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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

PETITIONS

The Marrakesh Treaty

STUDY

(DRAFT)

Abstract

This study, commissioned by the European Parliament Policy Department for Citizens' Rights and Constitutional Affairs upon request by the PETI Committee, provides an analysis of the Marrakesh Treaty to Facilitate Access to Copyright Works for the Blind or Print-Disabled. It explains the background and movements that led to its proposal, negotiation and successful adoption. It then considers the Treaty's current situation in relation to its content and issues around its ratification, particularly by the EU. It finally examines future developments around copyright reform and makes recommendations to EU institutions and Member States.

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LIST OF ABBREVIATIONS

ABC	Accessible Book Consortium
AG	Advocate General of the CJEU
AG proposal	African Group proposal
BEPM	Brazil, Ecuador, Paraguay, Mexico
CJEU	Court of Justice of the European Union
CPRD	Convention on the Rights of Persons with Disabilities
E&Ls	Exceptions and Limitations
ETIN	European Trusted Intermediaries Network
GC	General Comment
ICESR	International Covenant on Economic, Social and Cultural Rights
IP	Intellectual Property
JURI	Committee on Legal Affairs
KEI	Knowledge Ecology International
PETI	Committee on Petitions
RNIB	Royal National Institute of the Blind
SCCR	Standing Committee on Copyright and Related Rights, WIPO
TIs	Trusted Intermediaries
TIGAR	Trusted Intermediary Global Accessible Resources
TPMs	Technological Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration on Human Rights

UNCPRD	United Nations Convention on the Rights of Persons with Disabilities
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VIPS	Visually Impaired Persons
WBU	World Blind Union
WIPO	Word Intellectual Property Organisation

EXECUTIVE SUMMARY

The rights of everyone to full participation in culture and to enjoy the benefits of scientific progress are acknowledged in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is an international treaty that establishes the equality of their human rights with other citizens. The EU is a party to this treaty, along with almost all its Member States. The rights of persons with disabilities are also acknowledged in the Charter of Fundamental Rights and in the Treaty of European Union. Up to one quarter of the European electorate declare some degree of impairment or disability, forming a significant constituency of public interest. The CRPD establishes the right of all disabled people to have access to information in accessible formats and technologies on an equal basis and without descrimination. It also establishes the right to take part in cultural life and have access to cultural materials on an equal basis. There is thus an international recognition that disabled people, including visually impaired and print-disabled, have a right to read. To achieve its aims, the CRPD imposes an obligation on states to take appropriate measures to, accordance with international law, to ensure that intellectual property rights, such as copyright protection, do not constitute an an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. Removing copyright barriers and increasing access to knowledge and information is at heart of the Marrakesh Treaty for the benefit of the blind and print-disabled.

Whilst most countries may have some disability exception to copyright infringement of some sort, the need for an international intrusment allowing for the cross-border distribution of accessible format copies was identified as far back as the 1980s. Beyond proposals and studies, however, no concrete action was taken. In the meantime, the global book famine for the print-disabled continued to grow even as technological advances made it increasingly easier for sighted people to access a wider range of knoweldge goods. As international trade agreements such as the TRIPs Agreement began to harmonise and prescribe minimum levels of intellectual property protection across the world to the same levels as those developed economies, developing countries found themselves increasingly raising the prescribed minimum standards in order to offer higher leves of protection without regard to their economic needs, social development and human rights obligations. Soon the agendas of developing countries pushing for a change in the culture at international norm-setting bodies like WIPO, the agendas of knowledge rights activities calling for broader user rights and the agendas of human rights/disabilities activists converged and culminated in a proposal for a more inclusive and pluralistic development agenda at WIPO. The WIPO development agenda represented a signfiicant shift from expansive rights to a more development-orientated approach to internatonal law-making. It was at this point that a proposal for binding treaty to adress the book famine was taken seriously and, after four years of intensive negotiations, resulted in the historic miracle at Marrakesh, ie the Marrakesh Treaty. The exceptional character of the Treaty, which combines human rights/disability law and intellectual property, creates for the first mandatory exceptions and limitation to copyright protection to increase access to books (and other materials) as well as their international distribution across members of the Treaty.

History was made when 20 countries ratified the Marrakesh Treaty, which came into force in September 2016. Unfortunately, despite undertaking a political commitment when signining it, the EU has yet to ratify and implement the Marrakesh exceptions. Questionable arguments about the substantive legal basis for ratification and the proper

nature of the competence (whether exclusive of the Union or shared with the Member States) has resulted in a deadlock and delays. In the light of the Advocate General Opinion issues as a result of a request to the Court of Justice of the EU, this study examines the current situation and finds the arguments against EU ratification simply wanting. Furthermore, the Commission's proposals for a Directive and the Regulation are examined, highlighting important strengths and some potential weaknesses. As the Marrakesh ratification by the EU has been bundled up with the overdue reforms of the copyright framework, there is some analysis into these developments which are not necessary to proceed with ratification. The final part makes some modest proposals and recommendationts for the Parliament/PETI, the Commission and the Member States.

INTRODUCTION

Hailed as an historic shift in the international culture of intellectual property norm-setting,[1] the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty) was adopted in 2013 at the World Intellectual Property Organisation (WIPO) with the stated aim of facilitating the availability and cross-border exchange of books and other print material in accessible formats around the world. It was signed by the European Union (EU) in April 2014[2] but due to institutional difficulties its ratification, as of the time of writing, remains pending. Despite absence of EU ratification, the Marrakesh Treaty became a reality following the ratification by twenty signatory countries and entered into force on 30th September 2016.[3] With the exception of Canada and Australia, most of the 24 members of the Treaty are developing countries and more need to join to ensure an end to the 'book famine' for visually impaired people (VIPs), ie the striking disparity between the number of books published per country per year and the actual number that are converted into accessible format. There is in particular urgent need for countries that are major producers of special format books to join, ie the United States and the EU –their unfortunate stance towards ratification seemingly underscores their initial appetite for a non-binding, soft law alternative conveyed in their proposals leading up to Marrakesh. The Treaty requires the parties to provide exceptions or limitations to copyright and related rights for the benefit of VIPs, 'a critically underserved population within the global copyright market', by allowing for the cross-border exchange of special format copies, including audio books, and other print material among the member countries. The availbability of books in formats that are available to print-disabled persons is estimated between 7% and 20% out of an estimated 2.2. millions of books published per country per year, leaving the more than 314 million blind and visually impaired people in the world in a state of 'book famine'. Accessible formats include, but are not limited to, Braille, large print, ebooks and audio books with special navigation, audio description and radio broadcasts.

As a result of deep institutional disagreements over the nature and legal basis of the competence to ratify the Marrakesh Treaty, the Commission requested clarification from the CJEU of whether or not the EU has exclusive competence to conclude the Treaty and the proper legal basis for ratification. On 8th September 2016, the Opinion of Advocate General (AG) Wahl was published taking the view that the EU has exclusive competence on this matter and the decision to conclude the Marrakesh Treaty ought to have a dual basis: Articles 19(1) and 207 TFEU.[4] The choice of the dual basis follows from objective factors, namely the aim and content of the measure. In this case, the AG viewed the Treaty as pursuing the goals of combating discrimination based upon disability pursuant to Art.19(1) TFEU and cross-border trade of accessible format copies implicating the common commercial policy pursuant to Art.207 TFEU. One of the basis the AG discarded was Art.114 TFEU as the improvement of the internal market conditions vis-à-vis the disability exception under the Information Society Directive is not the predominant purpose of Marrakesh. Notwithstanding the fact that the CJEU has yet to offer its Opinion,

[1] D Conway, 'The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO' in I Calboli and S Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests, and Intersections* (CUP, 2015), 35
[2] Council Decision 2014/221/EU of April 2014 (OJ L115, 17.4.2014) 1
[3] C Sanz, 'Vibrant Lauding Of "Historic" Marrakesh Treaty For The Blind At WIPO' http://www.ip-watch.org/2016/10/06/vibrant-lauding-of-historic-marrakesh-treaty-for-the-blind-at-wipo/ [accessed 24 October 2016]
[4] A-3/15 Opinion Procedure CJEU [8 September 2016], Opinion of AG Wahl

on 14th September 2016 the Commission published a proposal for a Directive[5] and another for a Regulation[6] in order to bring Union law in line with the EU's international commitments under Marrakesh. Whilst the Directive requires Member States to introduce mandatory exceptions to certain rights harmonised under Union law and to ensure cross-border access to special format copies within the internal market, the Regulation seeks to lay down the conditions for the export and import of accessible format copies between the Union and third countries that are parties to the Marrakesh Treaty. The legal basis for these EU proposals follow very closely those indicated in the Opinion of the AG.

[5] COM(2016) 596 final, 14.9.2016. Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-596-EN-F1-1.PDF

[6] COM(2016) 595 final, 14.9.2016. Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-595-EN-F1-1.PDF

1. HISTORY: THE ROAD TO MARRAKESH

KEY FINDINGS

- The need for a mandatory disability exception to copyright that permits the international distribution of accessible books was identified at least as far back as the 1980s.
- The adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2006 recognised that intellectual property (IP) rights (including copyright) can act as discriminatory barriers to the right of people with disabilities to read. The CRPD thus created an international obligation on states to take steps to remove such barriers.
- The Development Agenda promoted by developing countries and human rights activists helped to change the culture at the World Intellectual Property Organisation (WIPO).
- The reaction to international trade agreements, such as the TRIPs Agreement, provided the space for the intersection between human rights/disability rights and IP.
- UN bodies began to pay increased attention to IP and human rights through General Comments. Thus, IP and human rights (including disability rights) rose to the international agenda.

1.1. Studies and reports by WIPO and UNESCO

Those tracking the historical events leading up to the negotiations that culminated in the Marrakesh Treaty point to the studies and reports published in the 1980s under the auspices of WIPO and UNESCO highlighting concerns abouts the lack of a mechanism to faciliate access by VIPs to copyright works, none of which sparked significant international interest for several years.[7] For instance, a 1985 report prepared for WIPO identified two key issues as representing barriers to access for persons with disabilities: a) the lack of an exception or limitation in domestic laws that would permit the reproduction of works to make them accessible, and b) the absence of a mechanism to distribute accessible works across borders once they were made.[8] These concerns were not taken forward but the argument that an international treaty could solve these problems began to emerge. Against this background, similar concerns were raised in further studies and reports that were prepared in response to the 'disability agenda' that had reached the international copyright-policy making stage in the early 1980s.[9] Indeed, beginning in 2003, the WBU actively began asking WIPO to address the needs of VIPs, particularly 'to achieve greater

[7] A Rekas, 'Tracking The Progress of the Proposed WIPO Treaty on Exceptions and Limitations to Copyright to Benefit Persons with Print Disabilities'(2013) 4 European Yearbook of Disability Law 45.
[8] A Brown and C Waelde, 'Human Rigths, Persons With Disabilities and Copyright' in C Geiger (ed) in *Research Handbook on Human Rights and IP* (EE, 2016), 585
[9] Notable are the 2003 WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Sam Ricketson (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805) [acessed 24 October 2016], and the 2006 WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions, prepared by Nic Garnett. (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952) [accessed 24 October 2016]

harmonisation on minimum limitations and exceptions to copyright, and to address the need to export and import works in accessible formats.'[10] Yet crucial for the disability/copyright agenda to rise once more at WIPO was the momentous adoption of the UNCRPD in 2006.[11] The CRPD reaffirmed that that persons with all types of disabilities must enjoy all human rights and fundamental freedoms, namely the freedom to receive information and ideas on an equal basis with others and the through all forms of communication. The following year, WIPO published the Sullivan Report on 'Copyright Limitations and Exceptions for the Visually Impaired' which described in detail the diverse nature of limitations and exceptions for the visually impaired in national copyright laws.[12]

In concluding that the framework in international treaties and conventions relating to IP permit exceptions for the benefit of VIPs, the Sullivan Report highlighted that such exceptions were neither directly addressed nor mandatory under these treaties and conventions and, referring to the then draft of the UNCRPD, stated that pursuant to Art.30(3) it would no longer be merely an option to take into account the needs of VIPs. In fact, Art.30(3) of the UNCRPD is the first international treaty specifically to mention that intellectual property rights, including copyright, may act as unreasonable or discriminatory barriers for persons with disabilitites to access cultural materials in acccessible formats.[13] 'Cultural materials' are not limited to print books but may broadly include 'literature, artefacts, radio, screen and television productions, performance and visual arts.'[14] Under Art.30(3), the CRPD entrenches the right of people with disabilities to take part in cultural life on an equal basis with others as a human right in international law, as first recognised as a binding norm in Art.15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) which came into force in 1976.[15]

WIPO's evolving agenda played a key role in these international efforts to address the social needs of VIPS within the human rights and copyright spheres. In 2004, WIPO launched its Development Agenda in the form of 'an ambitious document that call[ed] for WIPO to revisit its mandante and shift from its traditional emphasis on promotion and expansion of intellectual property rights towards a more development-orientated aproach.'[16] After several meetings held in 2005, WIPO agreed to adopt Brazil and Argentina's Proposal to Establish a Development Agenda which many believed was a long overdue step forward that would 'profoundly refashion the WIPO agenda toward development and new approaches to support innovation and creativity.'[17] By 2007, WIPO's development agenda was formally established. As part of this development agenda, the WIPO General Assembly adopted a set of forty-five recommendations to enhance the development dimensions in all of the institution's activities and adjust its activities to the

[10] World Blind Union (WBU) and Knowledge Ecology International (KEI) Meeting on a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons, July 24-25, 2008. http://keionline.org/content/view/206 [accessed 14 October 2016]
[11] A Brown and C Waelde, (n 8) 585; D Conway (n 1) 42
[12] "Study on Copyright Limitations and Exceptions for the Visually Impaired," WIPO SCCR/15/7, 20.02.2007. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf
[13] C Spanga, 'Disability, Right to Culture and Copyright: Which Regulatory Option?' (2015) 2-3 IRLCT 88, 96
[14] H Harpur and N Suzor, 'Copyright Protections and Disability Rights: Turning the Page to New International Paradigm (2013) 3 UNSWLJ 745, 760
[15] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3, available at: http://www.refworld.org/docid/3ae6b36c0.html [accessed 22 October 2016]
[16] U Suthersanen, 'A2K and the WIPO Development Agenda: Time to List the "Public Domain"' (2008) 1 Policy Brief 1
[17] Geneva Declaration on the Future of WIPO, March 4 2005. Available: http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf [accessed 22 October 2016]. See also, J Boyle, 'A Manifesto on WIPO and The Future of Intellectual Property' (2004) 9 Duke Law & Technology Rev 1

specific needs of developing countries, presenting the recommendations into six clusters with the most relevant ones regarding access to knowledge in Cluster B (norm-setting, flexibilities, public policy, and public domain) and Cluster C (technology transfer, information and communication technologies, and access to knowledge). The importance of the WIPO development agenda cannot be understimated. Some observed that 'its shift in purpose and responsibility means that the institution must pay attention to issues beyond protection of the interests of private rights holders, such as the access needs of people with sensory disabilities, as well as the needs of those facing social, cultural, and educational challenges in developing countries.'[18]

The social and development dimension to WIPO's norm-setting activities promoted in the Development Agenda came on the back of an increasing interest that the UN human rights system began to take in IP developments in early 2000. It was the intersection between human rights and intellectual property arising in reaction to the TRIPS Agreement that provided the impetus for comprehensive work on IP issues within the UN human rights bodies.[19] The first human rights reaction to TRIPS occurred in the form of a resolution in August 2000 by the Sub-Commission on Human Rights noting that 'actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realisation of economic, social and cultural rights.'[20] In the view of the Sub-Commission, TRIPS does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress. In clear antagonistic language, the resolution stated that 'there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.'[21] In resolving these conflicts, it urged all national governments to ensure 'the primacy of human rights obligations over economic policies and agreements.'[22]

1.2. Activities of the Committee on Economic, Social and Cultural Rights: General Comments No. 17, 5 and 21

The same year the Committee on Economic, Social, and Cultural Rights published a background study on the Drafting History of Art.15(1)(c) of the ICESCR,[23] which tracks closely the wording of Art.27(2) of the Universal Declaration on Human Rights (UDHR),[24] throwing some light on what had hitherto been described as 'neglected'[25] provisions that provide 'the starting point for a human rights analysis of TRIPS.'[26] The study identified an

[18] D Conway (n 1) 47
[19] L Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Lawmaking' (2004) 29 Yale J Int. Law 1, 49
[20] Res.2000/7, UN ESCOR Commission on Human Rights, 52d Session, UN Doc. E/CN.4/Sub.2/2000/L.20 (2000)
[21] Ibid at 2
[22] Ibid vat 3
[23] M Green, Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/15 (9 October, 2000). http://www.bayefsky.com/general/e_c_12_2000_15.pdf [accessed 22 October 2016]
[24] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 22 October 2016]
[25] A Chapman, 'Approaching Intellectual Property As A Human Right: Obligations Related To Article 15(1)(c)' (2001) 3 Copyright Bulletin 4, 13
[26] UN Economic and Social Council, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property on Human Rights*, E/CN.4/Sub.2/2001/13 (27 June 2001), 5 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/143/45/PDF/G0114345.pdf?OpenElement [accessed 22 October 2016]

internal 'unresolved tension' arising from the pairing of the right of everyone to 'benefit from the advances of science' with the right of the author to 'material and moral interests' within Art.15 but found little discussion in the drafting history on the difficult balance between 'public needs and private rights when it comes to intellectual property.'[27] Though the drafters appeared to have focussed almost exclusively on 'authors as individuals' rather than corporations or copyright owners, the study surmised that a human rights analysis of the TRIPS Agreement and its progeny must mean that their intention was not to include the rights of authors in sub-section (c) as an intentional limit on the right of all to benefit in sub-section (b) of Art.15.[28]

In 2001, the Committee issued a statement highlighting that the importance of IP for human rights was 'high on the international agenda' and setting out a new ambitious plan to draft general comments on key human rights principles derived from the ICESCR that must be taken into account in the design, interpretation and development of contemporary IP norms.[29] Since then, the Committee has been 'the progenitor of a movement to imbue [the economic, social and cultural rights in the Covenant] with greater prescriptive force.'[30] Shortly after, it issued its General Comment No.17 (GC) on Art.15(1)(c) setting out the content of the right to protect the moral and material interests of authors and the nature of the international obligations on states to protect and fulfil the right of everyone to participate in cultural life and benefit from cultural and scientific progress. On the basis of foundational principles, GC No.17 rejected equating authors' moral and material interests with the legal entitlements recognised in IP systems and, notwithstanding some commonalities between the two, made the basic assertation that the scope of the protection of authors' rights in Art.15(1)(c) 'does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.'[31] Derived from the inherent dignity and worth of all persons, the right of authors' to benefit from moral and material interests in their works 'seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as whole.'[32] As such, the right to authorship cannot be considered in isolation since it is intrinsically linked to all the other rights envisaged in Art.15, ie the right to participate in cultural life (1)(a), the right to enjoy the benefits of scientific progress (1)(b) and the freedom of scientific research and creative activity (3). These competing rights thus exist in a symbiotic relationship in terms of being 'at the same time mutually reinforcing and reciprocally limitative.'[33]

Like all the other rights recognised in the Covenant, GC No.17 emphasises that authors' rights are subject to limitations provided that such limitations respect the essence of the rights of authors, that is, 'the protection of the personal link between the author and his/her creation and of the means which are necessary to enable authors to enjoy an

[27] M Green (n 23) at 45
[28] Ibid at 46
[29] Statement by the Committee on Economic Social and Cultural Rights on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/15 (14 December 2001) (Under the human rights of equality and non-discrimination, the Committee stressed that a human rights-based approach should focus particularly on the needs of the most disadvantaged and marginalised individuals and communities, though the example given was that of indigenous peoples.) http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf
[30] L Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2007) 40 UCD Law Rev 971, 988
[31] UN Committee Economic, Social and Cultural Rights (CESC), *General Comment No.17 The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17. http://www.refworld.org/docid/441543594.html [accessed 23 October 2016]
[32] Ibid at 4
[33] Ibidem

adequate standard of living.'[34] These are the core dual purposes of recognising authors' moral and material interests as human rights, forming 'a zone of personal auonomy'[35] to enable authors to fulfil their creative potential and earn a livelihood and, at the same time, marking the limits of any government restrictions. However, protection of authorship does not imply absolute control over literary and artistic creations. Since only *certain* attributes of IP rights protect the author's core zone of autonomy, legal protections beyond those needed to establish it may in some cases be desirable but are neither mandated nor subject to rigid scrutinity under Art.15 ICESCR.[36]

Accordingly, beyond these core rights (one moral, the other material) *additional* IP protection must be balanced with the other rights recognised in the Covenant, with particular consideration to the wider public interest in access to knowledge and cultural participation.[37] Yet if a state does decide to offer additional rights, the ICESCR gives it wide discretion 'to shape them to the particular economic, social and cultural conditions within their borders.'[38] Under this core minimum approach, states cannot violate the ICESCR if they reduce or modify excessive protection required under TRIPS or TRIPS-plus agreements (ie, those international agreements prescribing more extensive protection without the flexibilities of TRIPS) as long as such protection has no human rights basis.[39] Others argue that this core minimum approach has significant implications for authors and inventors. It provides them with the 'minimum essential levels of protection even in situations where states need resources to realise other human rights.'[40] But when such approach is used with other human rights, ie the right to education and self-determination, 'it creates the maximum limits of intellectual property protection that are needed but are often omitted in international treaties' and thereby facilitates 'creativity, innovation, and cultural participation and development.'[41] This interpretation thus accords with the Committee's view that IP is ultimately 'a social product and has social function.'

