigations and proceedings, it is understandable that the 2nd Additional Protocol maintains this focus in Article 6. Nevertheless, private entities including intellectual property rights owners and private investigators operating on their behalf may need to pursue a degree of investigation themselves before being in the position to present a persuasive report of criminality to the appropriate law enforcement authority. Further, intellectual property offences in many countries may also be pursued by entities as private prosecutions, and of course private entities such as intellectual property owners also need access to domain name registration data for the pursuit of legitimate civil investigations and proceedings. Post the implementation of GDPR, the lack of certainty about when requests to access domain registration data are lawful and duly justified requests of legitimate access seekers has led to inconsistency of response to such requests. Brand owners, and entities providing domain name services, in addition to law enforcement authorities, would benefit from clear and unambiguous statements as to the legitimacy of data disclosure for the investigation of a potential intellectual property offence or infringement and

¹ <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/intellectual-property-crime>

its enforcement. The proposed 2nd Additional Protocol might therefore be considered to be missing an opportunity to provide such clarity which, **MARQUES** contends, would meet the aims of the Convention to deliver greater co-operation between Member States and private entities.

We thank you for your kind consideration of the above comments.

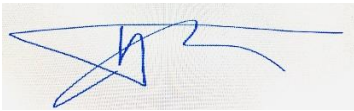
Yours sincerely,

Submitted on behalf of **MARQUES**, the European Association of Trade Mark Owners

1st May 2021



Joachim Hofmann, Chairman of **MARQUES** Council



Tjeerd Overdijk, **MARQUES** Cyberspace Team Chair