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# The Marrakesh VIP Treaty, Accessibility, and (E)U

Liam Sunner\*

## Abstract

In an effort to combat the global ‘book famine’ for individuals with visual impairments, in that over 90% of the printed works of the work were unavailable to them in an accessible format, the international community developed and ratified the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh VIP Treaty). The Treaty’s purpose was to provide new and improved methods of accessibility while not infringing the protections afforded by copyright on the printed works. As digitalisation and improvements to text to speech narration advanced in line with other technologies, arguably, it became easier and more cost-effective to adapt the material for those with visual impairments. However, in doing so, the adaptation ran afoul of copyright protection. The Marrakesh VIP Treaty thus facilitates this adaption while not infringing or preventing future commercial exploration of the work in question.

This paper seeks to outline the context for the introduction, negotiation, and ratification of the Marrakesh VIP Treaty within the broader spirit of the CRPRD from the perspective of the European Union (EU). It also analyses the EU’s ability to include human rights-related goals as part of its external relations policy and the question of competence to act in this regard in relation to the Marrakesh VIP Treaty. Finally, it examines each trade-based agreement following the ratification of the Marrakesh VIP Treaty by the EU to assess whether they are aligned to the spirit of the Treaty. In doing so, the innovative and protective aspects are contrasted with requirements to protect and promote various human rights, such as the rights of the person with disabilities and where the Marrakesh VIP Treaty shapes the rights to education, knowledge, culture, and the impact such inclusion has in addressing the global ‘book famine’.

**Keywords:** EU Law, Disability Law, IP Law

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## 1. Introduction

The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh VIP Treaty) came into force in September 2016, after having been signed in 2013.<sup>1</sup> The Marrakesh VIP Treaty was a significant development in relation to copyright protection and enforcement within the World Intellectual Property Organisation (WIPO) and the international intellectual property (IP) community. The adoption of this Treaty was viewed as a milestone within the international human rights community. A central achievement was the first Treaty focusing on IP protection provisions developed from the perspective of the public interest and human rights perspective rather than the commercial aspects of the IP rights holders. In addition, the Treaty is the first which obligates parties to implement mandatory limitations and exceptions to copyright protection for the benefit of the blind, visually impaired, and otherwise print disabled persons. These limitations and exceptions include permission to facilitate the reproduction, distribution, and making available published works in formats designed to be accessible.<sup>2</sup> The Treaty also operates on a broad definition of what amounts to work, including material 'in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media'.<sup>3</sup> Previously, such limitations and exceptions were (merely) permitted, thus continuing the broader IP debate of framing the balance towards and allowance of use rather than an allowance to restriction.<sup>4</sup>

This article outlines the context for the introduction, negotiation, and ratification of the Marrakesh VIP Treaty within the broader spirit of the CRPRD from the perspective of the European Union (EU). It also analyses the EU's ability to include human rights-related goals as part of its external relations policy and the question of competence to act in this regard in relation to the Marrakesh VIP Treaty. Finally, it examines each trade-based agreement following the ratification of the Marrakesh VIP Treaty by the EU to assess whether they are aligned to the spirit of the Treaty. Following this brief introduction, this article is divided into four sections. Firstly, this article lays out the context for developing the 'Miracle of Marrakesh'.<sup>5</sup> In doing so, this charts the introduction, negotiation, and adoption of the Marrakesh VIP Treaty. This section also illustrates how the intentions behind the

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<sup>1</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (WIPO Doc VIP/DC/8).

<sup>2</sup> Marrakesh VIP Treaty Article 2(b) "“accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons, and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons’.

<sup>3</sup> Marrakesh VIP Treaty Article 2(a).

<sup>4</sup> Laurence R. Helfer, Molly K. Land, and Ruth L. Okediji, 'Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty' (2020) 42 *European Intellectual Property Review* 332, 334. < [https://scholarship.law.duke.edu/faculty\\_scholarship/4005/](https://scholarship.law.duke.edu/faculty_scholarship/4005/).

<sup>5</sup> Abbe Brown and Charlotte Waelde, Human Rights, Persons with Disability and Copyright in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar) 587. < <https://www.elgaronline.com/view/edcoll/9781788977982/9781788977982.00021.xml>>.