Even though the focus of GC No.17 is largely on the basic human rights interests of authors, the Committee reminded states of their obligation to strike an adequate balance between the other interests in Art.15 by ensuring that 'the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their products should be given due consideration.'[42] Helfer's analysis uncovers an 'interpretative principle' about how states can achieve balanced, human rights-compliant rules of IP protection.[43] Under this interpretative principle, states must ensure that their treaty-based IP rules for protecting authors' rights 'constitute no impediment to their ability to comply with core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its application, or any other right enshrined in the Covenant.'[44] The ultimate purpose of this balancing exercise must be 'promoting and protecting the full range of

[34] CESC (n 31) 22
[35] L Helfer, 'Towards a Human Rights Framework for Intellectual Property' (n 30) 996
[36] Ibidem
[37] Ibidem
[38] Ibidem
[39] P Yu, 'Reconceptualising Intellectual Property Interests In a Human Rights Framework' (2007) 40 UCD Law Rev 1039, 1105
[40] Ibid 1108
[41] Ibid 1108-1109 (Despite its benefits, Yu notes that the core minimum approach has several limitations. Firstly, it is difficult to determine precisely the scope of the obligations. Secondly, it fails to provide guidance on the maximum limits of excessive protection as resources become available. Thirdly, it does not explain the interdependent relationship of the different human rights.)
[42] CESC (n 31) at 35
[43] L Helfer, 'Towards a Human Rights Framework for Intellectual Property' (n 30) 997
[44] CESC *General Comment No. 17* (n 31) at 35

rights guaranteed in the Convenant.'[45] Furthermore, covenant-based core obligations include non-discrimination in Art.2(2) and equal enjoyment of rights by men and women in Art.3, which constitute cross-cutting obligations that apply to all rights contained in Articles 6 to 15 of the Covenant, including the right of everyone to take part in cultural life and to enjoy the benefits.[46] Indeed, the nature of Articles 2(2) and Art.3 is 'integrally related and mutually reinforcing' insofar as that 'the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.'[47]

The principle of non-discrimination prohibits differential treatment of a person or group on the basis of his/her or their particular status relating to race, colour, sex, language, religion, political, national, social origin, birth, or 'other status'. That catch-all term 'other status' covers discrimination on the grounds of disability. In its GC No.5, the Committee reviewed some of the ways in which issues concerning persons with disabilities arise in connection with the obligations under the Covenant even in the absence of a disability-related provision. It broadly defined disability-based descrimination as 'including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based upon disability which has the effect of nullifying or impairing recognition, enjoyment or exercise of economic, social or cultural rights.'[48] After highlighting the fact that the effects of disability-based discrimination are particularly severe in the fields of education, employment and cultural life (all of which closely relate to the rights to science and culture), GC No.5 interpreted the right to science and culture in the Covenant as importing the same state obligation as that articulated in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilites,[49] namely to 'ensure that persons with disabilities have the opportunity to utilise their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community...'[50] Of great note here is that in this 1994 General Comment the right to full cultural participation for persons with disabilities was defined as requiring that 'communication barriers be eliminated to the greatest extent possible' through useful measures such as the use of talking books.[51]

[45] Ibidem
[46] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, at 22. Available at: http://www.refworld.org/docid/43f3067ae.html [accessed 24 October 2016]; UN Committee on Economic, Social and Cultural Rights (CESCR*), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, at 7. Available at: http://www.refworld.org/docid/4a60961f2.html [accessed 24 October 2016]
[47] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant),* 11 August 2005, E/C.12/2005/4, at 3. Available at: http://www.refworld.org/docid/43f3067ae.html [accessed 24 October 2016]
[48] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22. Available at: http://www.refworld.org/docid/4538838f0.html [accessed 23 October 2016]
[49] UN General Assembly, *Standard rules on the equalization of opportunities for persons with disabilities: resolution / adopted by the General Assembly*, 20 December 1993, A/RES/48/96, Rule 10 Culture. Available at: http://www.refworld.org/docid/3b00f2e80.html [accessed 24 October 2016]
[50] CESCR, *General Comment No. 5* (n 48) This would eventually become Art.30(2) of the CRPD.
[51] Ibid at [37]

2. THE EMPOWERMENT RIGHT OF SCIENCE AND CULTURE

KEY FINDINGS

- The key to the basic human right to science and culture is *access*. It is thus 'a right of access.'
- The access dimension of this right requires accommodation of disability in order to participate on an equal basis with others in cultural life.
- Scientific knowledge, information and advances must be made available to all, without discrimination of any kind.
- The call for an international minimum core of exceptions to copyright to restore balance.

2.1 The Right to Science and Culture

The right to science and culture is thus part of the socioeconomic rights protected by the Covenant that, by definition, address 'basic human needs essential to human survival and dignity to which all people may not have access in the absence of state assistance.'[52] Despite being part of interrelated provisions vindicating other interests and values, the touchstone of the right to science and culture is 'access'. This access dimension is satisfied only when the cultural good is physically accessible to all, with accommodation of disability that includes adaptability to the particular needs of the community and individual.[53] In 2009, the Committee published its GC No.21 on the right of everyone to take part in cultural life which it identified as being equivalent to the right to participation on an equal basis with others in cultural life in Art.30(1) of the CRPD. The right can be best characterised as a 'freedom,' which states should respect and fulfil on the basis of equality. The phrase 'cultural life' is 'an explicit reference to culture as a living process' which encompases, for instance, 'ways of life, language, oral and written literature, music, song, non-verbal communication...'[54] Also, the terms 'participate' or 'take part' cover three interrelated components of participation, access and contribution to cultural life. As such, the right confers the freedom upon persons with disabilities (alone or with others) not only to 'learn about forms of expression and dissemination through any technical medium of information and communication,' but also to be actively involved in creating 'the spiritual, material, intellectual and emotional expressions of the community.'[55]

The Committee thus underscored 'accessability' as one of the necessary elements for the full realisation of the right of everyone to science and culture that entails 'effective and concrete opportunities for individuals and communities to enjoy culture fully...without discrimination.' [56] On this latter point, it specifically highlighted that access for persons

[52] L Shaver, The Right to Science and Culture, (2010)121 Wisconsin LR 121, 170
[53] Ibid, 171
[54] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, at [12]-[13]. Available at: http://www.refworld.org/docid/4ed35bae2.html [accessed 29 October 2016]
[55] Ibid at [15]
[56] Ibid at [16]

with disabilities must be provided and facilitated, which imposes a state obligation to take positive action to ensure access to a wide range of cultural activities such as 'cultural material, television programmes, films, theatre and other cultural activities, *in accessible forms*.'[57] Properly implemented, the right promotes 'inclusive cultural empowerment' as a tool for reducing social disparities in a democratic society.[58] Yet, whilst affirming the interrelatedness of the cultural rights in Art.15 ICESCR and emphasising the intrinsic link of the right to science and culture with other human rights such as the right to education, nowhere did the Committee address the imminent role of copyright in acting as a disabling barrier for persons with disabilities seeking to exercise their right to full access to cultural materials as mandated in Art.30(3) CRPD.

Given the clear wording of the states' duty under Art.30(3) CRPD and the Committee's own assimilation of the right to full cultural participation in the Covenant with that in the CRPD, it was a missed opportunity not to address the issue head-on and offer guidance for states and international norm-making bodies. However, the Committee did warn states about their duty to comply with this right in negotiating international financial aid and in concluding bilateral agreements.[59] In its concluding remarks, the Committee also recalled the Covenant obligations of actors other than states to 'adopt international measures likely to contribute to the progressive implementation of Art.15(1)', particularly reminding WIPO (and others) that, as a specialised agency of the UN, it must intensify its 'efforts to take into account human rights principles and obligations in [its] work concerning the right of everyone to take part in cultural life…'[60] This clear warning added to the mounting pressure on WIPO to adopt concrete measures to fulfil the aims of the Development Agenda.

2.2.. UN Special Rapporteur in the field of Cultural Rights

Although the Committee has yet to articulate the normative content and scope of the 'right of everyone to enjoy the benefits of scientific progress and its applications' in the Covenant, it is possible to draw on the scholarship and jurisprudence developed in general comments around other socioeconomic rights. Thus, in 2012 the UN Special Rapporteur in the field of cultural rights described this right as 'the right to science' which serves to advance the aims of the other cultural rights, that is, 'the pursuit of knowledge and understanding and…human creativity in a constantly changing world.'[61] The right to science is a prerequisite to the realisation of other rights such as the right to education and the right to development. It thus connotes 'a right of access' in the sense that 'scientific knowledge, information and advances must be made available to all, without discrimination of any kind', including disability grounds.[62] Moreover, the terms 'benefits' and 'scientific progress' imply 'a positive impact of the well-being of people and the realisation of their human rights.' Consistent with GC No. 21, the Special Rapporteur understood the normative content of the right to science as including, amongst others, an

[57] Ibid at [31] (emphasis added)
[58] Ibid at [69] (emphasis added)
[59] Ibid at [59]
[60] Ibid at [69] (emphasis added); The same warning to WIPO, WTO and other UN agencies was issued in the context of the right of authors to benefit from their moral and material interests in 2005. See also, CESC, *General Comment No.17* (n 31) at [56]
[61] UN General Assembly, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, on 'The Right to Enjoy the Benefits of Scientific Progress and its Applications'*, A/HRC/20/26, 14 May 2012, at [3]. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-26_en.pdf
[62] Ibidem

obligation on the states to provide non-discriminatory 'access to the benefits of science by everyone', including the benefit of scientific applications and technologies *as a whole* and 'innovations essential for a life with dignity', particularly for marginalised populations such as persons with disabilities.[63] As digital information technologies continue to offer increased access to content to sighted people, the right ot science clearly aims to prevent, for example, the risk of 'digital exclusion' of VIPs, as the European Blind Union (EBU) has argued before,[64] and enhance the democratic participation of these 'IP-marginalised'[65] social groups.

Unlike the Committee, the Special Rapporteur did engage with the conflict between the right to science and modern IP protection, expressing concerns about TRIPS-plus norms that significantly restrict the 'flexibilities' offered in TRIPS and further reduce the policy space for states to promote important social policies inherent in the human right to science. Drawing on arguments advanced by knowledge-rights activists and scholars, the Special Rapporteur recommended adopting 'a public good approach to knowledge innovation and diffusion and…reconsidering the current maximalist intellectual property approach to explore the virtues of a minimalist approach to IP protection.'[66] Consistent with their historical origins, scholars argue that the international human rights to science and culture in Art.27 UDHR and Art.15 ICESCR require 'knowledge to be treated as a shared public resource, with international collaboration and universal access as touchstone commitments' rather than as private property.[67] In supporting its privatisation, the IP-maximalist approach treats knowledge as a public goods *problem* that can only be solved by excluding access to incentivise the supply of longer-term creations and innovations but operating under an 'evidence-free zone' in support of the premise that the social costs are truly outweight by the benefits.[68]

2.3. The 2006 Report on "limitations and exceptions"

Yet knowledge as a 'global public good' means that information goods are expanded rather than diminished as greater numbers of people enjoy access to them. Thus, science and culture may alternatively be treated as a public goods *opportunity* so that 'we could not only enhance human welfare by collaborating to provide these goods, but…the process of collaboration itself would also pay divident.'[69] Regrettably, the Special Rapporteur offered no elaboration on what this 'IP-minimalist' approach should entail though scholars have offered several options and proposals callling for reduced terms of protection, expansion

[63] Ibid at [25], [29], and [31]. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-26_en.pdf

[64] EBU Response to the EU Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3, 26 November 2008. Available at: https://circabc.europa.eu/webdav/CircaBC/FISMA/markt_consultations/Library/copyright_neighbouring/consultation_copyright/ebu_european_blind_union.pdf [accessed 29 October 2016]

[65] L Mtima, 'Copyright and Social Justice in the Digital Information Society: Three-Steps Towards IP Social Justice' (2015) Houston LR 459, 463

[66] UN General Assembly, *Report of the Special Rapporteur in the field of cultural rights* (n 61) at [65] (Citing L Shaver (n 52) 159-160)

[67] L Shaver (n 52) 155. ('The framers sought to ensure that enjoyment of cultural life and new technologies would not remain an elite domain, but be made accessible and affordable to the common.)

[68] L Shaver (n 52) 156-160; UN General Assembly, *Report of the Special Rapporteur in the field of cultural rights,* (n 61) at [65] ('Legal scholars are incresingly questioning the economic effectiveness of intellectual property regimes in propomoting scientific and cultural innovation.')

[69] L Shaver (n 52) 161

of copyright exceptions and limitations (E&Ls),[70] and reinvigorating user rights.[71] Apart from human rights, scholars began to advocate for the use and development of other internal policy tools to bring balance between authors' exclusive rights and the wider public interest in access to copyright works which was perceived to be distorted by the one way-ratchet of international IP law, particularly copyright. Some increasingly observed how more adept rights holders had proved than user groups at putting their demands for higher protection before several legislatures and international lawmakers with little attention for the user side of the equation[72] or even how international copyright law rarely addresses E&L's on the rights of the *owner*.[73] Scholars argued that, when high level of international protection is conferred, exceptions must become integral to the balance of copyright by imposing 'substantive maxima' on heightened copyright protection or more 'explicit user rights',[74] or even by developing an 'international fair use standard' that could act as a 'ceiling' on increasingly harmonised copyright norms which is TRIPS-compliant whilst performing its 'welfare functions' in the the domestic needs and priorities of developing countries.[75] In 2006, a report commissioned by the UN Conference on Trade & Development and the International Centre for Trade and Sustainable Development identified a category of 'global minimum limitations and exceptions', including a disability exception, highlighting 'strategic and substantive' advantages in the drafting of more detailed E&Ls in an an international instrument and calling for such 'international minimum core' of E&Ls to become a mandatory part of the international copyright system.[76] In calling for mandatory IP ceilings on the scope of international copyright as a way to restore balance between the expectations of authors and users, the study lent even further support for the growing pressure at WIPO for an international mandatory instrument to address the global book famine of VIPs.[77]

[70] Ibid 121, 173 (Arguing that the drafting history suggests that 'access' element of the right to science and culture was uncontroversially accepted whereas the 'protection' element concerning authorship was later added under unusual controversy. For that reason, it would be inappropriate the interprete the access element of the rights as limited by the protection element.)

[71] R Cooper Dreyfuss, 'TRIPS-ROUND II: Should Users Strike Back'(2004) U Chicago LR 21, 27; G Dinwoodie, 'The International Intellectual Property Law System: New Actors, New Institutions, New Sources'(2006) Marquette IP Law R 205, 214

[72] R Cooper Dreyfuss (n 71) 27

[73] G Dinwoodie (n 71) 516

[74] R Cooper Dreyfuss, (n 71) 27

[75] R Okediji, 'Towards an International Fair Use Doctrine'(2000) 39 Columbia J of Transnational L 75, 168-169 (Arguing that Articles 7 and 8, read in conjunction with Art.13, TRIPS support the development of an international framework of fair use.)

[76] R Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' (2006) Issue Paper No.15, UNCTAD-ICTSD, 20-23 (Calling for a global disability exception simply based upon basic human rights law.)
http://unctad.org/en/docs/iteipc200610_en.pdf [accessed 29 October 2016]

[77] Developing countries in Latin America were the first to table proposals for studying on an agreement on minimum E&Ls based upon national practices, particularly for the benefit of VIPs to enable the export and import of copies produced under a disability exception though calling simply for formaly declaration See WIPO SCCR 13th Sess, Proposal by Chile on the Analysis of Exceptions and Limitations, SCCR/13/5, 22 Novermber 2005. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf [accessed 29 October 2016]; WIPO SCCR 16th Sess, Proposal by Brazil, Chile, Nicaragua and Uruguay for Wok Related to Exceptions and Limitations, SCCR/16/12, 17 July 2008. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf [accessed 29 October 2016]

3. WIPO NEGOTIATIONS

KEY FINDINGS

- Proposal by the World Blind Union and Latin American Countries for an international treaty on exceptions to copyright.
- Intense opposition led to other proposals calling for a mere declaration or recommendation but not a treaty.
- After four years of intense negotiations, the Marrakesh Treaty is successfully adopted in June 2013.
- Stakeholders Platform as a practical way to implement and achieve the aims of the Marrakesh Treaty: *TIGAR and ETIN*

3.1 The Proposals

It is clear then that the nature of IP laws (particularly copyright) was increasingly identified as a potential obstacle to the 'full realisation' of the human rights guaranteed in the Covenant and the CRPD, particularly affecting the social inclusion and cultural participation of IP-underserved groups (ie persons with disabilities) in their universal entitlement to equal access to knowledge or 'empowerment' right –'a right that enables a person to experience the benefit of other rights.'[78] UN human rights bodies have since at least 2000 raised growing concerns about the impact of the increased global protection of IP under TRIPS upon the states' commitments to ensure they undertake and achieve the full realisation of their human rights obligations paying particular attention to the needs of the most marginalised and socially disadvantaged groups. The implementation of TRIPS-prescribed minimum standards for protecting IP, coupled with growth in TRIPS-plus agreements (that is, obligations over and above minimum standards without the built-in flexibilities permitted under TRIPS), make it exceedingly difficult for individual countries to have the flexibility to promote social, economic, cultural, and scientific development for all, as mandated in international human rights instruments. The concerns raised in the General Comments and, more recently in the Reports of the Special Rapporteur, are unequivocally expresed in Art.30(3) of the CRPD. Though non-binding, the recommendations adopted in the General Comments provided a solid 'template'[79] for developing countries, knowledge-rights activists and human rights/disability rights advocates which formed a global social movement under the umbrella term 'access to knowledge' in opposing expansive IP protection standards and calling for a more transparent and pluralistic process of international lawmaking at WIPO.[80] In parallel, new umbrella organisations such as IP-Watch, KEI (Knowledge Ecology International) and IP Justice were created to contribute and report on the activities of these groups.

