Kluwer Copyright Blog

Blocking Marrakesh: an argument based on a house of cards

Ana Ramalho (Maastricht University) · Sunday, May 3rd, 2015

Back in April 2014, following the Council's authorization, the EU signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled ("Marrakesh Treaty"). Under the Treaty, parties are to adopt copyright exceptions to facilitate access to formats of works accessible to persons who are blind, visually impaired, or print disabled. Countries must moreover provide for the cross-border exchange of accessible-format works.

There were however no less than 7 Member States that considered that the Treaty fell under an area of shared competence between the EU and the Member States. According to the opposing Member States, Article 4 of the Marrakesh Treaty (which imposed an obligation to provide an exception to the rights of reproduction, distribution and making available to the public) went beyond the optional character of article 5 paragraph 3(b) of the Information Society Directive. That being the case, the EU had not become exclusively competent under Article 3(2) TFEU. Doubts were also raised as to using article 207 TFEU as the legal basis for the signature and ratification of the Treaty.

The contention about the EU's competence on this matter has been dragging on since then and does not seem to have an end in sight, judging from the arguments thrown in the debate that took place in the European Parliament Plenary Session last 29th of April. Again some countries opposed the ratification of the Marrakesh Treaty under EU exclusive competence, arguing that this is a mixed agreement (i.e., one where both the EU and the Member States hold competence, the Treaty having in that case to be ratified separately by the Member States as well as the EU).
The point this blogger wants to make is – this is a non-issue. The argument relating to the (lack of) exclusive competence of the EU is as sound as a house of cards. Whatever the provision, the competence of the EU will be exclusive on this matter.

If article 3(2) TFEU is at stake, as analysed previously in this blog and following the Court of Justice's decision in case C-114/12 – Commission and Parliament v. Council, the EU will have exclusive competence where a specific analysis of the relationship between the Marrakesh Treaty and the EU acquis (namely, the Information Society Directive) reveals that the former is capable of affecting the latter or altering its scope. This will happen where the international Treaty falls within the scope of the EU acquis (as per the Court's ruling in the ERTA case). However, as the Court clarified in case C-114/12, "falling within the scope" of EU rules does not mean that the international Treaty must coincide fully with EU rules. Rather, a finding that the international Treaty relates to an area "largely covered" by EU rules is enough to conclude that such Treaty may affect EU rules, thereby making the EU exclusively competent (see paragraphs 68-70 of the decision in case C-114/12).

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

One of the arguments that was put forth already in 2014 to oppose the exclusive competence of the EU was the optional nature of article 5(3)(b) of the Directive, which meant that Member States did not have to implement the corresponding exception. But this argument does not proceed. The provision has actually been implemented by all Member States, with minor deviations (as evidenced by this study). Further, as follows from the Deckmyn case, the optional character of an exception does not have a bearing on its nature as an autonomous concept of EU law (cf. paragraphs 14-17 of the decision). This means that "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature" (cf. article 5(3)(b) of the Directive), which is now implemented throughout the EU, is an autonomous concept of EU law, independently of how the Member States have transposed that exception into their national laws. Therefore, the Marrakesh Treaty may affect or alter the scope of a common EU rule, which makes its ratification an exclusive competence of the EU.

If on the other hand article 207 TFEU is used as a legal basis, following the Daiichi case, there needs to be a "specific link to international trade", which may be fulfilled if a given Treaty undertakes an international harmonization of standards of certain rules that consequently facilitate international trade (on which see previous blog post here and paragraphs 59-60 of the Daiichi decision). And this is the case of the Marrakesh Treaty, which among other things prescribes the cross-border exchange of accessible format copies in its article 5.

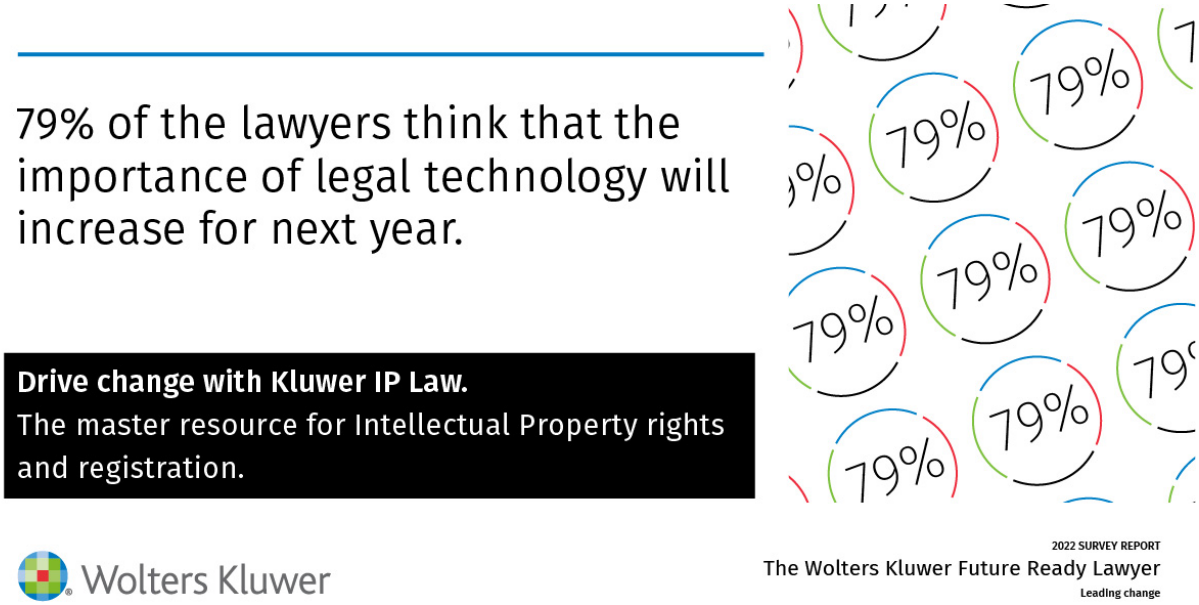
Either way, independently of the norm used, the competence of the EU is exclusive on this matter. Hiding a lack of political will behind competence issues is like trying to hide an elephant behind a flower: futile, ineffective and right down silly.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Sunday, May 3rd, 2015 at 10:48 am and is filed under European Union, Legislative process, Limitations
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.