Marrakesh VIP Treaty fit into the broader spirit of the Convention on the Rights of Persons with Disabilities (CRPRD). Section Two, building on the first, examines the issue from the perspective of the European Union (EU). This primarily focuses on the EU's engagement with the CRPRD and the process behind the Marrakesh VIP Treaty. Section Three then moves to provide an analysis of the EU's ability to include human rights-related goals as part of its external relations policy and the question of competence to act in this regard in relation to the Marrakesh VIP Treaty. Finally, Section Four then examines each trade-based agreement following the ratification of the Marrakesh VIP Treaty by the EU to assess whether the spirit of the Treaty was included and implemented or if it was a mere box-checking inclusion to satisfy international obligations. This article then concludes by providing some commentary on the situation ahead of future agreements and the importance of the Marrakesh VIP Treaty.

## 2. Development towards the 'Miracle of Marrakesh'

The nature of the right to the protection of IP creations has attracted a significant body of scholarly attention,<sup>6</sup> and questions concerning whether IP rights should be equated to human rights persist.<sup>7</sup> In more recent years, however, the belief that IP rights are not only capable of being considered human rights but rather must be conceived of as 'instrumental legal tools to further social and economic purposes' has led scholars to focus primarily on the intersection between the protection of IP and other human rights. A particular focus, both in the macro sense of this discussion, and that of this article, is the right to participate in cultural life, the right to knowledge, and the right to education.<sup>8</sup> Each exists as part of a

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<sup>6</sup> The literature on the topic is vast. Among many others see: Peter K. Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69 Southern Methodist University Law Review 37 <<https://scholar.smu.edu/cgi/viewcontent.cgi?article=1082&context=smulr>>; J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving beyond the Natural Rights Property Focus' (2017) 20 Vanderbilt Journal of Entertainment and Technology Law 207 <<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1086&context=jetlaw>>; Robert L. Ostergard, Jr., 'Intellectual Property: A Universal Human Right?' (1998) 21(1) Human Rights Quarterly 156 <[https://www.jstor.org/stable/762740?casa\\_token=D6h7PMi0I8gAAAAA%3AtDGaVnml9bpkPMYC\\_15ixGvpKazW0Jlv9KYnFkvyNH07PF1kEAY6-Ew7h87\\_r\\_ISDEpgc5xTMO\\_TACZAc7xvCZ3BAU7AyyBV5eP1\\_laijeTUKpC\\_E&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/762740?casa_token=D6h7PMi0I8gAAAAA%3AtDGaVnml9bpkPMYC_15ixGvpKazW0Jlv9KYnFkvyNH07PF1kEAY6-Ew7h87_r_ISDEpgc5xTMO_TACZAc7xvCZ3BAU7AyyBV5eP1_laijeTUKpC_E&seq=1#metadata_info_tab_contents)>; Laurence R. Helfer 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) Minnesota Intellectual Property Review 47 <<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1399&context=mjst>>.

<sup>7</sup> Robert J. Gutowski, 'The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?' (1999) 47 Buffalo Law Review 713, 745 <<https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1363&context=buffalolawreview>>. Gutowski notes, while discussed in relation to TRIPS and criticism of the agreement, that '[w]estern industrialized countries contend that intellectual property rights are natural, human rights and are so recognized in the Universal Declaration of Human Rights (UDHR)'.

<sup>8</sup> Aurora Plomer, 'The Human Rights Paradox: Rights of Access to Science and Intellectual Property Rights', (2013) 35 Human Rights Quarterly, 143, 151 <[https://www.jstor.org/stable/23352255?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23352255?seq=1#metadata_info_tab_contents)>.

contentious debate, which can be made more complex when the elements of accommodation and accessibility are factored in.

The debate on the nature of IP can then be traced back to the Universal Declaration of Human Rights (UDHR). In particular, the binding and foundational nature of the UDHR would become in relation to the international debate.<sup>9</sup> In a holistic sense, the UDHR protects the right to property under Article 17, which states that '[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property'. Although this provision does not mention IP, it is considered to encompass it. Therefore, any protection afforded to IP rights under Article 17 is qualified,<sup>10</sup> and the UDHR does not address the role of IP in cultural creation.<sup>11</sup> For this reason, Article 17 must be read in conjunction with Article 27 UDHR, which protects the right to participate in cultural life. Article 27(1) UDHR states that '[e]veryone 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'. However, Article 27(2) UDHR requires the protection of 'of the *moral and material interests resulting from any scientific, literary or artistic production of which he is the author*' (emphasis added).