[78] P Yu (n 39) 1114
[79] L Helfer, 'Towards a Human Rights Framework for Intellectual Property' (n 30) 1000
[80] A Kapczynski, 'The Access to Knowledge Mobilisation and The New Politics of Intellectual Property'(2008) 117 Yale LJ 804, 854

The efforts by the WBU and KEI in convening an expert group from nineteen countries to consider a text for a possible Treaty for VIPs were instrumental in paving the way for 'the right to read' movement[81] that galvanised countries to place the issuse of an international treaty on the WIPO agenda.[82] In 2009, the WBU persuaded a group of Latin American countries to table a proposal at the 18th Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR) for a specific treaty entitled the 'Proposal by Brazil, Ecuador and Paraguay Relating to Limitations and Exceptions: Treaty Proposed by the WBU' (which Mexico later joined and so it became the WBU/BEPM proposal).[83] The central purpose of the WBU/BEPM Proposal was 'to frame the right to read as an issue of fundamental human rights.'[84] It did so by proposing, in esssence, to establish a multilateral legal framework of exceptions and limitations for the benefit of persons with reading disabilities that would ensure full and equal access to information and communication.

At the same time, the WBU/BEPM Proposal placed emphasis on broad measures necessary for the cross-border transfer of copyright works that have been adapted for such purposes even without trusted intermediaries, though this perceived as potentially stoking up publishers' stated fears of piracy.[85] In terms of the benefiaries and the range of accessible format works covered, it offered 'extremely inclusive' definitions that 'would make all forms of accessible works available to the broadest range of users covered.'[86] The WBU/BEPM Proposal also devided the exceptions into two categories: activities of 'non-profit' entities to make and supply accessible format copies without the authorisation of the copyright holder and without any form of notification or remuneration,[87] and activities of 'for-profit' entities with the possibilty of an opt-out mechanism regarding the application of the exception. When the copyright holder is entitled to 'adequate remuneration', this does not exceed reasonable commercial norms, taking into account the economic situation of the contracting state (whether developed or developing country) and provided that the the work is not reasonably available.[88] Of note is the novel approach to create an obligation to ensure that beneficiaries have the means to enjoy the exception where any technological protection measures (TPMs) (including any digital rights management systems, DRMs) are built into a digital work, and to declare any contractual clauses contrary to the exceptions null and void.[89]

Although the WBU/BEPM Proposal garnered 'a great deal of support among the rights organisations and users', a number of WIPO members pointed to inconsistencies with their national legislation implementing international obligations.[90] Indeed, so far-reaching and controversial was the WBU treaty proposal that, the following year, three new proposals from the African Group, the EU and the US were circulated for consideration, each of which supported alternative approaches that whilst relatively similar were also remarkably different. The African Group proposed a 'Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions,

[81] D Conway (n 1) 42
[82] WBU/KEI (n 10)
[83] 18th Session WIPO SCCR/18/5, May 25, 2010. http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732
[84] D Conway (n 1) 43
[85] A Rekas, (n 7) 61
[86] Ibidem
[87] Art.4(a)((4).
[88] Art. 4(c) and (d).
[89] Articles 6 and 7.
[90] A Rekas, (n 7) 63 (Australia and the EU raised such concerns.)

Libraries and Archives'[91] which was then revised and tabled as binding treaty for E&Ls (AG Proposal).[92] Overall, the AG Proposal represented a very ambitious attempt to benefit *all* disabled people (not just print-disabled) by promoting 'equal access to education, culture, information and communication as a fundamental right that comes under public policy.'[93] It thus identified the class of beneficiaries more broadly, including educational and research institutions, libraries and archieves as beneficiaries of the mandatory E&Ls to copyright materials. Though it shared similar language to the WBU/BEPM Proposal, the AG Proposal went much further in adopting a more a 'holistic approach' to the proper recognition of the puplic interest within the international copyright system, which eventually led to the proposal's downfall.[94]

Whilst the WBU and African Group proposals presented striking similarities in the sense of being more favourable to VIPs on many fronts, the US and EU proposals were far more restrictive by merely supporting a non-binding instrument and being rightholders-orientated. For instance, the EU tabled a 'Draft Joint Recommendation' (EU Proposal) aiming to increase the number of accessible format works for print-disabled people only to the extent that 'there is no approriate commercial product on offer' and merely recommending 'that every Member State should introduce in their national copright law an exception' to certain rights on a non-commercial basis.[95] Such print-disability exception was subject to the international three-step test, namely 1) only in certain special cases 2) which do not conflict with a normal exploitation of the work and 3) do not unreasonably prejudice the legitimate interests of the right holder.[96] The EU Proposal championed the idea of a global network of Trusted Intermediaries (TIs) whose activities would 'facilitate the production of works in accessible formats, and/or their cross border transfer in a controlled manner' subject to a long list of mandatory conditions.[97] It further advanced the interests of copyright owners by proposing adequate remuneration, prohibiting direct distribution of accessible format copies to the beneficiary, and mandating notice to the right-holders when making an accessible format under the exception.[98]

The EU's solution based upon TIs, accompanied by notice to the right-holder, attracted sustained criticism for being an unworkable solution that would hinder rather than increase access.[99] Nor did the 'Draft Consensus Instrument' proposed by the US offer

[91] WIPO SCCR 20th Sess, Proposal by the African Group for a 'Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives', SSCR/20/21, 15 June 2010

[92] WIPO SCCR 22th Sess, Proposal By the African Group for a 'Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives', SSCR/22/12, 3 June 2011 http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf [accessed 24 October 2016]

[93] Ibidem

[94] A Rekas (n 7) 64; D Conway (n 1) 44-45

[95] WIPO SCCR 20th Sess (n 91)

[96] Art.13, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

[97] WIPO SCCR 20th Sess (n 91) Art.1(iv) Trusted Intermediaries should fulfill the following conditions: they operate on a not-for-profit basis; they register the persons with a print disability they serve; they provide specialised services relating to training, education, or adaptive reading or information access needs of persons with a print disability; they maintain policies and procedures to establish the bona fide nature of persons with print disabilities that they serve; and they maintain policies and procedures to ensure full and complete compliance with copyright and data protection laws.
http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf

[98] WIPO SCCR 20th Sess, Proposal by the EU for 'Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability,' SCCR/20/12, 17 June 2010. (Articles 2, 4 and 6)
http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf [accessed 24 October 2016]

[99] A Rekas(n 7) 65

a better solution (US Proposal).[100] This was the shortest of the four proposals, relying on the aparent flexibility of the three-step test and on the disputed view of the US that it would become binding upon its members as an interpretatitve instrument of that test. Tracing very closely the EU Proposal, the US Proposal covered a defined class of beneficiaries (print-disabled) and centred largely around the use of TIs for the export and import of 'special format' copies though with fewer mandatary conditions for TIs and without copyright owner's authorisation. It left the question of monitioring and approving TIs unaddressed, which was also problem the EU Proposal. In the face of fierce opposition to a binding treaty by the US/EU representatives,[101] the negotiations achieved little progress in reconciling the divergent positions in the proposals but there was a commitment to a work programme on E&Ls for the two-year period 2011-2012.[102]

3.2 Compromise

The position adopted by EU representatives at WIPO was in stark contrast to the full and public support of the EU Parliament for the WBU/BEPM proposal for a binding legal treaty.[103] In September 2011, the European Parliament Petitions Committee (PETI) heard a petition by the European Blind Union (EBU) and the Royal National Institute of the Blind (RNIB) requesting Parliament to ensure that EU negotiatiors actively pursue a binding treaty rather than propose a mere recommendation (or even regressive amendments) at WIPO meetings and discussions.[104] Supportive of the EBU/RNIB's petition, on 15th February 2012 the Parliament Plenary heard answers from the Commission and the Council to oral questions from Erminia Mazzoni MEP on behalf of the Petitions Committee. The MEPs' questions were 'vehemently critical' of the Commission's stance though it emerged during the discussions that a mandate from the Council was needed for the Commission to pursue a binding treaty.[105] In its resolution, the EU Parliament recognised that print-disabled in the EU have 'severely restricted acccess to books and other print materials because 95% of all published works are never converted into accessible formats' and fully supported the proposal for an international legally binding framework for a copyright exception for cross-border distribution of accessible books.[106] It thus called on 'the Council and the Commission to support a binding WIPO treaty...'[107] Unfortunately, this was not the last time that Parliament had to intervene to request reassurances from EU representatives. But the views of the EU Parliament were consistent with the findings of

[100] WIPO SCCR 20th Sess, Proposal by the US for 'Draft Consensus Instrument,' SCCR/20/12. 17 June 2010. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.pdf [accessed 29 October 2016]
[101] 'US and EU blocking treaty to give blind people access to books,' The Guardian, 30 July 2012. https://www.theguardian.com/global-development/2012/jul/30/us-eu-blocking-treaty-blind-books [accessed 29 October 2016]
[102] WIPO SCCR 21st Sess, Conclusions, SCCR/21/Conclusions (8-12 November 2010). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_21/sccr_21_conclusions.pdf [accessed 29 October 2016]
[103] European Parliament resolution of 12 May 2011 on unlocking the potential of cultural and creative industries (2010/2156(INI)) (At [70], it called on the Commission 'to work actively and positively' within the WIPO to agree on a binding norm based on the treaty proposal drafted by the WBU and tabled at WIPO in 2009)
[104] Petition 0924/2011 by Dan Pescod on Behalf of the EBU/RIBP
[105] Parliamentary Questions, O-000006/2012, 15 February 2012 http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20120215&secondRef=ITEM-017&language=EN [accessed 29 October 2016] The Council authorised the Commission to negotiate, on behalf of the EU, an international agreement on 26 November 2012. See OJ L115/1, 17.4.2014
[106] OJ 2013/C 249E/13, European Parliament resolution of 16 February 2012 on Petition 0924/2011 by Dan Pescod (British), on behalf of the European Blind Union (EBU)/Royal National Institute of Blind People (RNIB), on access by blind people to books and other printed products (2011/2894(RSP)). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CE.2013.249.01.0049.01.ENG&toc=OJ:C:2013:249E:TOC
[107] Ibidem

two reports published in 2009 by the EU Parliament Petitions Committee (PETI). After examining the multiple barriers that print-disabled people face, the PETI reports identified a combination of solutions such as a stronger commitment from the publishing industry to improve commercial availability, an international treaty to allow the sharing across borders of accessible format publications and a mandatory disability exception in EU copyright law to allow such publications to circulate freely within the EU.[108]

At WIPO, the initial proposals were subsequently merged into two and finally into a unified text which combined elements from the earlier proposals.[109] Although less comprehensive than the WBU/BEPM treaty proposal, the unified text certainly represented a significant step with broad support from the delegations. However, it was not until November 2012 that progress towards a binding treaty was made when the EU abandoned its pro-publishers stance for a non-binding solution leaving the US delegation isolated.[110] Later that year and in a more constructive atmosphere, common ground and understanding resulted in a working draft text for an international treaty (or another instrument) that was then transmitted for evaluation to WIPO General Assembly, which could decide on whether to convene a diplomatic conference in 2013.[111] A primary area of contention in the discussions was a set of clauses, one of them relating to the requirement of a commercial availability as prerequisite for using the treaty and another one was the prohibition on charities to send accessible format books directly to print-disabled individuals in other countries.[112] Commercial availability clauses mandate that prior to the making available of an accessible book, commercial availability of this book on the local market at reasonable conditions, such as price, should be checked. These contentious clauses appeared in Articles D and E of the Draft Text, which were seen by some as representing EU support for protecting the publishers' interests rather than increase accessible books.

This prompted the WBU to write a letter to the Commission asking for reassurances that the EU negotiators would not pursue these conditions in the upcoming negotiations in April 2013. For the WBU, the commercial availability check would be 'burdensome and impossible to implement', particularly when charities in developing countries have limited resoures, and requirement for a 'middleman' to transfer accessible books to a blind person simply as a very inefficient way of maximising availability.[113] In its reply, the Commission saw the commercial availability condition 'as the best possible incentive for publishers

[108] Note 'From Better to Full Access to Works for Print-Disabled Persons,' (2009), PETI http://www.europarl.europa.eu/RegData/etudes/divers/join/2009/419610/IPOL-JURI_DV(2009)419610_EN.pdf; Note 'Improving Access to Works for Visually Impaired Persons (2009) PETI, http://www.europarl.europa.eu/document/activities/cont/200911/20091113ATT64499/20091113ATT64499EN.pdf

[109] WIPO SCCR 22nd Sess, 'Proposal on an international instrument on limitations and exceptions for persons with print disabilities,' SCCR/22/16, 15-24 June 2011. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_16.pdf [accessed 24 Cotober 2016]

[110] 'Talks in the balance: EU backs treaty leaving USA isolated', EBU, 26 November 2012. http://www.euroblind.org/media/press-releases/EBU_press_release_26_nov_2012.doc [accessed 24 October 2016]

[111] WIPO 25th Sess, DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES, SCCR/25/2 REV, 19-23 November 2012. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_2_rev.pdf [29 October 2016]. See also, 'WIPO Committee Finishes A Step Closer To Treaty For Visually Impaired', IP Watch, 24 November 2012 http://www.ip-watch.org/2012/11/24/wipo-committee-finishes-a-step-closer-to-treaty-for-visually-impaired/ [accessed 24 October 2016]

[112] WIPO 25th Sess (Ibid)

[113] Letter of Wolfgang Angermann, President of EBU, to EU Commissioner Michael Barnier, 28th March 2013. http://www.euroblind.org/media/lobbying/Letter-from-the-European-Blind-Union-28th-March-2013.doc [accessed 29 October 2016]

themselves to put the special format books in the market' whilst the condition for an intermediary as the best way forward to avoid potential abuses.[114] Understandably, the EBU viewed the reply as surprising, at best, and frustrating, at worst, since the treaty proposal was not intended to serve as incentive for publishers but about copyright exceptions to ensure maximum access for the print-disabled without infringing copyright and without burdensome bureaucracies.[115] Indeed, one of the EP studies in 2009 had already reported that 'until now the publishing industry has largely ignored print-disabled people as a market segment, having deemed us not be a commercially viable customer group.'[116] In intense negotiations held between February and April 2013, it was agreed that the commercial availability requirement would be rephrased as optional rather than a mandatatory pre-condition for the exception, in order to allow countries with similar commercial availability clauses to ratify the treaty, such as the UK and other EU countries.[117] One way in which consenus was reached was through specific language in 'agreed statements' that were added in a footnote to certain contentious provisions as a way out of an entrenched position. This is how the issue of direct distribution to a beneficary was eventually settled.[118] After four years of arduous negotiations, the efforts and active involvement of NGOs finally came to fruition with the adoption of the Marrakesh Treaty in June 2013.

3.3. WIPO Stakeholders' Platforms

In opposition to the treaty proposal, rightholders associations acknowledged the need for enhancing access to accessible works but instead hastily proposed calling on WIPO 'to launch a platform of stakeholder consultation to develop a roadmap for ensuring access to copyright works for the blind and visually impaired... in a trusted in secure environment.[119] To this end, in 2008 the SCCR launched the WIPO's Stakeholder Platform, a working group comprising major stakeholders representing copyright holders, publishers, libraries, and advocate organisations acting on behalf of the blind and VIPs. The aim of the Stakeholder Platform was 'to facilitate arrangements to secure access for disabled persons to protected works,'[120] though the Chilean delegation observed that the Platform's intended nature was

[114] Letter of EU Commissioner Michel Barnier to President of the EBU, 16 May 2013. http://www.euroblind.org/media/lobbying/787508---Let-MB-a-W--Angermann.doc [accessed 29 October 2016]
[115] 'WIPO accessible book treaty- Do EU negotiators know what blind people need better than EBU does?' By Dan Pescod, 27 March 2013. http://www.euroblind.org/working-areas/access-to-education/nr/10 [accessed 29 October 2016]
[116] 'Improving Access to Works for Visually Impaired Persons', European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2009, Note for the JURI committee.
[117] Time Ticking For WIPO Delegates On Copyright Exceptions Treaty, IP Watch, 19 April 2013. http://www.ip-watch.org/2013/04/19/time-ticking-for-wipo-delegates-on-copyright-exception-treaty/ [accessed 29 October 2016]
[118] 'How The Main Issues Of The Marrakesh Treaty For The Blind Were Solved In The Nick Of Time,' IP Watch, 01 July 2013. http://www.ip-watch.org/2013/07/01/how-the-main-issues-of-the-marrakesh-treaty-for-the-blind-were-solved-in-the-nick-of-time/ [accessed 29 October 2016]
[119] Statement on the Promotion of Accessible Reading Materials for the Blind in a Trusted Enviornment by IFFRO, November 2008. http://www.ifrro.org/upload/documents/WBU%20proposal_IFRRO%20statement%20SCCR%20Nov%2008.pdf [accessed 24 October 2016]
[120] WIPO SCCR 17th Sess, Conclusions of the SCCR (Nov 5-7, 2008) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_www_112533.pdf [accessed 24 October 2016]

to complement rather than substitute the proposal for a treaty.[121] It was thus intended to be a practical course of action to increase, without delay, accessible formats for the print disabled irrespective of the legal outcome of the formal negotiations. In truth, this was not an entirely new idea as discussions between the WBU and the International Publishers Association (IPA) had been ongoing for some years with little progress.[122] The Platform was divided into two working subgroups, namely the trusted intermediaries' subgroup and the technology subgroup, with the aim of 'exploring their concrete needs, concerns, and suggested approaches' in order to implement goals of the proposed treaty at a practical level.'[123]

In 2010, WIPO's Stakeholder Platform produced two principal initiatives, namely VisionIP.org and the Trusted Intermediary Global Accessible Resources (TIGAR).[124] The VisionIP project, which was commonly referred to as the stakeholders' platform, sought to collect technical commentary from anyone interested in providing input through the website. As a multistakeholder platform, VisionIP also compromised several areas of activity, one of which was the TIGAR project whose aim was 'to make the publishing community feel comfortable sharing their master files with trusted intermediaries, which would then transfer those files in accessible format to users.'[125] TIGAR thus sought to 'find a "sustainable business model" to support transfer of accessible book files on an ongoing basis.'[126] The term 'trusted intermediary' generally refers to 'any entity that facilitates interactions between two parties who both trust the third party', with the mandate to ensure 'the controlled distribution of accessible copies of works, when these are not commercially available, to persons with a print disability.'[127] Overall, TIGAR meets three important objectives for improving the global book famine: firstly, it saves individual publishers the costs in unnecessary duplication by removing the need to create master files from stratch; secondly, it assauages publishers' fears of piracy; and thirdly, it streamlines licensing arrangements as it acts as a one-stop shop for all organisations publishing accessible formats. Permission by the copyright owner is, therefore, one of the central features of the TIGAR pilot programme.

