## Intellectual Property

*This section is devoted to giving readers an inside view of the crossing point between intellectual property (IP) law and risk regulation. In addition to updating readers on the latest developments in IP law and policies in technological fields (including chemicals, pharmaceuticals, biotechnology, agriculture and foodstuffs), the section aims at verifying whether such laws and policies really stimulate scientific and technical progress and are capable of minimising the risks posed by on-going industrial developments to individuals' health and safety, inter alia.*

# Signed, Sealed, but not Delivered: The EU and the Ratification of the Marrakesh Treaty

*Ana Ramalho**

Back in April 2014, following the Council's authorization,[1] the European Union (EU) signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (Marrakesh Treaty).[2] Under the Treaty, parties are to adopt copyright exceptions to facilitate access to formats of works accessible to persons who are blind, visually impaired, or print disabled. Countries must moreover provide for the cross-border exchange of accessible-format works. According to Article 18 of the Treaty, it will enter into force three months after 20 ratifications have been formally deposited with WIPO (World Intellectual Property Organization). At the time of writing, 11 countries have ratified the Treaty (none of which is an EU Member State, ironically enough). The Treaty proved to be highly controversial from its inception, despite the – very laudable – aim of providing access to books for the blind, visually impaired or print disabled. Arguably, right holders were concerned with setting a precedent that would lead to demands for copyright exceptions by other groups of potential beneficiaries.[3] In the end, the different interests at stake impaired the negotiations and a final agreement was only reached after four years,[4] even though the issue of copyright exceptions for the benefit of the visually impaired and/or persons with disabilities had been visible in the international arena for quite some time.[5]

The Treaty was signed by the EU on 30 April 2014. There were however no less than 7 Member States that, while recognising the importance of the Marrakesh Treaty, considered that it fell under an area of shared competence between the EU and the Member States.[6] According to the opposing Member States, Article 4 of the Marrakesh Treaty (which imposed an obligation to provide an exception to the rights of reproduction, distribution and making available to the public regarding accessible format copies) went beyond the optional character of Article 5 paragraph 3(b) of the Information Society Di-

* Assistant Professor of Intellectual Property Law, Maastricht University.

1 Council Decision of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled, O.J. 2014 L 115/1.

2 For the full text of the Treaty, see http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301016 (last accessed 28 October 2015).

3 Kaya Koklu, "The Marrakesh Treaty – time to end the book famine for visually impaired persons worldwide", 45 *International Review of Intellectual Property and Competition Law* (2015), pp. 737 *et sqq.*, at p. 738.

4 Catherine Seville, "The principles of international intellectual property protection: from Paris to Marrakesh", 5 *The WIPO Journal* (2013), pp. 95 *et sqq.*, at p. 103.

5 See, e.g., the Report of WIPO and UNESCO's Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protectd by Copyright, 1982, available at http://www.keionline.org/misc-docs/tvi/berne_1982_wipo_unesco.html (last accessed 28 October 2005).

6 See Annex to the Council note 8305/14, available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%208305%202014%20ADD%201 (last accessed 28 October 2015).

rective.[7] Article 5 paragraph 3(b) of the Directive enables – but does not mandate – Member States to provide for an exception in their national laws to the rights of reproduction, communication to the public and making available for "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability."The EU had thus, in the opinion of the opposing countries, not become exclusively competent under Article 3 paragraph 2 of the Treaty on the Functioning of the European Union (TFEU).[8] Doubts were also raised as to using Article 207 TFEU as the legal basis for the signature and ratification of the Treaty (Article 207 TFEU clarifies *inter alia* that the commercial aspects of intellectual property come under the common commercial policy of the EU, the latter in turn being an exclusive competence of the Union pursuant to Article 3 paragraph 1(e) TFEU).