According to Plomer, the drafting history of Article 27 UDHR shows that delegations from some socialist countries backed the French initiative to include rights of authors and inventors within the protection of their intellectual creations, while the US, UK, and former Anglo-Saxon colonies opposed the proposal.<sup>12</sup> According to Chapman,<sup>13</sup> Article 27(2) UDHR instead reflected the 'desire by some drafters to harmonize the UDHR with the provision on intellectual property in the American Declaration on the Rights and Duties of Man, 1948'.<sup>14</sup> It is apparent that Article 27 is indeed the result of a compromise in that while

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<sup>9</sup> This binding and foundational nature of the UDHR is clearly seen within the preambles of the various agreements discussed throughout this Article, as well as various provisions that require interpretation of rights to reflect and respect the UDHR.

<sup>10</sup> It is provided that a person can be deprived of his/her property under certain circumstances, but not arbitrarily. The term 'arbitrarily' would seem to prohibit unreasonable interferences by states and the taking of property without compensation, but a precise and agreed upon definition does not appear in the preparatory documents.

<sup>11</sup> Peter K. Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2007) 23 Georgia State University Law Review 709,734 <<https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2156&context=gsulr>>. Yu argues that 'article 17 [UDHR] is at best ambiguous about whether property rights provide the basis for the right to the protection of material interests in intellectual creations in article 27(2)'.

<sup>12</sup> Aurora Plomer, 'The Human Rights Paradox: Rights of Access to Science and Intellectual Property Rights', (2013) 35 Human Rights Quarterly, 143, 160-161 <[https://www.jstor.org/stable/23352255?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23352255?seq=1#metadata_info_tab_contents)>.

<sup>13</sup> Audrey Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access To The Benefits Of Science*, <[https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_5.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf)> 7.

<sup>14</sup> Article 13 of the American Declaration reads as follows: 'Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his

protecting the right of authors, it places the rights of everyone to share scientific advancement and its benefits in a prominent position. In doing so, Article 27 UDHR requires a balance between individual rights and public rights of access to science. Thus, this broad terminology and requirement of participation can be seen as the spark that would become the Marrakesh VIP Treaty. However, as discussed below, this process has been arduous and fraught with unnecessary complications.

The origin of the Marrakesh VIP Treaty, can in part, be traced back to Article 30 of the Convention on the Rights of Persons with Disabilities (CRPD). Article 30(3) requires the parties to ensure that 'intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'. On the other hand, the Marrakesh VIP Treaty also arose in response to the global 'book famine'.<sup>15</sup> The global 'book famine' specifically refers to the inaccessibility of material to the estimated 300 million people with visibility disabilities to access over 95% of the world's books, which some argue is 'directly attributable to copyright laws.'<sup>16</sup> However, the development period was not without issue, with scholars noting that:

the political, legal, economic and social challenges faced by the negotiation of this Treaty echo those that have characterised disability, copyright and human rights for many years, and have also been intensified because of the bringing together of the often opposing interests of these domains.<sup>17</sup>

The Marrakesh VIP Treaty was, and remains, a significant development in relation to copyright protection and enforcement within WIPO, with some describing the Marrakesh VIP Treaty as 'the most effective response that international copyright law has provided to the human rights obligations of Article 30 CPRD to date'.<sup>18</sup> In doing so, the Marrakesh VIP Treaty recalls the CRPD principles in its principles and sets out to provide for a binding

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moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author'.

<sup>15</sup> World Intellectual Property Organization, Study on Copyright Limitations and Exceptions for the Visually Impaired, SCCR/15/7 (Feb. 20, 2007) available

[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=75696](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696). This can be further traced to previous studies commissioned by WIPO including Report of the Working Group on Access by Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, UNESCO/WIPO/WGH/I/3, Paris, 3 January 1983; and Wanda Noel, 'Copyright Problems Raised by the Access by Handicapped Persons to Protected Works', report to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, Paris, 1985, IGC(1971)/VI/11 – B/EC/XXIV/10 ANNEXII; Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment', SCCR/9/7, 5 April 2003

<sup>16</sup> Molly K Land, 'The Marrakesh Treaty as Bottom Up Lawmaking: Supporting Local Human Rights Action on IP Policies' (2018) 8 UC Irvine Law Review 513, 546 <<https://scholarship.law.uci.edu/ucilr/vol8/iss3/5/>>.