During the ongoing treaty negotions, TIGAR became a highly sensitive political issue as the WBU decided to suspend its participation when it became clear some stakeholders were wrongly viewing TIGAR as an alternative to a binding legal instrument and a justification for slowing down any progess on a treaty.[128] WBU also cited that 'the terms [of the stakeholders' agreements] would be too onerous and the cost benefits too unclear' as another reason for its temporary withdrawal. The TIGAR project nevertheless continued. Even though the three-year mandate ended in 2013, a separate TIGAR iniatiative to establish a global accessible library was taken forward. Thus, in May 2014 the WIPO SCCR agreed to evolve the project into 'a permanent multi-stakeholder entity

[121] WIPO SCCR 19th Session, Secretariat's Report SCCR/19/15 (Dec 14-18, 2009) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_15.pdf [accessed 24 October 2016]
[122] 'Improving Access to Works for Visually Impaired Persons', European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2009, Note for the JURI committee.
[123] WIPO 20th Sess, 'Third Interim Report of the Stakeholders' Platform', SCCR/20/6. 21-24 June 2010. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_6.pdf [accessed 24 October 2016]
[124] D Conway (n 1) 48
[125] A Rekas (n 7) 68
[126] A Rekas (n 7) 68
[127] EU Stakeholders Dialogue Memorandum of Understanding (MOU) on Access to Works by People with Print Disabilities, 14 September 2010.
http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/2010/20100914_mou_en.pdf
[128] WBU Suspension of Activity on WIPO and Stakeholder Platforms, 26 February, 2011 http://www.worldblindunion.org/English/our-work/our-priorities/Pages/WBU-Suspension-of-Activity-on-WIPO-and-Stakeholder-Platforms.aspx [accessed 24 October 2016]

to be named the Accessible Books Consortium (ABC)' which was launched on the first anniversary of the adoption of the Marrakesh Treaty.[129] The ABC's stated purpose is to support and complement the aims of the Marrakesh Treaty with its ABC Book Service (formerly known as TIGAR) being 'a blogal online catalogue of books in accessible formats that provides libraries serving people who are print-disabled with the ability to search and make requests for accessible books.'[130]

More specifically, the ABC Service is 'an international library-to-library technical platform' that makes 'operational the treaty's cross-border provisions.' As of 2016, it has 19 'authorised entities' (that is, a TI by another name) in 16 countries participating in its service which offers a catalogue of 315,000 titles in more than 55 languages.[131] It has also reported more than 5,100 downloads by authorised entities with an estimated saving in production costs in the region of USD 10.2 million, though long delays due to clearance of publishers' permission continues to be the biggest challenge in increasing accessible titles. In addition to its library services, ABC also covers other two practical iniatives to support the Marrakesh implementation. ABC's 'capacity building' activities focus on providing training and technical assistance in developing and least developed countries (LDC) in the production and distribution of accessible books.

In 2015, four capacity building projects were completed in South East Asia countries covering Bangladesh, Nepal and Sri Lanka thanks to funding from the Australian Government, and a similar project in India thanks to donations from the Korean Republic. It is estimated that 88,500 print-disabled students in these countries will benefit from the production of educational accessible materials in national languages, and there are plans to roll out building capacity projects in Africa and Latin America.[132] Another important ABC initiative is to promote 'accessible publishing' which encourages publishers to produce 'born accessible' publications, ie books that are usable from the start both sighted persons and the print-disabled.[133] To achieve these born accessible aims, ABC seeks collaboration between print-disabled organisations and publishers as a central strategy to advance and increase the accessability of commercial e-books or other digital publications to VIPs. Without doubt, ABC's 'born accessible' project represents a concrete step in achieving the need for a 'book for all' strategy that the 2009 EP study identified as a way to promote social inclusion through publishing, ie 'books that everyone can buy and read, at the same time, at the same price, and through the same distribution channels.'[134]

At European level, the signing of the 2010 Memorandum of Understanding (MoU) established a system of mutual recognition of TIs so that registered print-disabled persons could access books from all over the EU.[135] The MoU was drafted and agreed by a group of organisations representing people with print disabilities on one side, and the European publishing industry on the other. Both sides acknowleged 'the need to find pragmatic solutions' and agreed to set up a system whereby publications in accessible formats, such

[129] WIPO 55th Series of Meetings, 'Report on the Accessible Books Consortium,' A/55/INF/9, 5-14 October 2015. http://www.wipo.int/edocs/mdocs/govbody/en/a_55/a_55_inf_9.pdf [accessed 24 October 2016]
[130] WIPO 56th Series of Meetings, 'Report on the Accessible Books Consortium A/56/INF/8, 3-11 October 2016. http://www.wipo.int/edocs/mdocs/govbody/en/a_56/a_56_inf_8.pdf [accessed 24 October 2016]
[131] Ibidem
[132] Ibidem
[133] Ibidem (ABC has published the 'ABC Charter for Accessible Publishing', which contains 8 high-level aspirational principles relating to digital publications in accessible formats that publishers are invited to sign.)
[134] 'From Better to Full Access to Works for Print-Disabled Persons', , European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2009, Note for the JURI committee.
[135] Copyright: Commissioner Barnier welcomes agreement on greater access to books for the visually impaired, IP/10/1120, 14 September 2010.
http://europa.eu/rapid/press-release_IP-10-1120_en.htm?locale=en [accessed 24 October 2016]

as Braille and audio books, can be more easily distributed across the EU Member Stes.[136] Another aim of the MoU is to support publishers in making the production of accessible works an integral part of publishing. The MoU is the brainchild of the Commission's Green Paper entitled 'Copyright in the Knowledge Economy' in which several questions were raised around the issue of 'how to supply relevant organisations with a non-protected digital copy for creating accessible formats in a way that addresses publishers' concerns about security...'[137] A suggested solution to that problem was a system of TIs which can negotiate with rightholders and enter into agreements, and that is precisely what the MoU sought to do. Incidently, despite observing signficant disparities in the way national legislations have introduced a disability exception, none of the questions asked whether the optional exception in Art.5(3)(b) of the Copyright Directive should become mandatory.

Some signatories of the MoU include the International Federation of Reproduction Rights Organisation (IFRRO), European Writers' Council, Federation of European Photographers, International Association of Scientific, Technical and Medical Publishers (STM), EBU and the European Dyslexia Association (EDA). The practical implementation of the commitments under the MoU led to the creation of the European Trusted Intermediaries Network (ETIN) -a Brussels-based network representing both TI organisations and rightholders which aims to have pan-European coverage.[138] With the support of the Commission, the ETIN acts as contact point and advisory/consultation centre for the cross-border distribution and supply of accessible copies. To this end, it has agreed a model licence/agreement as a basis for arrangements between potential TIs and publishers at national level.[139] Notwithstanding their different geographical coverage, the ABC Service (TIGAR) and the ETIN are complementary and mutually supportive albeit the activities of the former seem to have overtaken the latter at European level.[140]

[136] EU Stakeholders Dialogue Memorandum of Understanding(n 127)
[137] EU Commission's Green Paper on 'Copyright in the Knowledge Economy', COM(2008) 466/3, 16 July 2008. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf
[138] http://hub.eaccessplus.eu/wiki/European_Trusted_Intermediaries_Network_(ETIN) [accessed 23 October 2016]
[139] http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm [accessed 23 October 2016]
[140] http://www.ifrro.org/content/access-persons-print-disabilities [accessed 23 October 2016]

4. THE MARRAKESH TREATY

KEY FINDINGS

- The central aim of the Marrakesh Treaty is to introduce mandatory exception to national copyright laws.
- The heart of the Treaty is the cross-border sharing of accessible format copies.
- The Treaty has so far been ratified by 26 countries and entered into force on 30th September 2016. It is thus a binding international norm.
- EU ratification has been delayed by a blocking minority of countries in the Council who argue that there are issues about timing and competence.
- Though the Court of Justice of the EU is yet to offer its opinion, the recent Opinion of the Advocate General confirms the Union's exclusive competence and calls for the Treaty to be ratified.

4.1 Contents

The idelogical tensions that accompanied the proposals and negotiations is evident in the Preamble to the Treaty. The underlying reasons for its adoption as well as the two opposing arguments that plagued its protracted negotiations are clearly stated thereof. The Treaty's human rights basis is identified in freedom of expression, the right to education and the right to take part in cultural life. Its justifications for addressing the book famine are identified in 'the need both to expand the number of works in accessible formats and to improve the circulation of such works,' including the 'possibilities of cross-border exchange of accessible format copies' to avoid duplication efforts and resources that go into making works accessible to print disabled persons. In emphasising the importance of the role of rightholders in making their works accessible in the first place, the Preamble recognises the political compromise in the description of the limitations and exceptions as arising 'particularly when the market is unable to provide such access.' There is nevertheless a stated acknowledgement of 'the need to maintain a balance between the effective protection of the right of authors and the larger public interest…'

A central feature of Marrakesh is to be the first multilateral, binding agreement primarily devoted to the rights of users in the global copyright regime by recognising their fundamental human right to equal access to information and participation in culture. These users represent 'a historically underserved segment of society', ie the visually impaired, notwithstanding disruptive information technologies and new digital media increasingly creating even more access to printed content and knowledge for sighted people. Furthermore, the compromise proposal that culminated in the Marrakesh Treay clearly retained important distinct features of the initial proposals. For instance, the binding nature of E&Ls (WBU/BEPM and AG Proposals), minimum E&Ls but with exceptions-plus provisions that permit adopting more extensive protection (WBU/BEPM Proposal), the flexibility in the implementation method (WBU/BEPM and AG Proposals), and import and exports of accessible format copies (WBU/BEPM and AG Proposals).

Art.2 offers the definitions of 'works' (the subject-matter covered), an 'accessible format copy' and 'authorised entity'. The reference to 'literary and artistic works' means that Marrakesh Treay applies to a broad category of materials protected by copyright. The expression 'literary and artistic works' is found in international copyright and include 'every production in the literary, scientific and artistic domain' such as 'books, pamphlets and other writings, lectures, addresses, sermons and other works of the same nature, dramatic or dramatico-musical works, choreographic works and entertainments in dumb show, musical compositions with or without words.'[141] Art.2(a) of Marrakesh states that the specific copyright works covered may be expressed 'in the form of text, notation and/or related illustrations' but goes on to stress 'whether published or otherwise made publicly available in any media.' This indication clearly purports to apply expansively as the reference to 'any media' suggests the Marrakesh exceptions are technology neutral. This allows any new forms of digital formats to be covered. It also means that a print-disabled can obtain an accessible copy whether or not it has been published. Moreover, the 'agreed statement' clarifies audio form, such as audiobooks, are covered.[142]

Similarly, the definition of 'accessible format copy' is accommodating in the sense that the alternative form allowed is on that 'gives the beneficiary person access to the work, including to permit that person to have access as feasibly and confortably' as a person without the disability. This definition also makes clear that the Marrakesh exceptions do not affect the moral rights of the author as it requires the beneficiary 'to respect the integrity of the original work.'[143] Furthermore, an 'authorised entity' is broad terms as 'an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiaries on a non-for brofit basis,' It also covers government organisations. The range of actors allowed to create and share accessible copies is thus expansive. Authorised entities are also permitted, without the authorisation of the copyrght owner, to obtain from another authorised entity an accessible copy and supply to beneficiary persons by any means. They therefore play a vital role achieving the intended purpose of the Treaty. Also broadly defined is the category of beneficary persons. Thus, Art.3 lists three categories: a) blind, b) has a visual impairment or perceptual or reading disability which cannot be improved to give a visual function, or c) otherwise unable, through physical disability to hold or manipulate a book or focus or move the eyes for reading. This is sufficiently broad to include people with progressive eye loss due to aging, motor-neuron patients, etc. Commentators also include dyslexia and the proposed Marrakesh Directive explicit incorporates it.[144]

The core obligations are laid down, in particular, in Articles 4 to 7. Thus, Art.4 mandates exceptions or limitations to national copyright laws on the rights of reproduction, distribution and making available to the public in order to enable accessible format copies to be made under certain conditions (broadly defined as literary and artistic works, including audio books) for beneficiary persons.[145] These mandatory exceptions thus limit rather than expand the scope of copyright protection, as has historically been the case. In

[141] Art. 2, Berne Convention 1886.
[142] Agreed Statement concerning, Art. 2(a) Marrakesh Treaty.
[143] M Ficsor, 'Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired.' 10 November 2013. http://www.copyrightseesaw.net/archive/?sw_10_item=50 [accessed 24 October 2016]
[144] COM(2016) 596 final, 14.9.2016. Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-596-EN-F1-1.PDF
[145] Art.4, Marrakesh Treaty.

addition to these rights, contracting parties may also extend the exceptions to the right of public performance but are not required to do so.

It seems that the public performance right might have been added to address situations where ebook readers offered a text-to-speech function, like the Amazon Kindle 2 initally had, but Amazon disabled at the request of the Authors Guild in the US.[146] The claim was that the reading of a book aloud by a device constituted infringement of the public performance right unless the copyright holder specifically granted permission. But the right of public performance requires the presence of a live audience or 'public' and VIPs routinely use speech function to access books for private use. In any case, the specific reference to 'audio books' as a protectable category of works under the Treaty would cover text-to-speech function. Though limited in terms of application, the exception to the public performance right may cover audio description devices like the ones used in cinemas or even recordings of theatrical representations made as accessible format copies which are accompanied by (sotto voce) descriptions of the acts, movements, source of sounds/noises, the scene and/or costumes.[147]

The controversial requirement of a check on commercial availability is optional but not mandatory for the use of the exception.[148] So is the clause for the mandatory exception to be subject to remuneration.[149] On the other hand, Art.5(1) mandates the cross-border distribution of accessible format copies in two cases: by an authorised entity directly to a beneficiary person, or by an authorised entity to another authorised entity in another contracting state. Whichever option is adopted, the condition is that the the originating authorised entity had no knowledge (or reason to believe) that the accessible copy would be for someone other than the beneficiary.[150] This condition thus addresses the publishers' stated concern for abuse or piracy. Art. 6 is the counterpart to Art.5 in the sense that, if the Art.5 exception exists in the contracting state, it allows the importation of accessible copies for a beneficiary person without permission from the rightholder. Furthemore, Art.7 guarantees the proper enjoyment of the exceptions envisaged in Articles 4 to 6 by requiring states to ensure access by beneficiaries where rightholders use technological protection measures (TPMs).

Although the Treay does not mention how this is to be achieved in practice, it does require states to take 'appropriate measures, as necessary.' Whilst Art.8 guarantees the privacy of the beneficiary, Art.9 concerns cooperation to foster the cross-border exchange of accessible copies by encouraging information-sharing to assist authorised entities. This provison encourages states to engage with TI networks such as ABC at WIPO, ETIN at EU level, or the local TI. In contrast, Articles 10 to 12 lay down general guidance on the general principles for interpreting and applying the Treaty. A key characteristic of the Treaty is that it is not prescriptive regarding how states decide to implement these international obligations into their national copyright legislations. Rather, it merely offers suggestions but leaves it entirely up to the individual signatory to make the choice. Indeed, Art.10 explicitly preserves the freedom and sovereign discretion of contracting parties to determine 'the appropirate method' of implementing their Treaty obligations within their own legal system. Moreover, it implicitly adopts the principle of 'flexibility' on implementation which allows a contracting party to choose to develop new E&Ls that would

[146] National Federation of the Blind Responds to Authors Guild Statement on the Amazon Kindle 2, 12 February 2009. https://nfb.org/node/1184 [accessed 29 October 2016]
[147] M Ficsor (n 143)
[148] Art.4(4), Marrakesh Treaty
[149] Art.4(5), Marrakesh Treaty.
[150] Art.5(2)(b), Marrakesh Treaty.

apply domestically for the benefit of VIPs.[151] Such additional copyright exceptions in no way affect those provided by national law and may even go beyond those provided by the Treaty, having regard to the contracting party's 'economic situation, and its social cultural needs, in conformity with [its] international rights and obligations...'[152] Crucially, these two provisions go a long way in addressing some academic opposition that, whilst accepting the need for a solution to the global book famine, expressed concerns about the potential for an international treaty on mandatory exceptions becoming a straightjacket for developing countries in the sense of proving 'both unwieldy and inadaptable to inevitable changes in technological or economic conditions.'[153]

Without doubt, the heart of Marrakesh is cross-border sharing of accessible books both between organisations and directly from organisations to blind or print disabled individuals without complicated requirements for checks on whether those books are commercial availability in the receiving country.

4.2.Signature

In June 2013, WIPO's 187 states adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. As of October 2016, more than 80 countries had signed the agreement and 26 had ratified it, enabling the treaty to enter into force on September 30, 2016.[154] The countries that have ratified it are India, El Salvador, United Arab Emirates, Mali, Paraguay, Singapore, Argentina, Mexico, Mongolia, South Korea, Australia, Brazil, Peru, North Korea, Israel, Chile, Ecuador, Guatemala, Canada, Saint Vincent and the Grenadines, Tunisia, Botswana, Sri Lanka. Canada's ratification on 30th June 2016 enabled the Treaty to come into force. Although the EU signed the Treaty in April 2014 and the Member States did so the same year,[155] there is yet to be formal ratification from the EU or its Members.