The contention about the EU's competence (or lack thereof) on this matter has further been followed up in the debate that took place in the European Parliament Plenary Session on 29 April 2015. [9]Again some countries opposed the ratification of the Marrakesh Treaty under EU exclusive competence, arguing that this is a mixed agreement (i.e., one where both the EU and the Member States hold competence, the Treaty having in that case to be ratified separately by the Member States as well as the EU).[10] As a result, on May 2015 the EU Council adopted a decision asking the Commission to submit a proposal aimed at amending the current EU legal framework so that it complies with the Marrakesh Treaty.[11]As of 16 September 2015, examination of the Commission's proposal for a Council Decision on the conclusion of the Marrakesh Treaty was still ongoing.[12]

On the wake of these debates, it is worth looking into the main question that apparently caused radically opposing views: is the EU exclusively competent on this matter? In the opinion of this author, the answer should be a rotund yes; whatever the provision picked, the competence of the EU will be exclusive.

Following the Court of Justice's decision in case C-114/12, Commission and Parliament v. Council,[13] in order for an international agreement to come under the EU's exclusive competence as established in Article 3 paragraph 2 TFEU, it is necessary to perform a "specific analysis of the relationship between the envisaged international agreement and the EU law in force."[14] According to the Court, the EU has exclusive competence to negotiate an international agreement where it is clear from said analysis that such agreement is capable of affecting EU common rules or altering their scope.

That is to say, if Article 3 paragraph 2 TFEU is at stake, the EU will have exclusive competence where a specific analysis of the relationship between the Marrakesh Treaty and the EU acquis (namely, the Information Society Directive) reveals that the former is capable of affecting the latter or altering its scope. This will be the case where the international treaty falls within the scope of the EU acquis, as per the Court's ruling in the *ERTA* case.[15] It's worth recalling that one of the rationales of the so-called "ERTA doctrine" was exactly the need to have a parallelism between internal EU legislation and the conclusion of international agreements, with a view to ensuring the unity of the internal market and the uniform application of EU law.[16] If the EU acquis and the matters to be negotiated in the international agreement

7 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. 2001 L 167/10.

8 Article 3 paragraph 2 TFEU reads: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

9 The transcript of the debate is available at http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20150429&secondRef=ITEM-024&language=EN&ring=O-2015-000021 (last accessed 20 October 2015),

10 Piet Eeckhout, *EU External Relations Law*, 2nd ed. (Oxford: Oxford University Press, 2011), pp. 212-214

11 See Council note 8967/15, p. 8, available at www.consilium.europa.eu/en/meetings/gac/2015/05/st08967_en15_pdf/ (last accessed 28 October 2015).

12 http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-009538&language=EN (last accessed 28 October 2015). For an analysis of what an amendment to the current legal framework should consist of, see Reto Hilty, Kaya Koklu, Annette Kur et al., "Position paper of the Max Planck Institute for Innovation and Competition concerning the implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled", 46 *International Review of Intellectual Property and Competition Law* (2015), pp. 707 *et sqq*.

13 C-114/12, Commission and Parliament v. Council [not yet published].

14 Paragraph 74 of the decision.

15 Case 22/70, Commision v. Council (*ERTA*) [1971] 263.

16 Paragraph 31 of the *ERTA* case. See also Piet Eeckhout, *op. cit.*, pp. 75-76

overlap, then the EU ought to be solely competent to enter into that agreement, so as to guarantee coherence between it and existing EU legislation.

However, as the Court clarified in case C-114/12, such overlap does not have to be absolute, as "falling within the scope" of EU rules does not mean that the international Treaty must coincide fully with EU rules.[17] Rather, a finding that the international Treaty relates to an area "largely covered" by EU norms is enough to conclude that such Treaty may affect EU rules, thereby making the EU exclusively competent.[18]It can furthermore be argued that the wording of Article 3 paragraph 2 TFEU ("*may* affect common rules or alter their scope") suggests that a mere possibility is enough to trigger an exclusive competence of the EU.

It seems that the Marrakesh Treaty falls under this provision, as its subject matter is "largely covered" by EU rules. In fact, the relevant area for the purpose of analysing the relation between the Marrakesh Treaty and the Information Society Directive is exceptions to copyright, and in particular exceptions that benefit disabled persons. In this area, various elements of the Treaty are covered by the Directive (namely, the possibility of providing for an exception to the rights of reproduction, distribution, and making available to the public that allows for the making and distribution of accessible format copies for the benefit of the print disabled, as per Article 5 paragraph 3(b) and 5 paragraph 4 of the Directive).