<sup>17</sup> Abbe Brown and Charlotte Waelde Human Rights, persons with disability and copyright in Christophe Geiger (eds), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar) 577 <<https://www.elgaronline.com/view/edcoll/9781788977982/9781788977982.00021.xml>>.

<sup>18</sup> Caterina Sganga, 'Disability in EU Copyright Law' in Delia Ferri and Andrea Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar) 212

<<https://www.elgaronline.com/view/edcoll/9781788976411/9781788976411.00020.xml>>

normative framework for compliance with Article 30(3) CRPD. As such, several features of the Marrakesh VIP Treaty may allow it to provide a vehicle to translate IP issues into human rights terms. First by recognising the human rights violation under the current system and then by providing a mechanism to address (and possibly resolve) this violation.<sup>19</sup>

As with all other rights, IP rights do not exist in a vacuum. Rather, they are exercised within a community,<sup>20</sup> and this is further acknowledged by Articles 1(1), 7, and 8 of TRIPS. In this connection, IP rights must be viewed in relation to the broader intersection or within a community,<sup>21</sup> and Article 1(1) TRIPS further acknowledges this.<sup>22</sup> As such, the right(s) of authors and creators must be balanced with other competing rights, in this instance, the provision of accessible material to the public.

As such, the protective elements drawn from the right(s) of authors and creators must be balanced with other competing rights. Thus, one must briefly examine how this balance has been achieved in the contested area between IP and broader human rights before including the additional criteria afforded of the persons with disabilities are included.

Similar to Article 27 UDHR, Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) places IP rights alongside the right to access culture, but this does not explicitly address the relationship between IP and access to culture.<sup>23</sup> Moreover, despite affirming the right of authors to benefit from IP, it fails to answer the question of to what degree property could be considered to constitute a human right.<sup>24</sup> Additionally, Article 15(2) ICESCR requires the Parties to take steps to facilitate the 'full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture'. In doing so, this creates a broad requirement for ensuring accessibility. Furthermore, the interpretation at this level, has some arguing that Article 27

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<sup>19</sup> Molly K. Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' (2018) U.C Irvine Law Review 8 514, 546 <<https://scholarship.law.uci.edu/ucilr/vol8/iss3/5/>>.

<sup>20</sup> J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 Vanderbilt Journal of Entertainment and Technology Law. 207, 212. <<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1086&context=jetlaw>>

<sup>21</sup> J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 Vanderbilt Journal of Entertainment and Technology Law. 207, 212 <<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1086&context=jetlaw>>

<sup>22</sup> Article 1(1) of TRIPS states that 'Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

<sup>23</sup> Article 15(1) ICESCR states that '[t]he 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. (emphasis added)'

<sup>24</sup> Jakob Cornides, 'Human Rights and Intellectual Property: Conflict or Convergence?' (2004) 7 The Journal of World Intellectual Property 135, 139-143 <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jwip7&section=9&casa\\_token=vxa7cimC1NgAAAAA:X9nFQT1E-SuUtlIK7rjH9dsOzwrLYeFEJK\\_4Ft9tFYFqMgeNRM-1m1pMxynjhp8H-EdnF5a](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jwip7&section=9&casa_token=vxa7cimC1NgAAAAA:X9nFQT1E-SuUtlIK7rjH9dsOzwrLYeFEJK_4Ft9tFYFqMgeNRM-1m1pMxynjhp8H-EdnF5a)>.

UDHR, as well as Article 15 ICESCR, have been used to support the argument that IP is, in fact, a human right, despite being regulated at the international level mostly within trade-related settings.<sup>25</sup>

In particular, Article 27(2) UDHR and 15(1)(c) ICESCR have been considered to qualify the right of the author as a human right. This serves to highlight that the concurrent development of the IP and the moral right of the author remains at 'the centre of copyright as a human right lives in the moral rights arena'.<sup>26</sup> Additionally, it can be said that the 'international intellectual property system is not solely convened with economic imperatives', insofar as it takes the existence of the authors' rights into account.<sup>27</sup> However, *General Comment No. 17* of the Committee on Economic, Social and Cultural Rights (CESCR Committee) did not offer a definitive solution to the nature of IP rights.<sup>28</sup> Rather, it continued to the broad position that 'the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other'.<sup>29</sup> However, in doing so, while this grants scope to questions related to accessibility, it does not act upon or press the development.