4.3. Ratification

As stated at the outset, ratification of the Marrakesh Treaty has stalled due to significant institutional disagreements over the nature of the competence, ie shared or exclusive competence. When the Commision first sought authorisation from the Council to negotiate an international agreement at WIPO, the Commission's request highlighted the likelihood that any exceptions to copyright law required to improve access for the print-disabled would affect exclusive rights that are harmonised under the EU Copyright Directive. It thus

[151] Art.10(2) and (3)
[152] Art.12 (1) and (2).
[153] Comment by Jane Ginsburg and June Besek for the Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyright Works for the Blind or Other Persons with Disabilities, November 13, 2009. http://www.copyright.gov/docs/sccr/comments/2009/comments-2/ginsburg-besek-columbia-law-school.pdf [accessed 25 October 2016] But see also, Reply Comments of Judit Rius Sanjuan, KEI, December 4, 2009. http://www.copyright.gov/docs/sccr/comments/2009/reply-2/27-judit-rius-sanjuan.pdf [accessed 25 October 2016]
[154] WIPO, Contracting Parties to the Marrarrakesh Treaty. http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843 [accessed 24 October 2016]
[155] Council Decision 2014/221/EU 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 (OJ L115, 17.4.2014, 1)

envisaged that 'the scope of a possible future international agreement would come within the scope of application of EU law and in any event within an area which is largely covered by EU rules.'[156] The Commission therefore offered Art.3(2) of the Treaty on the Functioning of the EU (TFEU) as the basis for its recomendation for a Council Decision. However, the question of competence and nature of the Council Decision became a sensitive political issue for which the Permanent Representatives Committee (Coreper) was invited to discuss.[157] It transpired there was fierce opposition in the Council about the form and the substance of the proposed Decision, with the first amended proposal authorising the Commission to negotiation only as regards matters within the EU's competence and the Members States to participate on their own behalf only as regards matters within their competence.[158]

The Council Presidency then circulated a compromise proposal in which the form of the proposed text stated that a Decision would 'be adopted by the Council alone and cover [...] solely matters falling under exclusive EU competence.'[159] The Commission was finally authorised to negotiate an agreement 'on behalf of the Union to the extent that the subject matter falls within the Union's Competence' and in close cooperation with the Member States but with no further reference to the their competence.[160] The compromise text was however subject to a statement from the UK that the Presidency would represent the views of the Member States regarding any matters falling outside the scope of this Council Decision. After a fragile compromise, the EU signed the Marrakesh Treaty on 14th April 2014.[161] Yet the unresolved issue of the competence of the Member States would prove an insurmountable obstacle for ratification. The Commission first submitted a proposal for a Council Decision authorising the ratification of the Treaty on 21st October 2014,[162] but was opposed by a minority of seven delegations forming a strong blocking minority in the Council.[163] Proposals for ratification have been blocked ever since. The blocking minority's concerns were about, on the one hand, the timing of ratification in the sense that they believe the EU must first adapt its copyright legal framework and, on the other hand, the legal basis of the proposed Council Decision in conjunction with the issue of competence (exclusive of the EU versus shared EU/Member States).[164]

[156] EU Council (Partial Declassification) 11180/12 EXT1, PI 73, 5 February 2013, 4-5 http://data.consilium.europa.eu/doc/document/ST-11180-2012-EXT-1/en/pdf [accessed 24 October 2016]

[157] EU Council Decision 12930/12 EXT1, PI 109, 20 September 2012

[158] EU Council Decision 14961/12 EXT1, PI 122, 19 October 2012 http://data.consilium.europa.eu/doc/document/ST-14961-2012-EXT-1/en/pdf [accessed 24 October 2016]

[159] EU Council Decision 15377/12 EXT1, PI 129, 29 October 2012. http://data.consilium.europa.eu/doc/document/ST-15377-2012-EXT-1/en/pdf [accessed 24 October 2016]

[160] EU Council Decision 16259/12 EXT 2, PI 147, 15 November 2012. http://data.consilium.europa.eu/doc/document/ST-16259-2012-EXT-2/en/pdf [accessed 24 October 2016]

[161] OJ L115/1, 17 April 2014. http://publications.europa.eu/resource/cellar/9e67bb18-c5fe-11e3-9fe4-01aa75ed71a1.0006.03/DOC_1 [accessed 24 October 2016]

[162] EU Commission, Proposal for a Council Decision on the Conclusion, on behalf of the Union, of the Marrakesh Treaty for Persons Who are Blind, Visually Impaired, or Otherwise Print-Disabled, COM(2014) 638 final, 21 October 2014. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014PC0638&from=EN [accessed 24 October 2016]

[163] EU Council Decision 8387/15, PI 28, 4 May 2015. http://data.consilium.europa.eu/doc/document/ST-8387-2015-INIT/en/pdf [accessed 24 October 2016]

[164] EU Council Decision 5100/15 LIMITE, PI 3, 9 January 2015. http://www.statewatch.org/news/2015/oct/eu-marrakesh-impaired-rights-5110-15.pdf [accessed 24 October 2016]

In statements published by the Council during discussions on a decision for signature, the Czech Republic, Finland, France, Germany, Romania, Slovakia and Slovenia considered that the Marrakesh Treaty is within the area of shared competence and, as such, it must be signed and concluded not only by the Union but also all the Member States.[165] The basis for their argument was that the disability exception in Art.5(3)(b) of the Copyright Directive is an *option* for Member States, with the result that the Marrakesh mandatory exception goes beyond the EU harmonised framework under the Copyright Directive and affects the internal market, which falls under shared competence of the Union and its Member States. For these blocking minority, neither the legal basis of Art.3(2) nor Art.207 TFEU changes the form of a mixed agreement that the Marrakesh Treaty must take since even provisions of a secondary nature that fall outside the Union's exclusive competence and within that of the Member States may still render the agreement of shared competence.

On the other hand, Poland and the UK abstained the signature and rejected Art.207 as the proper legal basis, both agreeing that the Union did not have exclusive competence but for different reasons.[166] Whilst Poland believed that shared competence was grounded upon Art.114 (internal market), read in conjunction with Art.19 (discrimination) TFEU, the UK rejected the reliance on Art.207 altogether because common commercial policy is not the Treaty's primary objective but declined to point to the relevant legal basis. The Commission, however, has consistently argued that the Treaty's ratification falls within the Union's exclusive competence but it has been hardly consistent in its choice of the legal basis, sometimes proposing Art.3[167] and other times proposing Art.114 and 207 TFEU as the dual legal basis.[168] For the Council's Legal Service, Art.207 is not only the substantive legal basis but also the most appropriate one, though reported discussions do not explain why.

In 2015, the divergent positions in Coreper became far more entrenched. Following the Commissions's paper outlining its preliminary views on the possible ways of implementing the Marrakesh Treaty,[169] the delegations considered paper too vague and falling short of a necessary concrete legislative proposal. The principal reason for opposition, however, was the persistent view of 'a larger number of delegations' that ratification should only proceed 'until the internal EU legal framework has been adjusted accordingly' which the Commission had not yet submitted.[170] This is a questionable argument which many academics reject, pointing to the adoption of new rules without prior adjustment of the copyright framework.[171] Yet a similar large number of delegations continued to insist on the shared EU/national competence of the treaty, with at least some of them indicating their intention to ratify it unilaterally even if the Commission disagreed

[165] EU Council Decision 8305/14 ADD1, P1 39, 9 April 2014. http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208305%202014%20ADD%201 [accessed 24 October 2016]
[166] Ibid
[167] Ibid
[168] EU Council Decision 5100/15 LIMITE (n 164)
[169] EU Council Decision 6035/12, PI 7, 11 February 2015. http://data.consilium.europa.eu/doc/document/ST-6035-2015-INIT/en/pdf [accessed 24 October 2016]
[170] EU Council Decision 7321/15 LIMITE, PI 16, 20 March 2015. http://data.consilium.europa.eu/doc/document/ST-7321-2015-INIT/en/pdf [accessed 24 October 2016]
[171] R Hilty 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' (2015) 6 IIC 707, 709 (Citing the Orphan Works Directive as example. See, Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.)

with this unilateral approach. It was evident that the timing and legal basis remained outstanding issues for a growing number of Member States.

As a result of the impasse, Coreper decided to suspend the proposal for ratification and agreed to recommend to the Council to request the Commission 'to submit, without delay, a legislative proposal to amend the EU legal framework so that it complies with the Marrakesh Treaty.'[172] However, having considered the concerns of the blocking group and the willingness of a considerable number of delegations to proceed with ratification, the Presidency decided to table 'a pragmatic compromise proposal' which purported to allow the Member States to ratify the Treaty alongside the EU and, at the same time, address concerns about the voting rights of intergovernmental organisations under Art.13(3)(b) Marrakesh.[173] But even that compromise proposal was vehemently opposed by 'seven delegations forming a strong blocking minority.'[174] On May 20th 2015, the Council adopted a decision requesting the Commission to issue a legislative proposal with a view to amending EU copyright law as a pre-condition for ratification. The EBU issued a statement calling on the blocking minority in the Council led by Italy and Germany to support swift ratification on the basis of their commitments under the CRPD.[175]

For its part, the EU Parliament has several times called on the Commission and the Council to speed up the ratification process in Parliamentary discussions[176] and has even passed a resolution expressing its 'profound indignation' at the dead-lock.[177] At the outset of drafting this Study, a questionnaire was submitted to the EU Permanent Representations in an attempt to gain more insights into their persistent opposition to ratification (see Annex). Unfortunately, only one reply was received without concrete answers to our questions.

Against this background, in July 2015 the Commission submitted a request to the Court of Justice of the EU (CJEU) to deliver an opinion on the nature of the EU's competence for ratification. Although the CJEU has yet to issue its opinion, the Opinion of AG Wahl was published in 8 September 2016.[178] In his Opinion, the AG set out to do to two things, namely the indentification of the correct substantive legal basis (or bases) and then the determination of the nature of the competence exercised by the EU. Under EU treaties, the choice of the correct legal basis for the proposed act is of 'constitional significance' for several reasons: it establishes whether the Union has the power to act,

[172] EU Council Decision 7321/15 LIMITE (n 170)
[173] EU Council Decision 7576/1/15 REV1 LIMITE, PI 20, 20 April 2015. http://data.consilium.europa.eu/doc/document/ST-7576-2015-REV-1/en/pdf
[174] EU Council Decision 8387/15 PI 28, 4 May 2015. http://data.consilium.europa.eu/doc/document/ST-8387-2015-INIT/en/pdf [accessed 24 October 2016]
[175] "Right to read" for blind and low vision Europeans still denied – access to literary works locked,' EBU 10 December 2016 http://www.euroblind.org/news/nr/2748 [accessed 24 October 2016]
[176] EU Parliament, Parliamentary Questions E-002919-15, 25 February 2015, http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-002919&language=EN; Parliamentary Questions O-000021/2015, 3 March 2015, http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20150429&secondRef=ITEM-024&language=EN; Parliamentary Questions E-002919/2015, 15 June 2015, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-002919&language=EN; Parliamentary Question E-009538/2015, 16 September 2015, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-009538&language=EN; EU Council Decision 11239/15 LIMITE, PE-1E 402, 27 July 2015, http://data.consilium.europa.eu/doc/document/ST-11239-2015-INIT/en/pdf [accessed 24 October 2016]
[177] EU Parliament Resolution, B8-0168/2016, 28 January.2016. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2016-0168+0+DOC+PDF+V0//EN [accessed 24 October 2016]
[178] A-3/15 CJEU [n 4] Opinion of AG Wahl

for what purpose and the procedure it must follow. The indication of the legal basis thus policies the division of powers between the Union and the Member States.[179]

According to the Opinion of the AG, the Commission (supported by the Parliament) submitted that the dual legal bases rested on Articles 114 and 207 TFEU due to the harmonising effect which the Marrakesh Treaty will have on EU copyright law and the commercial nature of cross-border distribution between contracting parties between the EU and third parties. But regardless of the legal provision, the Commission maintained that the Union's competence is exclusive under Art.3(2) due to the effect upon the scope of the copyright rules introduced by the Copyright Directive.[180] On the other hand, the Czech Republic, Finland, France, Lithuania, Hungary, Romania and the United Kingdom all contended against the existence of the Union's exclusive competence as the conditions in Art.3(2) were not fulfilled.[181] Their views however differred significantly as regards the substantive legal bases for ratification. Yet, according to the AG Opinion, none of them actually identied the correct legal bases following the settled case-law of the CJEU, that is, the aim and content of the proposed measure.

In the AG's view, the decision to conclude and ratify the Marrakesh Treaty should have a dual bases, ie Articles 19(1) and 207 TFEU. Under the former, the anti-discrimination component on grounds of disability represents the ultimate purpose of the Treaty and this rationale is in turn linked up with the duty to remove IP laws acting as discriminatory barriers under the CRPD. Indeed, for the AG the Treaty can be regarded 'as implementing the commitment undertaken in [Art.30(3) CRPD],'[182] which was precisely the driving force of the WBU/BEUM Proposal. Similarly, Art.207 grants exclusive competence on the Union in matters of common commercial policy, which includes 'commercial aspects of IP'. According to *Daiichi Sankyio* in which the CJEU interpreted for the first time the scope of Art.207, the common commercial policy which falls within the Union's exclusive competence relates to 'trade with non-member countries, not to trade in the internal market' and must therefore be defined broadly in accordance within its open nature.[183] In the field of IP rules, the AG recalled that the CJEU has held that 'only those [aspects] with a specific link to trade are capable of falling within the field of the common commercial policy.'[184] This link is evidently present in several Marrakesh obligations regarding cross-border distributions (exports and imports) and cooperation to facilitate such activities. These provisions 'are intended to promote, facilitate and govern trade in a specific type of goods: accessible format copies.'[185] This follows from the reasoning of the CJEU in *Daiichi Sankyo* which declared the rules in the TRIPs Agreement as falling within the commercial aspects of IP in Art.207 TFEU. *Daiichi Sankyo* thus brought the field of the common commercial policy in line with the sphere of operation of WTO, overturning

[179] Ibid at [24]. On this division of powers over CRPD implementation, see L Waddington, 'The European Union and the United Nations Convention on the Right of Persons with Disabilities: A Story of Exclusive and Shared Comeptence'(2011) 18 Maastricht J Eur & Comp L 431
[180] A-3/15 Opinion Procedure (n 4) at [24]
[181] Ibid at [26]
[182] Ibid at [78]
[183] C-414/11 *Daiichi Sankyo v DEMO*, [2013] CJEU, at [50]
[184] -3/15 Opinion Procedure (n 4) at [45]
[185] Ibid at [48] (The view that the cross-border distribution of copies may take place on a non-commercial basis and thus be of 'non-commercial aspects of IP' which are outside Art.207 was rejected. All IP rights are forms of monopoly that limit the free circulation of goods or services and are, by their nature, mostly trade-related. Some of the transaction covered by Marrakesh are of a commercial character and this is enough.)

previosuly restrictive case-law on the scope of the EU's external competence concerning international trade agreements.[186]

Despite the fact that an international trade agreement may pursue multiple objectives, it is possible for the content of that agreement to be dominated by one or two of them and thus provide the subsantive legal basis even in the presence of other ancillary aims. Whilst several aims may be achieved by the effective implementation of the Marrakesh Treaty, ie humanitarian, development, social policy, increased harmonisation of the internal market, commercial aspects, non-commerical aspects, anti-discrimination, etc., for the AG the 'centre of gravity' is found in Articles 19 and 207 TFEU.[187] These dual legal bases mean that the nature of the EU's competence is both exclusive (regarding Art.207) and shared (regarding Art.19). However, this finding does not necessarily mean that the Treaty must be concluded as a 'mixed agreement.' When the content of an agreement falls within an area of shared competence, 'the choice between a mixed agreement or a EU-only agreement…is generally a matter for discretion of the EU legislature.'[188] In principle, a mixed agreement is necessary where the parts covering shared and exclusive competence are of equal weight. In the analysis of the AG, this is hardly the content of the Marrakesh Treaty.

Nevertheless when a competence which may be shared is internally exercised by the Union, it is possible for that competence to become exclusive *externally* on the basis of the additional source of competence prescribed in Art.3(2) TFEU. In the view of the AG, this is precisely the case for the Marrakesh Treaty. Art. 3(2) confers exclusive competence upon the Union when the conclusion of an international agreement 'may affect the common rules or alter their scope.' This would normally be the case where there has been complete EU harmonisation of an area covered by an international agreement though 'complete' harmonisation is not a necessary precondition for the EU's exclusive competence to arise. This was established in the 2014 *Broadcasting Rights* decision,[189] which this Study included in Question 4 of the Questionnaire circulated, in which the CJEU interpreted the newly added Art.3(2) by the Lisbon Treaty. In this decision, the CJEU rejected the argument that since the entry into force of the Lisbon Treaty the exclusive competence of the Union was viewed in a more restrictive manner. Following this case, the AG Opinion repeated that, for the EU's implicit competence to arise, 'what is crucial…is whether the area covered by the international agreement is already largely covered by EU rules so that any Member State competence to act externally in respect of that area would risk affecting those rules.'[190]

In this case, the mandatory Marrakesh exceptions correspond to an area largely covered by EU rules even in the absence of complete harmonisation. This is confirmed by the fact that the exceptions in Art.5 Copyright Directive are optional, are largely EU-regulated in the sense of being exhaustive and are subject to the three-step test. Furthermore, the AG observed that the CJEU's interpretation of certain concepts in Art.5

[186] L Ankersmit, 'The Scope of the Common Commercial Policy After Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments'(2014) 2 Legal Issues of Economic Integration 193, 209
[187] A-3/15 Opinion Procedure (n 4) at [105] and [113]. See also See also, C-137/12 *European Commission v Council of the EU*, CJEU [2013] (Applying the 'centre of gravity' test to determine the correct legal basis for EU measures that within the scope of multiple EU competences.)
[188] A-3/15 Opinion Procedure (n 4) at [119]
[189] C-114/12 *European Commission v European Parliament*, CJEU [2014], at [69] (A finding that there is a risk that EU rules might be adversely affected by international commitments, or that the scope of those rules might be adversely altered, 'does not pressuposethat the areas covered by the international commitments and those covered by the EU rules coincide fully.').
[190] A-3/15 Opinion Procedure (n 4) at [140]

as being autonomous concepts of EU law lends further support to his view.[191] In fact, in one of the CJEU's cases referred to in the Opinion, the optional nature of the exception in Art.5 (ephemeral recordings of works made by broadcasting organisations by means of their own facilities) to the exclusive right of reproduction harmonised in Art.2 Copyright Directive did not preclude the Court's interpretation that 'the EU legislature is deemed to have exercised the competence previously devolved on the Member States in the field of Intellectual Property.'[192] Within the scope of the Copyright Directive, the EU is thus deemed to have taken the place of the Member States, which may no longer exercise their own discretion conferred under international agreements such as the Berne Convention.[193] Though the EU is not a party to this Convention, it is nevertheless obliged under Art.1(4) of the WIPO Copyright Treaty (WCT) to comply with Articles 1 to 21 of the Berne Convention. It is precisely some of these exclusive rights recognised in the Berne Convention/WCT that are affected by the mandatory Marrakesh exceptions to national copyright laws for print-disabled people. The AG therefore concluded that The Marrakesh ratification will affect common rules largely occupied by EU law which triggers the Union's exclusive competence under Art.3(2) TFEU.