The argument used by the opposing Member States back in 2014, regarding the optional nature of Article 5 paragraph 3(b) of the Directive, should not have a bearing on the exclusive competence of the EU.[19] While it is true that in theory Member States did not have to implement the corresponding exception, the provision has actually been implemented by all Member States, with minor deviations.[20] Further, as follows from the *Deckmyn* case,[21] the optional character of an exception is not incompatible with its nature as an autonomous concept of EU law.[22] This means that "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature" (cf. Article 5 paragraph 3(b) of the Directive), which is now implemented throughout the EU, is an autonomous concept of EU law, independently of how the Member States have transposed that exception into their national laws. Therefore, the Marrakesh Treaty may affect or alter the scope of a common EU rule, which makes its ratification an exclusive competence of the EU.

If on the other hand Article 207 TFEU is used as a legal basis, and following the *Daiichi* case,[23] there needs to be a "specific link to international trade", which may be fulfilled where a given Treaty undertakes an international harmonization of standards of certain rules that consequently facilitate international trade.[24] In *Daiichi*, the Court recognized that its earlier case law on the external competence of the EU is no longer applicable, as the commercial aspects of intellectual property are now part of the common commercial policy, which belongs to the sphere of the EU's exclusive competences. Yet, the Court has also pointed out that not every aspect of intellectual property will fall under the common commercial policy. That specific link to international trade is required. According to the Court, this requirement is not satisfied merely by the fact that the act has implications for international trade. Citing its old case law, the Court said that such link will be present only if the agreement concluded by the EU is "essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade."[25] However, the Court also mentioned that the standardization of world rules on intellectual property carried out by the agreement in that case (which was the TRIPS Agreement) had the effect of facilitating and liberalizing international trade, which would in turn cause TRIPS to come under the common commercial policy.[26] This could mean that an international harmonization of intellectual property standards would be enough for the specific link to trade to be established.

The Marrakesh Treaty leads to a partial harmonization of copyright laws at the international level, by

17 Paragraph 69 of the decision.

18 Paragraphs 68-70 of the decision.

19 See Annex to the Council note 8305/14, available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%208305%202014%20ADD%201 (last accessed 28 October 2015).

20 Guido Westkamp, "The Implementation of Directive 2001/29/EC in the Member States", 2007 pp. 35-37, available at http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf (last accessed 28 October 2015)

21 Case C-201/13, Deckmyn v. Vandersteen [not yet published].

22 Paragraphs 14-17 of the decision.

23 Case C-414/11 – Daiichi Sankyo v. DEMO, [2013] ECLI:EU:C:2013:520.

24 Paragraphs 59-60 of the decision.

25 Paragraph 51 of the decision.

26 Paragraphs 59-60 of the decision.

mandating parties to provide in their national laws for a limitation or exception to the rights of reproduction, distribution, and making available to facilitate the availability of accessible format copies for the beneficiaries (Article 4 paragraph 1(a)). It therefore proceeds to standardize rules (in this case, copyright rules) that have the effect of facilitating international trade of accessible format copies for people who are blind, visually impaired and print disabled. In any case, the Treaty specifically sees that accessible format copies can be exchanged cross-border (Article 5). This provision expressly shows that the Treaty is intended to promote trade (of this particular type of goods) – something that even distinguishes the Marrakesh Treaty from earlier IP treaties, which focused primarily on measures to be adopted by each country individually.[27] It is therefore apparent that the Marrakesh Treaty would fall under the exclusive competence of the EU pursuant to Article 207 TFEU as well.

In other words, independently of the norm used, the competence of the EU is exclusive on this matter. It might be that there is a lack of political will to straightforwardly recognize the exclusivity of the EU's competence here, for e.g. fear of contaminating other areas and situations with an assumption of exclusivity. However, that fact should not undercut the basic legal question. And from a pure legal perspective, the issue should have been long signed, sealed, and delivered.

27 As noted by Marketa Trimble, "The Marrakesh puzzle", 45 *International Review of Intellectual Property and Competition Law* (2015), pp. 768 *et sqq.*, at pp. 771-772.