Certain exemptions to copyright protections have existed for education purposes from the beginning.<sup>30</sup> Ginsburg notes the early emphasis of the introduction of copyright was not on the protection of the author, but rather 'enacting a copyright law formed part of a

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<sup>25</sup> The literature on the topic is vast. Among many others see: Laurence R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40(3) UC Davis Law Review 971 <[https://scholarship.law.duke.edu/faculty\\_scholarship/1973/](https://scholarship.law.duke.edu/faculty_scholarship/1973/)>; Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40(3) UC Davis Law Review 1039 <[https://lawreview.law.ucdavis.edu/issues/40/3/intl-rights-approaches-to-ip/DavisVol40No3\\_Yu.pdf](https://lawreview.law.ucdavis.edu/issues/40/3/intl-rights-approaches-to-ip/DavisVol40No3_Yu.pdf)>; Peter K Yu, 'The International Enclosure Movement' (2007) 82(4) Indiana Law Journal 827 <<https://www.repository.law.indiana.edu/ilj/vol82/iss4/1/>>; J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 Vanderbilt Journal of Entertainment and Technology Law. 207, 211 <<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1086&context=jetlaw>>.

<sup>26</sup> Ort Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 Fordham Intellectual Property, Media and Entertainment Law Journal. 497, 524 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1420&context=iplj>>.

<sup>27</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 175 <[https://scholarship.law.duke.edu/faculty\\_scholarship/2322/](https://scholarship.law.duke.edu/faculty_scholarship/2322/)>.

<sup>28</sup> Committee on Economic, Social and Cultural Rights, 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 is the Author, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006, paragraph 2, where the committee distinguished the right provided for in Article 15(1)(c) from IP rights which are 'of a temporary nature' and could be 'revoked, licenced or assigned to someone else', whereas human rights are 'timeless'.

<sup>29</sup> Audrey Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)' (2001) 35 Copyright Bulletin 4, 10–13 <<https://unesdoc.unesco.org/ark:/48223/pf0000125505>>.

<sup>30</sup> Joel Spring, *The Universal Right to Education: Justifications, definition, and Guidelines* (Routledge, 2000) <<https://www.taylorfrancis.com/books/mono/10.4324/9781410601889/universal-right-education-joel-spring>>.

grander scheme of public education'.<sup>31</sup> Further, Helfer and Austin suggest that '[c]onceptually and textually, there exists venerable connections between education and intellectual property'.<sup>32</sup> At the international level, the right to education was recognised early under Article 26 UHDR, Article 13 ICESCR, and the United Nations Convention on the Rights of the Child (UNCROC).<sup>33</sup>

Building on this development, the CESCR Committee's *General Comment No. 13* stressed the importance of the adaptability of learning material, as well as both the physical and economic accessibility of the material.<sup>34</sup> *General Comment No. 13* was then followed in the 2007 report, *A Human Rights Approach to Education for All*, which described the accessibility and learning material as a 'fundamental prerequisite of education'.<sup>35</sup> This was again recognised and restated by the UN Committee on the Rights of the Child, in *General Comment No. 1 on the UNCROC Article 29(1)*.<sup>36</sup> The right to access material for the benefit of education and the protection of the material from the perspective of the author may, however, conflict. In that connection, Foster notes that '[t]he critical problem of potential conflict arises from the fact that the educational material, in which authors may have a material interest, are critical to the realization of the right to education'.<sup>37</sup> While the broad position of allowing limitations and exceptions to copyright protection for educational purposes, this implies a standard term of use rather than a more expressive allowance for truly inclusive education. While it may be possible to expand the scope of educational limitations and exceptions to encompass this need, this expansion will be assessed through the 'proportional' balance between the rights of the copyright holder and the broader public. This approach would likely generate a more limited allowance than would have occurred if there was an express acknowledgment of inclusive education requirements at the time. In this connection, the various conceptual components to the right to education were subsequently addressed under the CESCR Committee's *General Comment No. 11*,<sup>38</sup>

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<sup>31</sup> Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1989) 64 *Tulane Law Review* 991, 1009.  
<[https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1694&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1694&context=faculty_scholarship)>

<sup>32</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 316 <[https://scholarship.law.duke.edu/faculty\\_scholarship/2322/](https://scholarship.law.duke.edu/faculty_scholarship/2322/)>.