Whichever route is followed, ie Article 3(2) or Art.207 TFUE, the EU has a wide scope of action regarding IP rights. Academic opinions agree with the interpretation in the AG Opinion of the competence issue as being supported in the settled case-law CJEU's.[194] Whilst the AG Opinion is fully supportive of the Union's exclusive competence, there is arguably some basis for thinking that his views are less supportive of claims for Marrakesh ratification without the need for adjusting the EU copyright framework. In fact, in passing he acknowledges the Council's request from the Commission to submit a proposal to amend copyright so as to give effect to the Marrkesh obligations and agrees that, once that amendment is adopted, the Union will have legitimately exercised its competence.[195] His passing comments are however limited to amendments to the optional disability provision, not to the entire legal instrument.[196]

An important issue absent from the Opinion of the AG is that, for the purpose of the specific analysis of the relationship between the international agreement and the EU law in force, the onus of proof is upon the party claiming exclusive implied competence under Art.3(2) TFEU. Here when the Commission submitted its 2014 Proposal for Council Decision to ratification, it cited the legal provision forming the substantive legal basis and further supporting evidence and justification, as required in the *Broadcasting Rights* decision.[197] Accordding to some academics, one way in which the Commission's obligation to provide evidence that the Union's exclusive competence has been established is to refer

[191] Ibid at [141], citing C-201/13 *Deckyman v Vandersteen*, CJEU [2014] (At [16], the CJEU ruled that the optional nature of the parody exception in Art.5(3)(k) Copyright Directive does not prevent the concept of 'parody' from being an autonomous concept of EU law and thus interpreted uniformly, rather than by reference to national law.)
[192] C-510/10 *DR, TV2 Danmark A/S v NCB*, CJEU [2012], at [31]
[193] Ibidem
[194] A Ramalho, 'Signed, Sealed, But Not Delivered: The EU and the Ratification of the Marrakesh Treaty'(2015) 6 European J of Risk Regulation 629; A Ramalo, 'All Roads Lead to Marrakesh: The Exclusive Competence of the EU'. 28 September 2016 (http://kluwercopyrightblog.com/2016/09/28/roads-lead-marrakesh-exclusive-external-competence-eu/) [accessed 24 October 2016] See also, Judge's Opinion That EU Is Competent To Ratify Marrakesh Treaty Might Break Standstill, IP Watch, 14.09.2016. http://www.ip-watch.org/2016/09/14/judges-opinion-that-eu-is-competent-to-ratify-marrakesh-treaty-might-break-standstill/ [accessed 24 October 2016]
[195] A-3/15 Opinion Procedure [n 4] at [151]-[152|
[196] Ibid at [143], [149]
[197] C-114/12 *European Commission v European Parliament*, CJEU [2014], at [75]-[99]. Here, however, in its 2014 Proposal for a Council Decision the Commission cited Art.114 TFEU (Internal market component) rather than Art.3(2), as established in the Broadcasting Rights case and as followed by the AG Opinion. Ths proposal should be amended to reflect this. See COM(2014) 638 final, 21 October 2014, p.5

to relevant case-law of the CJEU.[198] Overall, the commentary points out that the CJEU has recently tended to favour assessments that support a finding of exclusive competence and this Study endorses these views.[199] Some have even suggested that the institutional disagreement over the competence was simply a non-issue that should never have delayed ratification, raising the question of whether this is in fact a lack of political will in disguise[200] and similar views have been expressed in Parliamentary discussions over the ratification impasse.[201] It would be unfortunate if this was the case but following the AG Opinion and the CJEU's cases relied upon, the EU and its Member States should immediately begin the ratification process without delay.

[198] A Ramahlo, 'Conceptualising the European Union's Competence in Copyright: What Can the EU Do? (2014) IIC 178, 198 (Other wys in which the EU may justify the need for intervention is through impat studies and broad consultation.)

[199] A Ramalho, 'Signed, Sealed, But Not Delivered: The EU and the Ratification of the Marrakesh Treaty'(2015) 6 European J of Risk Regulation 629; Y Tanghe, 'The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Contructing a Dam to Resist a River Bursting Its Banks,' (2016) 82 Utrecht J of Int and European Law 27; L Ankersmit, 'The Scope of the Common Commercial Policy After Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments'(2014) 2 Legal Issues of Economic Integration 193, 209

[200] A Ramalo, 'All Roads Lead to Marrakesh: The Exclusive Competence of the EU'. 28 September 2016 (http://kluwercopyrightblog.com/2016/09/28/roads-lead-marrakesh-exclusive-external-competence-eu/) [accessed 24 October 2016];

[201] Parliamentary Questions O-000021/2015, 3 March 2015 and Parliamentary Debate of 29 April 2015. http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20150429&secondRef=ITEM-024&language=EN [accessed 24 October 2016]

5. CONCLUDING REMARKS

KEY FINDINGS

- Copyright reform is not a condition for the ratification of Marrakesh.
- The Commission's proposals for a Directive and Regulation adopt the most central provisions of the Marrakesh Treaty and make use its the exceptions-plus character, though some aspects may need some clarification.
- The Marrakesh Treaty is a triumph for the disability model.

5.1 Copyright Reform Package

The urgent need for reassessement of the essential role of E&Ls is highlighted in a recent non-binding resolution by the European Parliament supporting the revision of the Copyright Directive and outlining its position about the way the copyright *acquis* in the EU should be revised and developed. Following a report published in January 2015 (the Reda Report) that relied upon a consultative process with users,[202] the resolution aims to assess the implementation of key aspects of EU copyright law and its passage cleared the way for the Commission to develop strong and ambitious reform proposals to modernise copyright in the digital age that draws upon and include the key points raised by the Parliament.[203] One important statement is the strong call for 'any legislative iniative to modernise copyright be preceded by an exhaustive ex-ante assessment of its impact in terms of growth and jobs, as well as its potential costs and benefits.'[204] This evidence-based approach to policy-making applies to the creation of both new rights and E&Ls. On this basis, the Parliament's resolution called on the Commission 'to examine the possibility of reviewing a number of the existing expeceptions and limitations in order to better adapt them to the digital environment' ensuring their 'technological neutraility and future-compatability…'[205]

Whilst stating that 'some exceptions and limitations may…benefit from more common rules' for which the Commission should 'examine the application of minimum standards across exceptions and lmitations',[206] the resolution does not go as far as the Reda Report which asked 'to make mandatory all the exceptions and limitations referred to in [the EU Copyright Directive], to allow equal access to cultural diversity across borders within the internal market and to improve legal certainty.'[207] Instead, Parliament called for the strengthening of exceptions such as libraries, museums and archieves, and for the creation of a number of new exceptions such as text and data mining for search, research and education purposes which includes online and cross-border activities, e-lending for

[202] EU Parliament, Draft Report on the implementation of 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, 2014/2256(INI), 15 January 2015. (Reda Report)
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN
[203] EU Parliament, Resolution of July 9, 2015 on the implementation of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/225(INI)), P8_TA-PROV(2015)0273.
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0273+0+DOC+PDF+V0//EN
[204] Ibid at [21]
[205] Ibid at [35] and [44]
[206] Ibid at [[37-38]
[207] Reda Report, at [11]

public libraries as well as an exception allowing libraries to digitalise content for consultation, cataloguing and archiving.

Although the resolution emphasised that 'any legislative change…should guarantee people with disabilities access to works and services protected by copyright and related rights in *any formats*,' (emphasis added) it fell short of calling for the existing optional disability exception to be mandatory despite strong calls from academics[208] and disability groups for a mandatory disability exception in line with the binding Marrakesh obligations.[209] The Resolution did however call for swift ratification of the Marrakesh Treaty 'without making the ratification conditional upon the revision of the EU legal framework.' Whilst some academics have welcomed the importance of the Parliament's initiative, they have described the resolution as 'a missed opportunity to make a stronger statement on some essential issues of copyright law in the EU' since it is 'less ambitious and courageous in several regards than the original Draft Report proposed by the Rapporteur.'[210]

Indeed, the Reda Report had called for a mandatory harmonised framework of E&Ls (which other Parliamentary Committes fully supported)[211] alongside the adoption of an open norm introducing flexibility in the interpretation of this mandatory framework which was modelled on the existing three-step in Art.5(5) of the Copyright Directive.[212] The Reda Report's proposals were not new as they had already been proposed in an earlier study on the Directive which offered as a solution to improve copyright a two-tiered approach to E&Ls. Under this 2007 study, the EU legislator might first provide a shorter list of mandatory limitations reflecting fundamental freedoms, internal market considerations and user rights, and secondly, it could adopt an open norm leaving Member States Freedom to provide additional limitation following the three-step test.[213] Yet none of these proposals were include in the resolution. But more importantly, academic opinions refer to some 'polarised and, sometimes, contradictory statements' in the final text, particularly the emphasis on evidence-based norm-setting and the ideologically charged statements that any copyright reform should be based upon a high level of protection, which makes Parliament's message to the European Commission far from easy to follow.[214] Similarly, like numerous scholars before, these academics continue to argue that 'a more unified approach to copyright law in the EU seems crucial for the development of a truly European information society.'[215]

Following the EU Parliament's resolution and the conclusions of the European council meeting in June 2015, the Commission published its roadmap on the modernisation

[208] C Geiger et al, 'The Resolution of the European Parliament of July 9, 2015: Paving the Way (Finally) for a Copyrigh Reform in the European Union?'(2015) 11 EIPR 683, 691; European Copyright Society, Answer to the EC Consultation on the Review of the EU Copyright Rules, March 2014. http://infojustice.org/wp-content/uploads/2014/03/ECS-answer-to-EC-consultation-on-copyright-Review.pdf

[209] Response From the EBU to the Public Consultation on the Review of the EU Copyright Rules, February 2014. http://www.euroblind.org/media/position-papers/EBU-response-to-the-Public-Consultation-on-the-review-of-the-EU-copyright-rules-feb-2014.doc

[210] C Geiger et al, 'The Resolution of the European Parliament of July 9, 2015: Paving the Way (Finally) for a Copyrigh Reform in the European Union?'(2015) 11 EIPR 683

[211] EU Parliament, Draft Opinion of the Committee on Culture and Education for the Committee on Legal Affairs, 2014/2256(INI), 30 January 2015.
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-544.403%2B01%2BDOC%2BPDF%2BV0%2F%2FEN

[212] Reda Report at [13]

[213] Study on the implementation and effect in member states' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, IVIR, February 2007.
http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf

[214] Ibidem 685

[215] Ibidem 683.

of the EU copyright rules.The Commission specifically highlighted its commitment to ensure 'equal access for persons with disabilities in the digital environment' whilst providing a high level of protection for rightholders.[216] It presented a plan that included concrete actions with proposals for the very short term (ie portability of online services) and another set of proposals planned for 2016, which included legislation required to implement the Marrakesh Treaty. One of area of intended legislative action was the fragmentation of copyright rules in the EU particularly as regards exceptions which are option for national governments to implement. According to the Commission, this was particularly problematic for exceptions that are closely related to education, research and access to knowledge, including 'the optional nature and the lack of cross-border effect for the disabililty exception…'.[217] The immediate effect of this is to 'make it difficult for people with print disabilities to acess special formats made under the copyright exception of another Member State.' It thus proposed addressing this serious problem by ratifying and implementing the EU's international commitment under the Marrakesh Treaty.

The Commission's statement thus echoed one of the central responses from consumers and institutional users to public consultation on EU copyright reform that it conducted between December 2013 and March 2014. To the question of whether some or all of the exceptions should be made mandatory, the results report that, amongst end users, 'it is a common view that exceptions, at least those linked to the exercise of fundamental rights (eg. Quotation and criticim, newsreporting, parody) should be made mandatory and harmonised' whilst many others request 'a basic set of mandatory exceptions for scientific research, education,cultural heritage, disabilities, libraries and archieves.'[218] These views were largely shared by institutional users but not, needless to say, by stakeholders group who 'see no evidence that mandatory exceptions would lead to better results…' The stakeholders' views are, however, contrary to empirical evidence published in previous reports.[219] Moreover, the consumers' views were also consistent with their answers as to their experiences with the use of the disability exception in the Copyright Directive. Several users and institutional users refer in particular to dyslexia being excluded from its scope by several EU Member States and the legal uncertainty about exporting and importing accessible books such as Braille, large print and audio books with special navegation tools. Other responses underline that the existing licence-based solutions in the market are insufficient to ensure equal access for disabled people.[220] For these users Marrakesh ratification will satisfactorily address their concerns but they also recognise the need for generalising accessability features in mainstream publishing, ie

[216] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a modern, more European copyrigth framework', COM(2015) 626 final, 9 December 2015.
http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12524
[217] Ibid p.7
[218] EU Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, pp.29-30
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf
[219] Study on the implementation and effect in member states' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, IVIR, February 2007, pp.51-52 ('These divergences in the national legislation are not likely to be conducive to the development of viable business models aimed at the production and distribution of digital content that can cater to the needs of the physically impaired.)
http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf
[220] EU Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, pp.61-62
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

ePub3 format. This is precisely the purpose of the 'born accessible' iniative promoted by TIGAR.

The responses to the Commission's consultation are, unsurprisingly, consistent with another comprehensive study published by the European Parliamentary Research Group (EPRS) in the wider context of the review of the EU copyright framework.[221] Broadly speaking, the EPRS study did not report anything that previous reports have not found. Overall, the study highlighted that the Copyright Directive has not been effective for neither the industry nor the users and is 'increasingly outdates in the light of the rapid pace of technological change...' It particularly referred to the 'fragmented picture' that emerges from the implementation and scope of E&Ls in a selected number of Member States but, more importantly, such exceptions were found 'inreasingly misaligned with technological development, and the lack of an update limits the development of new, potentially high value added "welfare-enhancing" uses of information.'[222] The study identified a series of gaps that would require legislative intervention, stressing that no action is simply not option. Although the study did not discuss the optional disability exception in great detail, it did identify an imbalance in the main copyright instrument in the sense that the vast majority of the exclusive rights was harmonised and adaptaed to the digitial environment whilst the E&Ls were conceived as optional and thus increasing the risk of fragmentation and inefficiencies.

5.2. Commission's Proposals for a Directive and a Regulation to Implement Marrakesh

It is against this background that the Commission's copyright package was published in September 2016, which includes a Directive on Copyright in the Digital Single Market as well as two proposals for a Directive and a Regulation to implement the Marrakesh Treaty. The Copyright in the Digital Single Market Directive creates and harmonises new exceptions such as text and data mining exceptions, the digital use of works and other subject-matter for the purpose of cross-border teaching activities provided that it is for non-commercial purpose, and exception for preservation of cultural heritage.[223] The Directive also creates new exclusive rights for the benefit of publishers of online publications, fair remuneration in cotracts of authors and performers, and rights over the use of protected content on online platforms that provide storing and access to user-uploaded content (the so called 'value gap' right).[224] In the context of the aim to achieve a wide availability of content across the EU, it is also worth mentioning the Commission's proposal for the accessability requirements for products and services by removing barriers created by divergent legislation. The European Accessability Act (EAA) takes into account important commitments under the CRPD and seeks to bring significant benefits for disabled people in terms of fewer barriers when acessing information goods and open labour market. E-books are among the areas of services and products included 'in order to maximise their foreseable use by persons with functional limitations, including person with

[221] EU Parliament, Review of the EU Copyright Framework, EPRS, October 2015. http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf
[222] Ibid p.19
[223] EU Commission, Proposal for a Directive of the European Parliament and the Council on Copyright in the Digital Single Market, COM(2016) 593 final, 14 September 2016, Articles 3 to 5. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593
[224] EU Commission, Proposal for a Directive of the European Parliament and the Council Council on Copyright in the Digital Single Market, COM(2016) 593 final, 14 September 2016, Articles 11, 13 and 14.

disabilities."[225] The EAA does not, however, define what an 'ebook' actually is. Whilst the EBU fully supports the proposal for removing unnecessary barriers for disabled people, it has offered some suggestions and requested some clarifications.[226]

With regard to implementation of the Marrakesh Treaty, the proposals for a Directive and a Regulation were published separately from the copyright package and are intended to be read to together. Whilst the Directive seeks to ensure the cross-border dissemination of accessible format copies through the EU, the Regulation seeks to facilitate the exchange of such copies, between the Union and the third countries that are parties to the Marrakesh Treaty, for the benefit of beneficiary persons. To achieve these aims, the Directive makes the exception mandatory for Member States and will apply to rights harmonised at Union level and that are relevant for making and disseminating copies, as defined in Marrakesh.[227] Article 3 thus outlines the permitted uses as regards beneficiary persons and authorised entities. The permited uses cover the right of the beneficiary (or a person acting on their behalf) to make an accessible format copy of a work or other subject-matter for their exclusive use, and the right of the authorised entity to make, communicate, make available, distribute or lend an accessible copy to a beneficiary person or authorised entity. It is specifically stated that the exception should allow atuhorised entities to make and dissimienate online and offline copies within the EU. These permitted uses are more extensive than those envisaged under the Marrkesh obligations and extend also to the rights covered under the Rental and Lending Rights Directive and the Database Directive.

Similarly, the exception to TPMs in Art.6(4) and that three-step test under the Copyright Directive will apply to the mandatory exception. Furthemore, the obligation to allow an authorised entity to carry out the permitted uses across Member States, thus ensuring cross-border distribuition of copies. More significantly, under Art.6 the exception under the Marrakesh Directive complements the existing option exception under Art.5(3)(b) of the Copyright Directive, which leaves Member States the freedom to create additional permitted uses according to their own cultural, socieo-economic needs. Under Art.1 the mandatory exception does not require authorisation of the rightholder nor does it provide for compensation or the need to check commercial availability. It is also commendable that under Art.2 the list of beneficiary persons cover dyslexics as well, which should address the concerns raised in the Commission's consultation.

On the other hand, the proposal for a Marrakesh Regulation introduces legislation 'specifically on the international exchange of accessible format copies for beneficiary person."[228] Accordingly, the Regulation will ensure that accessible format copies that are

[225] EU Commission, Proposal for a Directive of the European Parliament and the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM(2015) 615 final, 2 December 2015, Article 1(2) (e) and Section VII.
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0615:FIN

[226] EBU Response to the European Commission Consultation on the proposal for a European Accessibility Act, February 2016.
http://www.euroblind.org/media/position-papers/EUAA-consultation-response-European-Blind-Union-FINAL.pdf

[227] EU Commission, Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, COM(2016) 596 final, 14.9.2016.
https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-596-EN-F1-1.PDF

[228] EU Commission Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, COM(2016) 595 final, 14.9.2016.
https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-595-EN-F1-1.PDF

made in any Member State in accordance with national provisions implementing the Marrakesh Directive may be exported to third countries outside the EU that are parties to the Marrakesh Trety, including the import of such copies made in accordance with the Treaty in third countries. The legal basis for the proposal is Art.207, which is in agreement with the Opinion of the AG. The subsantive provisions parallel very closely those of the proposed Directive. Whilst Art.3 allows an authorised entitty established in a Member State to the export of accessible format copies to third countries through distribution, communication or making available, Art.4 allows for the import of such copies from third countries. However, Art.5 imposes a number of obligations on authorised entities carrying out any of the permitted acts in Articles 3 and 4, namely

a) it distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;

(b) it takes appropriate steps to discourage the unlawful reproduction, distribution, communication and making available of accessible format copies;

(c) it demonstrates due care in, and maintains records of, its handling of works and other subject-matter and of their accessible format copies; and

(d) it publishes and updates, on its website if appropriate, information on the manner in which it complies with the obligations laid down in points (a) to (c).

Furthermore, Art.5 creates an obligation on the authorised entity to provide the following information, on request, to any beneficiary person or right holder:

(a) the list of works and other subject-matter of which it has accessible format copies and the available formats; and

(b) the name and details of the authorised entities with which it has eng

However, this set of obligations on authorised entities engaging in international exporting and importing are not applicable to authorised entities for their intra-EU exchanges. Nothing is said about why these obligations are limited to international exchanges. Perhaps the reason for these additional obligations is to address the 'Berne Gap' country provision in Art.5(4)(a) of the Marrakesh Treaty which requires an authorised entity, which is not a Berne Convention member, to ensure that the imported copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that contracting party's jurisdiction. It may help to minimise any potential resistance to the proposals to offer some explanation and intended purpose. Furthermore, the definition of 'authorised entity' does not refer to any official status or recognition of authorised entities. Art.2 of the Marrakesh Treaty refers to an entity that is authorised or recognised by the national government and it may therefore be appropriate to include some provisions to facilitate the identification and supervision of authorised entities. Similarly, there is no mention of any redress or complaints mechanism that Member States should put in place in cases where Marrakesh beneficiaries are not allowed the permitted exception. Such mechanisms are provided under Art.13(2) of the proposal for copyright in the Digital Single Market for the benefit of right holders whose protected works are stored on and accessed on platforms of user-uploaded content.

