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The EU mandate to negotiate the TTIP: should copyright be an outcast?

Ana Ramalho (Maastricht University) · Tuesday, May 21st, 2013

"It is not the European Parliament that officially determines the scope of the negotiating mandate, although its position now can certainly give a sign regarding the political winds that await the TTIP agreement."

The EU and the US have been holding talks on a trade agreement that goes by the name of Transatlantic Trade and Investment Partnership (TTIP). Apparently, it is both parties' intention to include a chapter on intellectual property, which has caused a lot of ACTA-related bells to ring. Regardless of the (de)merits of including an IP chapter in the TTIP, the specific mandate regarding copyright aspects is (still) unknown.

The Committee of International Trade of the European Parliament adopted a draft motion for a resolution on the agreement (to be voted next 23 May 2013), which refers to the negotiating mandate. There, it is stated that "the agreement should not risk prejudicing the Union's cultural and linguistic diversity, including in the audiovisual and cultural services sector" (point 10); and that "the agreement should include strong protection of precisely and clearly defined areas of intellectual property rights (IPRs), including geographical indications, and should be consistent with existing international agreements", while "other areas of divergence relating to IPRs should be resolved in line with international standards of protection" (point 12).

What the "precisely and clearly defined areas" of IP exactly are is unclear, as is the notion of "other areas" where divergences will be resolved according to international standards of protection. In which group does copyright fall? This will hopefully be clarified when the negotiations proper begin. In any case, it is not the European Parliament that officially determines the scope of the negotiating mandate, although its position now can certainly give a sign regarding the political winds that await the TTIP when the Parliament is called to take a stance on the final text of the agreement. According to art. 207/3 of the Treaty on the Functioning of the European Union ("TFEU"), it is up to the Council to define such mandate.

As per the Lisbon reform, the TFEU expressly includes the commercial aspects of intellectual

property in the common commercial policy of the EU (art. 207/1 TFEU). Those aspects can thus be part of the EU's external action. However, when it comes to the field of trade in cultural and audiovisual services, the Council has to act unanimously if the agreement risks prejudicing the Union's cultural and linguistic diversity (art. 207/4/a) TFEU)). On that note, both the European Union Trade Commissioner Karel De Gucht and the European Commission president José Manuel Barroso have expressed their will to keep Europe's cultural diversity untouched by the agreement, which might imply that the Council will be able to act by a qualified majority – and therefore more easily reach consensus. But even if that is the case, a couple of thorny issues still have to be considered. For example, given the link between copyright and culture, to what extent does the exclusion of "cultural diversity" limit the negotiating mandate on copyright matters? This blogger's guess is, to a not-so-negligible extent. While the definition of "cultural diversity" is absent from the Treaties, art. 167/2 TFEU gives some context to that concept by referring to such expressions as "the culture and history of the European peoples", "cultural heritage", or, more significantly, "artistic and literary creation."

Moreover, independently of the exclusion or inclusion of cultural diversity in the negotiating mandate, the question posed above is still valid in light of art. 207/6 TFEU, which reads: "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 harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization."

The first part of this provision is in line with case law of the Court of Justice of the European Union ("CJEU") establishing that internal measures cannot be separated from the system of external relations (see, e.g., the ERTA case). But the scope of the EU's external powers has been broadening throughout the various treaty amendments, which means that the external competence of the EU is not necessarily the mirror of its internal competences. On the other hand, and even though the common commercial policy is an exclusive competence of the EU (art. 3/1/(e) TFEU), the agreements negotiated must be compatible with internal Union policies and rules (see art 207/3 TFEU), which indeed implies a certain coherence between the internal and external dimensions of the EU. This tails with the second part of the provision, outlawing harmonization through the exercise of external competence in fields where the Treaties prohibit such harmonization. Notably, one of those fields is culture (art. 167/5 TFEU).

In sum, even if culture is not excluded from the negotiating mandate, a thorough application of Treaty rules might just have the same effect, at least if the idea is to reach some sort of harmonization with the copyright system of the other side of the pond. Pedro Velasco, from the Commission's Directorate General of Trade, has already declared that "neither highest IPR enforcement nor highest copyright exceptions will be harmonized in this agreement." Yet, given the connection between copyright and culture, on the one hand, and Treaty constraints, on the other, that list of excluded subjects might (should?) grow exponentially. In the end, if copyright does not turn out to be a complete outcast, it certainly should not play a central role either.

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This entry was posted on Tuesday, May 21st, 2013 at 9:39 pm and is filed under European Union, Jurisdiction, Legislative process, USA
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