<sup>33</sup> Convention on the Rights of the Child (New York, 2 September 1990 1577 U.N.T.S 3).

<sup>34</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13 of the Covenant) U.N Doc. E/C.12/1999/10 Dec. 8 1999. para 6.

<sup>35</sup> UNESCO, *A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children's Right to Education and Rights within Education* (UNESCO, 20007) 77.

<sup>36</sup> UN Committee on the Rights of the Child (CRC), General Comment No. 1 (2001), Article 29 (1), The Aims of Education, U.N Doc. CRC/GC/2001/1 Apr. 17 2001.

<sup>37</sup> Sharon E Foster, 'The Conflict between the Right to Education and Copyright' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer, 2008) 288 <<https://law-store.wolterskluwer.com/s/product/intellectual-property-and-human-rights-4e/01tof0000014HAA>>

<sup>38</sup> Committee on Economic, Social and Cultural Rights, General Comment No 11: Plans of Action for Primary Education (Article 14) U.N. Doc. E/C.12/1999/4 May 10, 1999. para 2. The General Comment notes how the concept of education moves between civil and political elements as well as social and cultural right that 'the right to education epitomizes the indivisibility and interdependence of all

which can be seen as a spiritual precursor to the development of CRPD. The importance of open, inclusive, and accessible education, was a key aspect of the development of the CRPD,<sup>39</sup> due to the importance of education as a 'pre-request to the exercise of many other rights'<sup>40</sup> and '[b]oth an end in itself as well as a means towards attaining all other human rights'.<sup>41</sup> However, or perhaps to allow this necessarily broad scope, Article 24 CRPD does not define inclusive education. Rather the focus is on the creation of 'real opportunities for individuals with disabilities to foster their capabilities, in order to enable them to take an active role in society, wherever possible'.<sup>42</sup>

As such, the tension between IP rights and human rights remains locked in step, forever reassessing the proportional balance between the two competing interests. This is further complicated, with the inclusion of CRPD based obligations, which serve to give extra weight or consideration to the human rights requirements. And this has been seen, within international Treaties, such as Article 40 TRIPS which prohibited the abusive use of IP protection to create barriers. When read in light of Article 30(2) and (3) CRPD, where IP is prohibited from creating 'unreasonable or discriminatory barrier to access by persons with disability to cultural material', a more correctly balanced picture between IP rights and human rights can be seen. Or at least, it should be seen. And this goes to the evolving nature of both IP itself and this larger conflict, as a static point of recognition and scope does not work. In this regard, Ricketson notes, 'the older and established regimes are now unmistakably beginning to show increasing strains when faced with the problems posed by technological purposes'.<sup>43</sup> However, as seen in relation to the CRPD, the adoption of a flexible scope can appear to sidestep (or at least mitigate) such strains in the face of new technologies and developments.<sup>44</sup> In drawing from these lessons, both the success and

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human rights'. Yoram Rabin, 'The Many Forms of the Right to Education' in Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford University Press, 2007) 267 <

<http://www.delhihighcourt.nic.in/library/articles/The%20Many%20Faces%20of%20the%20Right%20to%20education.pdf>>. Rabin notes the various components of what encompasses education as a practical concept.

<sup>39</sup> Gauthier de Boare 'Transition to Inclusive Education Systems According to the Convention on the Rights of Persons with Disabilities' (2016) *Nordic Journal of Human Rights*, 34(1) 40, 40 < <https://www.tandfonline.com/doi/abs/10.1080/18918131.2016.1153183>>.

<sup>40</sup> Conor O'Mahony, *Educational Rights in Irish Law* (Round Hall, 2006) 18 < <https://www.judicialstudiesjournal.ie/assets/uploads/documents/pdfs/2007-Edition-01/book-review/o%E2%80%99mahony-educational-rights-in-irish-law.pdf>>.