5.3 Conclusions

In many respects, the Marrakesh Treaty is the result of a backlash that followed the unrelenting expansion of TRIPS-plus standards in bilateral and multilateral trade agreements in early 2000. Not only did this backlash manage to mobilise a wide range of actors such as civil society groups, disability activities, NGOs, UN human rights bodies, and developing countries but it also prompted scholars to offer valuable suggestions for reform.[229] One of these academic proposals focussed on the internal limitations *within* the copyright systems, particularly the vital role of E&Ls on the rights of copyright owners. Some academics have thus proposed a soft law instrument delineating E&Ls as one way of restoring the proper place of user rights in order to achieve copyright's wider public interest goals of knowledge diffusion. This focus on E&Ls was intended to restore the public interest components of IP policy and transform TRIPS (and its progeny) into a more balanced instrument. As protection for the rights of copyright owners and producers occupied the central motivation for expanding IP norms, one way to counter the expansion was to articulate the rights of users in equivalent detail and with equal standing. Thus, scholars, NGOs, UN agencies and deveping countries converged in promoting the same access rights for users agenda which provided the impetus for a treaty on mandatory exceptions such as Marrakesh. In direct opposition to the 'floors' created by the minimum rights prescribed in TRIPS, these calls for access rights through mandatory exceptions impose 'ceilings' on the one-way rachet of IP standards.[230]

If the human right of equal access to cultural knowledge is to be fully realised, the law must go further than ensuring books for the VIPs and specific classes of print disabled persons. The EU should take the lead in championing the need to adapt IP laws to promote and serve the basic human rights of all disabled people. Those who have concluded that an international agreement on limitations and exceptions is possible within the confines of the international copyright *acquis* have noted that, one of the successful features of such an endeavour, is the breadth of its membership. If only a few countries join and the membership reflects largely a particular group, ie developing countries, this 'could imperil the legitimacy and credibility of the international solution.'[231] The Marrakesh Treaty is an international solution to the global book famine and for that solution to work it requires a broad-based membership. EU accession and ratification is thus imperative. The WBU has thus declared that it is vital that the major producers of accessible works, such as the EU and the US, ratify the treaty immediately.[232]

Those who have mapped the time periods of the contested and evolving relationship between human rights and IP describe the most recent period as involving international law-making initiatives to codifiy mandatory ceilings on IP protection in

[229] G Dindwoodie and RC Dreyfuss, 'An International *Acquis*: Integrating Regimes and Restoring Balance' in D Gervais (ed), *International Intellectual Property: A Hanbook of Contemporary Research* (EE, 2015) 126-127; L Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' in RC Dreyfuss and J Pila (eds), *The Oxford Handbook of Intellectual Property Law*, (OUP, forthcoming) (Outlining four periods within which the intersection between IP and human rights gradually evolved and became more entrenched.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832417

[230] A Kurr and H Grosse Ruse-Khan, 'Enough is Enough: The Notion of Binding Ceilings in International Intellectual Property' Max Planck Institute for Intellectual Property, Competition & Tax Law Research, Paper Series No. 09-01 (December 8, 2008). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429

[231] P Bernt Hugenholtz and R Okediji, 'Contours of An International Instrument on Limitations and Exceptions' in NW Netanel (ed), *The Development Agenda* (OUP, 2009) 490

[232] Statement of the WBU at the Fifty-Sixth Series of Meetings of the WIPO Assemblies, 5th October 2016. http://www.ip-watch.org/weblog/wp-content/uploads/2016/10/STATEMENT-OF-THE-WORLD-BLIND-UNION-on-Marrakesh-Short.docx [accessed 24 October 2016]

multilateral treaties, with Marrakesh Treaty being the most important development. Helfer calls the Treaty 'a watershed in multiple respects.'[233] From an IP perspective, it is 'the first international agreement focussing on mandatory exceptions to IP protection rules.'[234] From a human rights perspective, it marks 'the first time that the realisation of human rights law has been the explicit objective of a treaty negotiated under the auspices of WIPO.'[235] From a disability perspective, it represents 'a [concrete] step towards fulfilling international obligations of state parties to the UNCRPD,' particularly the duty under Art.30(3) to ensure access to knowledge on an equal basis.[236] But more importantly, it is a triumph for the social model of disability that seeks to further disabled people's empowerment through the eradication of inequalities and socially constructed barriers around access to information, knowledge and education as the driving force behind the CRPD.[237] For disability activists, a visual impairment like the one the Marrakesh Treaty aims to alliviate 'may be a human constant but "disability" need not and should not be.'[238] For other scholars seeking to integrate the human rights and IP regimes as a way to resolve tensions between the two, the Marrakesh Treaty provides a concrete illustration of this 'integrationist' approach, namely 'it employs the legal policy tools of copyright law to advance human rights ends.'[239]

[233] L Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' (n 189)
[234] Ibidem
[235] Ibidem
[236] Ibidem
[237] C Barnes, 'Understanding the Social Model of Disability: Past, Present and Future' in N Watson, A Roulstone, and C Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2012) 12, at 18
[238] Ibidem
[239] L Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' (189); See also, P Yu (n 39) 1114 (Supporting the 'progressive realisation' approach to determine how states can meet their obligations under international human rights instruments such as the UDHR and the ICESCR by asking not only what can be protected but also 'how it can be protected in a way that would allow for the progressive, or even full, realisation of other human rights.')

6. RECOMMENDATIONS:

6.1 Recommendations to the EP/PETI:

- Press for the swift ratification of the Marrakesh Treaty without any delay and without awaiting reforms of European copyright law, sending a clear message to the world that the EU is a champion of the human rights of print disabled people and fully committed to cooperating with other countries to end the global book famine.
- Work with the European Disability Forum (EDF), International Disability Alliance (IDA) and WIPO to assess barriers that disabled people with impairments not covered by the Marrakesh Treaty may face in having access to content and cultural materials.
- Explore the possibility of going further than the mandatory floor established by the Marrakesh Treaty by working closely with disability organisations such as the EBU to assess if there exist other accessibility barriers for VIPs that could be removed through other more extensive exceptions and limitations. The EBU and its members have valuable expertise that policy makers can use in furthering the stated aims of the Marrakesh Treaty and the CRPD when designing EU copyright norms.
- Consider assessing the impact that excluding exceptions to copyright materials such as audio-visual and cinematographic works (ie films, documentaries, etc) may have upon the empowerment right of VIPs to access knowledge and cultural participation on an equal basis. The duty of states under Art.30(3) CRPD covers any intellectual property right that could constitute a discriminatory or unreasonable barrier to access cultural materials irrespective of the medium or the form that the cultural expression may take.
- Support and engage actively with private sector initiatives that complement the Marrakesh aims of ending the global book famine such as Accessible Book Service's (ABC) initiative called the 'born accessible' publications, which seeks to create products that are usable from the start by both sighted persons and the print disabled as a way to promote inclusive publishing and increase the number of works in accessible formats.
- Support, together with the Commission and Member States, ABC and WIPO and help them to expand their global online catalogue of books in accessible formats and provide technical assistance through capacity building projects in developing countries. The WBU is actively involved and fully supportive of ABC's activities.

6.2 Recommendations to the Commission:

- Press ahead with EU ratification of the Treaty, notably after the Opinion of the AG clears the way for the exclusive competence of the Union.,
- After ratification, provide Member States with detailed guidance on implementing the provisions of the 'Marrakesh Directive' in order to ensure uncomplicated and effective exchange of accessible format copies within the single market.
- Consider selecting copyright rules and Article 30 of the CRPD as a focus of a meeting of the Disability High Level Group as part of the Commission's monitoring and policing duties.

- Support the establishment of a mechanism for legal remedies against violations of the rights under the Directive and the Regulation in order to ensure effective application of their provisions or, at the very least, a complaints mechanism for beneficiaries and authorised entities, having regard to the obligation under Art.10(1) to adopt any 'measures' to ensure effective application of the Marrakesh Treaty.

6.3 Recommendations to Member States:

- Support and work constructively with the Commission on the current proposals for a Marrakesh Directive and Regulation seeking to implement and ensure full application of the Marrakesh Treaty obligations, bearing in mind the Treaty's historic character and its distinct blend of universal human rights/disability rights and IP ceilings.
- Establish a mechanism to ensure that the objectives of the Marrakesh Treaty are actually achieved *in practice*. To this end, Member States could rely upon Art.33 CRPD independent monitoring bodies and their national IP Office to comply with their duty under Art.10(1) Marrakesth Treaty 'to adopt measures necessary to ensure application of this Treaty.'
- Authorise these monitoring bodies to enforce the national measures adopted and assess the extent to which beneficiaries and authorised entities are effectively enjoying the rights provided under the Directive/Marrakesh Treaty.
- Work closely with local organisations representing VIPs to produce an action plan outlining measures, objectives and concrete steps to achieve increased accessible format copies and collect data regarding such access, including the publication of information on the authorised entities established in the territory.
- Build links and share information about good practice with other Member States in order to create a combined front for the effective implementation of the Directive and full realisation of the Marrakesh commitments and goals.
- Support the European Accessability Act and work closely with the EU to fine-tune the proposed legislation on accessibility of products and services so as to reduce the number of inaccessible e-books and thereby fulfil the promise under Art.9 CRPD 'to enable persons with disabilities to live independently and participate fully in all aspects of life.'

REFERENCES

- Access for Persons with Print Disabilities, 2005 http://www.ifrro.org/content/access-persons-print-disabilities [accessed 23 October 2016]

- Access to copyright works for people with print disabilities (ETIN), 7 June 2016 http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm [accessed 23 October 2016]

- Barnes C, 'Understanding the Social Model of Disability: Past, Present and Future' in N Watson, A Roulstone, and C Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2012

- Bernt Hugenholtz B and Okediji R, 'Contours of An International Instrument on Limitations and Exceptions' in Netanel NW (ed), *The Development Agenda* (OUP, 2009)

- Boyle J, 'A Manifesto on WIPO and The Future of Intellectual Property' (2004) 9 Duke Law & Technology Rev 1

- Brown A and C Waelde, 'Human Rigths, Persons With Disabilities and Copyright' in Geiger C (ed) in *Research Handbook on Human Rights and IP* (EE, 2016)

- Chapman A, 'Approaching Intellectual Property As A Human Right: Obligations Related To Article 15(1)(c)' (2001) 3 Copyright Bulletin 4

- Conway D, 'The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO' in Calboli, I and Ragavan, S (eds), *Diversity in Intellectual Property: Identities, Interests, and Intersections* (CUP, 2015)

- Dindwoodie G and Dreyfuss RC, 'An International *Acquis*: Integrating Regimes and Restoring Balance' inGervais D (ed), *International Intellectual Property: A Hanbook of Contemporary Research* (EE, 2015)

- Dinwoodie G, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000)149 U Penn LR 469

  ––'The International Intellectual Property Law System: New Actors, New Institutions, New Sources' (2006) Marquette IP Law R 205

- Dreyfuss RC, 'TRIPS-ROUND II: Should Users Strike Back' (2004) U Chicago LR 21

- EU Council Decision 5100/15 LIMITE, PI 3, 9 January 2015. http://www.statewatch.org/news/2015/oct/eu-marrakesh-impaired-rights-5110-15.pdf [accessed 24 October 2016]

- European Trusted Intermediaries Network (ETIN), 19 November 2012 http://hub.eaccessplus.eu/wiki/European_Trusted_Intermediaries_Network_(ETIN) [accessed 23 October 2016]

- Ficsor M, 'Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired.' 10 November 2013 http://www.copyrightseesaw.net/archive/?sw_10_item=50 [accessed 24 October 2016]

- Garnett N, '2006 WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions' (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952) [accessed 24 October 2016]

- Geneva Declaration on the Future of WIPO, March 4 2005. Available: http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf [accessed 22 October 2016]

- Ginsburg J and Besek J, Comment by Jane Ginsburg and June Besek for the Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyright Works for the Blind or Other Persons with Disabilities, November 13, 2009 http://www.copyright.gov/docs/sccr/comments/2009/comments-2/ginsburg-besek-columbia-law-school.pdf [accessed 25 October 2016]

- Harpur H and Suzor N, 'Copyright Protections and Disability Rights: Turning the Page to New International Paradigm (2013) 3 UNSWLJ 745

- Helfer L, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' inDreyfuss RC and Pila J (eds), *The Oxford Handbook of Intellectual Property Law*, (OUP, forthcoming)

- –– Helfer L, 'Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Lawmaking' (2004) 29 Yale J Int. Law 1, 4––'Towards a Human Rights Framework for Intellectual Property' (2007) 40 UCD Law Rev 971, 988

- Hilty R 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' (2015) 6 IIC 707

- 'How The Main Issues Of The Marrakesh Treaty For The Blind Were Solved In The Nick Of Time,' IP Watch, 01 July 2013. http://www.ip-watch.org/2013/07/01/how-the-main-issues-of-the-marrakesh-treaty-for-the-blind-were-solved-in-the-nick-of-time/ [accessed 29 October 2016]

- Judge's Opinion That EU Is Competent To Ratify Marrakesh Treaty Might Break Standstill, IP Watch, 14.09.2016. http://www.ip-watch.org/2016/09/14/judges-opinion-that-eu-is-competent-to-ratify-marrakesh-treaty-might-break-standstill/ [accessed 24 October 2016]

- Kapczynski A, 'The Access to Knowledge Mobilisation and The New Politics of Intellectual Property'(2008) 117 Yale LJ 804

- Knowledge Ecology International, 'World Blind Union (WBU) and Knowledge Ecology International (KEI) Meeting on a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons, July 24-25, 2008' (http://keionline.org/content/view/206) [accessed 14 October 2016]

- Kurr A and Grosse Ruse-Khan H, 'Enough is Enough: The Notion of Binding Ceilings in International Intellectual Property' Max Planck Institute for Intellectual Property, Competition & Tax Law Research, Paper Series No. 09-01 (December 8, 2008).

- Letter of EU Commissioner Michel Barnier to President of the EBU, 16 May 2013. http://www.euroblind.org/media/lobbying/787508---Let-MB-a-W--Angermann.doc [accessed 29 October 2016]

- Letter of Wolfgang Angermann, President of EBU, to EU Commissioner Michael Barnier, 28th March 2013. http://www.euroblind.org/media/lobbying/Letter-from-the-European-Blind-Union-28th-March-2013.doc [accessed 29 October 2016]

- Mtima L, 'Copryright and Social Justice in the Digital Information Society: Three-Steps Towards IP Social Justice' (2015) Houston LR 459

- National Federation of the Blind Responds to Authors Guild Statement on the Amazon Kindle 2, 12 February 2009 https://nfb.org/node/1184 [accessed 29 October 2016]

- Okediji R, 'Towards an International Fair Use Doctrine'(2000) 39 Columbia J of Transnational L 75, 168-169 --'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' (2006) Issue Paper No.15, UNCTAD-ICTSD, http://unctad.org/en/docs/iteipc200610_en.pdf [accessed 29 October 2016]

- Ramalo A, 'All Roads Lead to Marrakesh: The Exclusive Competence of the EU'. 28 September 2016 (http://kluwercopyrightblog.com/2016/09/28/roads-lead-marrakesh-exclusive-external-competence-eu/) [accessed 24 October 2016]

- Rekas A, 'Tracking The Progress of the Proposed WIPO Treaty on Exceptions and Limitations to Copyright to Benefit Persons with Print Disabilities'(2013) 4 European Yearbook of Disability Law 45

- Ricketson S, '2003 WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805) [accessed 24 October 2016]

- Right to read" for blind and low vision Europeans still denied – access to literary works locked,' EBU 10 December 2016 http://www.euroblind.org/news/nr/2748 [accessed 24 October 2016]

- Sanjaun JR, Reply Comments of Judit Rius Sanjuan, KEI, December 4, 2009 http://www.copyright.gov/docs/sccr/comments/2009/reply-2/27-judit-rius-sanjuan.pdf [accessed 25 October 2016]

- Sanz C, 'Vibrant Lauding Of "Historic" Marrakesh Treaty For The Blind At WIPO' (06.10.2016) http://www.ip-watch.org/2016/10/06/vibrant-lauding-of-historic-marrakesh-treaty-for-the-blind-at-wipo/ [accessed 24 October 2016]

- Shaver L, The Right to Science and Culture, (2010)121 Wisconsin LR 121

- Spanga C, 'Disability, Right to Culture and Copyright: Which Regulatory Option?' (2015) 2-3 IRLCT 88

- Statement of the WBU at the Fifty-Sixth Series of Meetings of the WIPO Assemblies, 5th October 2016. http://www.ip-watch.org/weblog/wp-content/uploads/2016/10/STATEMENT-OF-THE-WORLD-BLIND-UNION-on-Marrakesh-Short.docx [accessed 24 October 2016]

- Statement on the Promotion of Accessible Reading Materials for the Blind in a Trusted Environment by IFFRO, November 2008. http://www.ifrro.org/upload/documents/WBU%20proposal_IFRRO%20statement%20SCCR%20Nov%2008.pdf [accessed 24 October 2016]

- 'Talks in the balance: EU backs treaty leaving USA isolated', EBU, 26 November 2012. http://www.euroblind.org/media/press-releases/EBU_press_release_26_nov_2012.doc [accessed 24 October 2016]

- Time Ticking For WIPO Delegates On Copyright Exceptions Treaty, IP Watch, 19 April 2013. http://www.ip-watch.org/2013/04/19/time-ticking-for-wipo-delegates-on-copyright-exception-treaty/ [accessed 29 October 2016]

- Suthersanen U, 'A2K and the WIPO Development Agenda: Time to List the "Public Domain"' (2008) 1 Policy Brief 1

- US and EU blocking treaty to give blind people access to books,' The Guardian, 30 July 2012. https://www.theguardian.com/global-development/2012/jul/30/us-eu-blocking-treaty-blind-books [accessed 29 October 2016]

- Waddington L, 'The European Union and the United Nations Convention on the Right of Persons with Disabilities: A Story of Exclusive and Shared Competence'(2011) 18 Maastricht J Eur & Comp L 431

- WBU Suspension of Activity on WIPO and Stakeholder Platforms, 26 February, 2011 http://www.worldblindunion.org/English/our-work/our-priorities/Pages/WBU-Suspension-of-Activity-on-WIPO-and-Stakeholder-Platforms.aspx [accessed 24 October 2016]

- WIPO accessible book treaty - Do EU negotiators know what blind people need better than EBU does?' By Dan Pescod, 27 March 2013. http://www.euroblind.org/working-areas/access-to-education/nr/10 [accessed 29 October 2016]

- WIPO Committee Finishes A Step Closer To Treaty For Visually Impaired', IP Watch, 24 November 2012 http://www.ip-watch.org/2012/11/24/wipo-committee-finishes-a-step-closer-to-treaty-for-visually-impaired/ [accessed 24 October 2016]

- Yu P, 'Reconceptualising Intellectual Property Interests In a Human Rights Framework' (2007) 40 UCD Law Rev 1039

- Study on Copyright Limitations and Exceptions for the Visually Impaired," WIPO SCCR/15/7, 20.02.2007 http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf

- 18th Session WIPO SCCR/18/5, May 25, 2010. http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732

- Comission, COM(2016) 596 final, 14.9.2016. Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-596-EN-F1-1.PDF

- Commission, COM(2016) 595 final, 14.9.2016. Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-595-EN-F1-1.PDF

- Commission, COM(2016) 596 final, 14.9.2016. Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-596-EN-F1-1.PDF

- Commission, EU Commission's Green Paper on 'Copyright in the Knowledge Economy', COM(2008) 466/3, 16 July 2008. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

- Commission, Proposal for a Council Decision on the Conclusion, on behalf of the Union, of the Marrakesh Treaty for Persons Who are Blind, Visually Impaired, or Otherwise Print-Disabled, COM(2014) 638 final, 21 October 2014. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014PC0638&from=EN

- Copyright: Commissioner Barnier welcomes agreement on greater access to books for the visually impaired, IP/10/1120, 14 September 2010. http://europa.eu/rapid/press-release_IP-10-1120_en.htm?locale=en [accessed 24 October 2016]

- EBU Response to the EU Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3, 26 November 2008. Available at:

- EU Council (Partial Declassification) 11180/12 EXT1, PI 73, 5 February 2013, 4-5 http://data.consilium.europa.eu/doc/document/ST-11180-2012-EXT-1/en/pdf

- EU Council Decision 11239/15 LIMITE, PE-1E 402, 27 July 2015, http://data.consilium.europa.eu/doc/document/ST-11239-2015-INIT/en/pdf

- EU Council Decision 12930/12 EXT1, PI 109, 20 September 2012

- EU Council Decision 14961/12 EXT1, PI 122, 19 October 2012 http://data.consilium.europa.eu/doc/document/ST-14961-2012-EXT-1/en/pdf

- EU Council Decision 15377/12 EXT1, PI 129, 29 October 2012.http://data.consilium.europa.eu/doc/document/ST-15377-2012-EXT-1/en/pdf

- EU Council Decision 16259/12 EXT 2, PI 147, 15 November 2012.

- EU Council Decision 2014/221/EU 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 (OJ L115, 17.4.2014, 1)

- EU Council Decision 2014/221/EU of April 2014 (OJ L115, 17.4.2014, 1)

- EU Council Decision 6035/12, PI 7, 11 February 2015. http://data.consilium.europa.eu/doc/document/ST-6035-2015-INIT/en/pdf
- EU Council Decision 7321/15 LIMITE, PI 16, 20 March 2015. http://data.consilium.europa.eu/doc/document/ST-7321-2015-INIT/en/pdf
- EU Council Decision 7576/1/15 REV1 LIMITE, PI 20, 20 April 2015. http://data.consilium.europa.eu/doc/document/ST-7576-2015-REV-1/en/pdf
- EU Council Decision 8305/14 ADD1, P1 39, 9 April 2014. http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208305%202014%20ADD%201
- EU Council Decision 8387/15 PI 28, 4 May 2015 http://data.consilium.europa.eu/doc/document/ST-8387-2015-INIT/en/pdf
- EU Council Decision 8387/15, PI 28, 4 May 2015. http://data.consilium.europa.eu/doc/document/ST-8387-2015-INIT/en/pdf
- EU Parliament Resolution, B8-0168/2016, 28 January.2016. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2016-0168+0+DOC+PDF+V0//EN
- EU Parliament, Parliamentary Questions E-002919-15, 25 February 2015, http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-002919&language=EN
- EU Stakeholders Dialogue Memorandum of Understanding (MOU) on Access to Works by People with Print Disabilities, 14 September 2010. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/2010/20100914_mou_en.pdf
- European Parliament resolution of 12 May 2011 on unlocking the potential of cultural and creative industries (2010/2156(INI)) http://data.consilium.europa.eu/doc/document/ST-16259-2012-EXT-2/en/pdf
- http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-26_en.pdf
- https://circabc.europa.eu/webdav/CircaBC/FISMA/markt_consultations/Library/copyright_neighbouring/consultation_copyright/ebu_european_blind_union.pdf [accessed 29 October 2016]
- M Green, Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/15 (9 October, 2000). http://www.bayefsky.com/general/e_c_12_2000_15.pdf [accessed 22 October 2016]
- Note 'From Better to Full Access to Works for Print-Disabled Persons,' (2009), PETI http://www.europarl.europa.eu/RegData/etudes/divers/join/2009/419610/IPOL-JURI_DV(2009)419610_EN.pdf
- Note 'Improving Access to Works for Visually Impaired Persons (2009) PETI, http://www.europarl.europa.eu/document/activities/cont/200911/20091113ATT64499/20091113ATT64499EN.pdf

- OJ 2013/C 249E/13, European Parliament resolution of 16 February 2012 on Petition 0924/2011 by Dan Pescod (British), on behalf of the European Blind Union (EBU)/Royal National Institute of Blind People (RNIB), on access by blind people to books and other printed products (2011/2894(RSP)). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CE.2013.249.01.0049.01.ENG&toc=OJ:C:2013:249E:TOC

- OJ L115/1, 17 April 2014. http://publications.europa.eu/resource/cellar/9e67bb18-c5fe-11e3-9fe4-01aa75ed71a1.0006.03/DOC_1

- Parliamentary Question E-009538/2015, 16 September 2015, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-009538&language=EN

- Parliamentary Questions E-002919/2015, 15 June 2015, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-002919&language=EN

- Parliamentary Questions O-000021/2015, 3 March 2015, http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20150429&secondRef=ITEM-024&language=EN

- Parliamentary Questions, O-000006/2012, 15 February 2012 http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20120215&secondRef=ITEM-017&language=EN [accessed 29 October 2016]

- Petition 0924/2011 by Dan Pescod on Behalf of the EBU/RIBP

- Res.2000/7, UN ESCOR Commission on Human Rights, 52d Session, UN Doc. E/CN.4/Sub.2/2000/L.20 (2000)

- Statement by the Committee on Economic Social and Cultural Rights on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/15 (14 December 2001) http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf

- UN Committee Economic, Social and Cultural Rights (CESC), *General Comment No.17 The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006, E/C.12/GC/17. http://www.refworld.org/docid/441543594.html [accessed 23 October 2016]

- UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, at 22. Available at: http://www.refworld.org/docid/43f3067ae.html [accessed 24 October 2016]

- UN Committee on Economic, Social and Cultural Rights (CESCR*), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July

2009, E/C.12/GC/20, at 7. Available at: http://www.refworld.org/docid/4a60961f2.html [accessed 24 October 2016]

- UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22. Available at: http://www.refworld.org/docid/4538838f0.html [accessed 23 October 2016]

- UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, at [12]-[13]. Available at: http://www.refworld.org/docid/4ed35bae2.html [accessed 29 October 2016]

- UN Economic and Social Council, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property on Human Rights*, E/CN.4/Sub.2/2001/13 (27 June 2001), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/143/45/PDF/G0114345.pdf?OpenElement [accessed 22 October 2016]

- UN General Assembly, *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, on 'The Right to Enjoy the Benefits of Scientific Progress and its Applications'*, A/HRC/20/26, 14 May 2012, at 3.

- UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3, available at: http://www.refworld.org/docid/3ae6b36c0.html [accessed 22 October 2016]

- UN General Assembly, *Standard rules on the equalization of opportunities for persons with disabilities: resolution / adopted by the General Assembly*, 20 December 1993, A/RES/48/96, Rule 10 Culture. Available at: http://www.refworld.org/docid/3b00f2e80.html [accessed 24 October 2016]

- UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 22 October 2016]

- WIPO 20th Sess, 'Third Interim Report of the Stakeholders' Platform', SCCR/20/6. 21-24 June 2010. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_6.pdf [accessed 24 October 2016]

- WIPO 25th Sess, DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES, SCCR/25/2 REV, 19-23 November 2012. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_2_rev.pdf [accessed 29 October 2016]

- WIPO 55th Series of Meetings, 'Report on the Accessible Books Consortium,' A/55/INF/9, 5-14 October 2015. http://www.wipo.int/edocs/mdocs/govbody/en/a_55/a_55_inf_9.pdf [accessed 24 October 2016]

- WIPO 56th Series of Meetings, 'Report on the Accessible Books Consortium A/56/INF/8, 3-11 October 2016. http://www.wipo.int/edocs/mdocs/govbody/en/a_56/a_56_inf_8.pdf [accessed 24 October 2016]

- WIPO SCCR 13th Sess, Proposal by Chile on the Analysis of Exceptions and Limitations, SCCR/13/5, 22 Novermber 2005 http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf [accessed 29 October 2016]

- WIPO SCCR 16th Sess, Proposal by Brazil, Chile, Nicaragua and Uruguay for Wok Related to Exceptions and Limitations, SCCR/16/12, 17 July 2008. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf [accessed 29 October 2016]

- WIPO SCCR 17th Sess, Conclusions of the SCCR (Nov 5-7, 2008) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_www_112533.pdf [accessed 24 October 2016]

- WIPO SCCR 19th Session, Secretariat's Report SCCR/19/15 (Dec 14-18, 2009) http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_15.pdf [accessed 24 October 2016]

- WIPO SCCR 20th Sess, Proposal by the African Group for a 'Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives', SSCR/20/21, 15 June 2010

- WIPO SCCR 20th Sess, Proposal by the EU for 'Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability,' SCCR/20/12, 17 June 2010http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf [accessed 24 October 2016]

- WIPO SCCR 20th Sess, Proposal by the US for 'Draft Consensus Instrument,' SCCR/20/12. 17 June 2010. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.pdf

- WIPO SCCR 21st Sess, Conclusions, SCCR/21/Conclusions (8-12 November 2010). http://www.wipo.int/edocs/mdocs/copyright/en/sccr_21/sccr_21_conclusions.pdf [accessed 29 October 2016]

- WIPO SCCR 22nd Sess, 'Proposal on an international instrument on limitations and exceptions for persons with print disabilities,' SCCR/22/16, 15-24 June 2011. http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_16.pdf [accessed 24 Cotober 2016]

- WIPO SCCR 22th Sess, Proposal By the African Group for a 'Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives', SSCR/22/12, 3 June 2011 http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf [accessed 24 October 2016]

- WIPO, Contracting Parties to the Marrarrakesh Treaty. http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843 [accessed 24 October 2016]

ANNEX 1

Contracting Parties to the Marrakesh VIP Treaty
(Total Contracting Parties: 25)

Contracting Party	Signature	Instrument	In Force	Details
Afghanistan	June 28, 2013			
Argentina	May 21, 2014	Ratification: April 1, 2015	September 30, 2016	
Australia	June 23, 2014	Ratification: December 10, 2015	September 30, 2016	Details
Austria	*June 25, 2014*			
Belgium	*June 25, 2014*			
Bosnia and Herzegovina	June 28, 2013			
Botswana		Accession: October 5, 2016	January 5, 2017	
Brazil	June 28, 2013	Ratification: December 11, 2015	September 30, 2016	
Burkina Faso	June 28, 2013			
Burundi	June 28, 2013			
Cambodia	June 28, 2013			
Cameroon	June 28, 2013			
Canada		Accession: June 30, 2016	September 30, 2016	
Central African Republic	June 28, 2013			
Chad	June 28, 2013			
Chile	June 28, 2013	Ratification: May 10, 2016	September 30, 2016	
China	June 28, 2013			
Colombia	June 28, 2013			
Comoros	June 28, 2013			
Congo	June 28, 2013			
Costa Rica	June 28, 2013			
Côte d'Ivoire	June 28, 2013			
Cyprus	*June 28, 2013*			
Czech Republic	*June 24, 2014*			
Democratic People's Republic of Korea	June 28, 2013	Ratification: February 19, 2016	September 30, 2016	
Denmark	*June 28, 2013*			
Djibouti	June 28, 2013			
Dominican Republic	June 28, 2013			

Ecuador	May 8, 2014	Ratification: June 29, 2016	September 30, 2016	
El Salvador	October 11, 2013	Ratification: October 1, 2014	September 30, 2016	
Ethiopia	June 28, 2013			
European Union (EU)	*April 30, 2014*			
Finland	*June 20, 2014*			
France	*April 30, 2014*			
Germany	*June 20, 2014*			
Ghana	June 28, 2013			
Greece	*April 30, 2014*			
Guatemala	June 2, 2014	Ratification: June 29, 2016	September 30, 2016	
Guinea	June 28, 2013			
Haiti	June 28, 2013			
Holy See	June 28, 2013			
India	April 30, 2014	Ratification: June 24, 2014	September 30, 2016	
Indonesia	September 24, 2013			
Iran (Islamic Republic of)	June 27, 2014			
Ireland	*June 20, 2014*			
Israel		Accession: March 21, 2016	September 30, 2016	
Jordan	June 28, 2013			
Kenya	June 28, 2013			
Lebanon	June 28, 2013			
Liberia		Accession: October 6, 2016	January 6, 2017	
Lithuania	*September 27, 2013*			
Luxembourg	*June 28, 2013*			
Mali	June 28, 2013	Ratification: December 16, 2014	September 30, 2016	
Mauritania	June 28, 2013			
Mauritius	June 28, 2013			
Mexico	June 25, 2014	Ratification: July 29, 2015	September 30, 2016	
Mongolia	June 28, 2013	Ratification: September 23, 2015	September 30, 2016	
Morocco	June 28, 2013			
Mozambique	August 22, 2013			
Namibia	August 12, 2013			
Nepal	June 28, 2013			
Nigeria	June 28, 2013			
Norway	June 20, 2014			

Panama	June 28, 2013			
Paraguay	June 28, 2013	Ratification: January 20, 2015	September 30, 2016	
Peru	June 28, 2013	Ratification: February 2, 2016	September 30, 2016	
Poland	*June 24, 2014*			
Republic of Korea	June 26, 2014	Ratification: October 8, 2015	September 30, 2016	
Republic of Moldova	June 28, 2013			
Saint Vincent and the Grenadines		Accession: September 5, 2016	December 5, 2016	
Sao Tome and Principe	June 28, 2013			
Senegal	June 28, 2013			
Sierra Leone	June 28, 2013			
Singapore		Accession: March 30, 2015	September 30, 2016	
Slovenia	*May 16, 2014*			
Sri Lanka		Accession: October 5, 2016	January 5, 2017	
Sudan	June 28, 2013			
Switzerland	June 28, 2013			
Syrian Arab Republic	November 22, 2013			
Togo	June 28, 2013			
Tunisia	June 28, 2013	Ratification: September 7, 2016	December 7, 2016	
Turkey	November 1, 2013			
Uganda	June 28, 2013			
United Arab Emirates		Accession: October 15, 2014	September 30, 2016	
United Kingdom	*June 28, 2013*			
United States of America	October 2, 2013			
Uruguay	June 28, 2013	Ratification: December 1, 2014	September 30, 2016	
Zimbabwe	October 2, 2013			

Source: WIPO Website, consulted on 4/11/2016
http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843

ANNEX 2: EU LEGAL BASIS FOR MARRAKESH

Issue	Legal Basis	Text of the Legal Basis
Negotiation of the Marrakesh Treaty	- Commission proposed Article 3(2) TFEU (exclusive competence) - Member States in the Council disagreed and supported shared competence - compromise: Commission negotiates for aspects falling under EU competence, in coordination with MSs	Article 3 1. The Union shall have exclusive competence in the following areas: (...) (e) common commercial policy. 2. 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.
Signature of the Marrakesh Treaty		
Ratification of the Marrakesh Treaty	- Commission proposed Article 3(2) TFEU (exclusive competence) + Article 207 TFEU (common commercial policy) - blocking minority in the Council (CK, FI, FR, DE, RO, SK, SL): first modify the Copyright regime; shared competence (PL: 114 + 19 TFEU; UK: shared competence, no Art. 207) - Council legal service: Article 207 TFEU is correct as legal basis	Article 207 1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. 3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by

		the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. 5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218. 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.
Request for an opinion to the CJEU	- Commission: Article 114 (approximation of laws in the internal market) + Article 207 = exclusive competence under 3(2) - EP supports COM - CK, FI, FR, LT, HU, RO, UK oppose COM and support shared competence - Advocate General supports Article 19 (1) + 207	Article 114 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection,

	= commercial policy, exclusive competence	will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective. 4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them. 5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them. 6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months. 7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure. 8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

		9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article. 10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.
		Article 19 (ex Article 13 TEC) 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2016 Commission proposal for a Directive	Article 114 TFEU	
2016 Commission proposal for a Regulation	Article 207 TFEU	

ANNEX 3: INTERNATIONAL TREATIES AND EU LAW REFERENCES

International Treaty / EU laws	Text
Universal Declaration of Human Rights	**Article 27** (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
International Covenant on Economic, Social and Cultural Rights (ICESCR)	**Article 2(2)** 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **Article 3** The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant. **Article 15** 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.
UNCRPD	**Article 30 - Participation in cultural life, recreation, leisure and sport** (...) 3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

EU Copyright Directive	**Article 5 - Exceptions and limitations** (...) **3.** Member States may provide for exceptions or limitations to the rights provided for in Articles 2 *(Reproduction right)* and 3 *(Right of communication to the public of works and right of making available to the public other subject-matter)* in the following cases: (...) **(b)** 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;

ANNEX 4: QUESTIONNAIRE SENT TO EU PERMREPS

QUESTIONNAIRE

Q1. Does your government oppose EU ratification of the Marrakesh Treaty in the Council? If yes, what is the basis for this opposition?

Q2. Would EU ratification of the Marrakesh Treaty create any problems for your Member State? If so, could you please explain the nature of these problems, ie legal, economic, political, institutional, etc?

Q3. How would a CJEU decision/opinion in this area impact the position of your Member State?

Q4. In the light of recent CJEU case-law on the area of competence such as C-114/12 *Commission v Council of the EU* [2014] and C-28/12 *Commisssion v Council of the EU* [2015], would your government be willing to re-examine its position? Why or why not?

Q5. If your government's opposition rests upon the argument that the proper legal basis for EU ratification is as a so-called mixed agreement, could you refer to the specific CJEU's case-law that supports this argument?

Q6. Does your government view the Marrakesh Treaty primarily as a Human Rights or Copyright treaty? Why?

Q7. Does your government consider support for EU ratiifcation of the Marrakesh Treaty entirely conditional upon the revision of the EU Copyright framework which the Commission might propose in mid-2016?

Q8 Might your government's position change in the light of resolution B8-0168/2016 recently adopted by the European Parliament on 28 January 2016 calling on the Council and the Member States to accelerate the ratification process without ratification being conditional upon revision of the EU legal framework or a CJEU's decision?

Q9. Has your government signed and ratified the UN Convention on the Rights of Persons with Disabilities? If so, do Articles 21 (Freedom of Expression), 24 (Right to Education) and 30(3) (Ensuring Intellectual Property laws do not create an unreasonable or discriminatory barrier to access to cultural materials) have any bearing on your government's decision whether or not to support EU ratification of the Marrakesh Treaty?

Q10 Are there any other important matters related to EU ratification of the Marrakesh Treaty? Plese explain and indicate how such matters ought to be addressed.

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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