<sup>41</sup> Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities* (Intersentia 2015) 293 < <https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/1699051/guid-17dc193e-9ce9-40b4-8aeb-9b3756a275ae-ASSET1.0.pdf>>.

<sup>42</sup> Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy Text, Cases and Materials* (Cambridge University Press, 2019) 255 < [https://assets.cambridge.org/97811084/18195/frontmatter/9781108418195\\_frontmatter.pdf](https://assets.cambridge.org/97811084/18195/frontmatter/9781108418195_frontmatter.pdf)>.

<sup>43</sup> Sam Ricketson, 'New Wine into Old Bottles: Technological Change and Intellectual Property Rights' (1992) 10(1) *Prometheus* 53, 54 < <https://www.tandfonline.com/doi/abs/10.1080/08109029208629514>>.

<sup>44</sup> For example, the Preamble of the CRPD on the ground that 'disability is an evolving concept and that disability results from the interface between persons with impairments and attitudinal and

failures, the Marrakesh VIP Treaty can build a new ground in which a proportional balance between the competing interests can be not only achieved but held as the standard going forward.<sup>45</sup> However, as with all such treaties, it will and remains dependent on its adoption, implementation, and conformity by the contracting parties. Thankfully, as will be discussed below, this appears to be promising.

### 3. The EU and its inclusion of Human Rights

Building on the previous section, the purpose of Section Two is to briefly highlight the EU's position and development in the areas of human rights, IP, and disability in relation to the scope/nature of this paper before examining its external policy. As a member of the international community, the EU and its Member States,<sup>46</sup> engaged and have often shaped the discussion surrounding the development of human rights, IP, and disability. However, despite the levels of engagement by the EU or the Member States, it must be noted that this occurred at a more ad hoc and limited basis due to a lack of direct competence and ability to engage the area fully. This reluctance to engage the human rights aspects can largely be attributed to the economic nature of the European Economic Community,<sup>47</sup> and the complexity that along brought to the discussion.

However, that does not mean to imply that human rights were entirely absent or ignored. Rather, they were engaged as part of the general principles of law for the EU, allowing their recognition and use on an ad hoc basis, where it served to highlight the supremacy of early EU law, rather than for its own development.<sup>48</sup> Nonetheless, as the Treaties saw revisions, the prominence of the position of human rights increased to its current position within the Treaty of Lisbon.

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environmental barriers that hinder their full and effective participation on an equal basis with others', Thus, sidestepping the conflict of the scope of the terminology, but also instances where such definitions are challenged by subsequent development and risk undoing the spirit of the Treaty due to technical oversights.

<sup>45</sup> Abbe Brown and Charlotte Waelde, Human Rights, Persons with Disability and Copyright, in Christophe Geiger (eds) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar) 588. In this regard, Brown and Waelde note '[t]he Marrakesh Treaty, seems, in other words to be an outcome that represents a genuine balance amongst the various stakeholders' interests represented in the potentially disparate domains of copyright, human rights and disability'.

<sup>46</sup> Due to the complex make-up of the EU over this period, it is perhaps worth noting that individual Member States would have been similarly active at the international level prior to accession to what would become the EU, thereby would have ratified the various Treaties discussed in Section One. However, in the event that the Member State had not, the ratification would have been a requirement for accession.

<sup>47</sup> Sionaidh Douglas-Scott 'The European Union and Human Rights after the Treaty of Lisbon' (2011) *Human Rights Law Review* 11(4) 645, 647-648 <<https://academic.oup.com/hrlr/article-abstract/11/4/645/618628>>. Douglas-Scott notes that '[t]here were no sections on fundamental rights because the EEC founders did not think this relevant to a treaty with mainly economic aspirations'.

<sup>48</sup> Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29(4) *Common Market Law Review* 669, 689.

As such, following the indication that the EU was to ratify the Marrakesh VIP Treaty, it was a rightful cause of celebration and notable triumph of the Treaty.<sup>49</sup> While the EU has made efforts in relation to the general area disability law within the Member States, either through legislative or policy action, this is far from a concluded matter. This may in part stem from the terminology of the Charter of Fundamental Rights and the difference relating to the enforceability of rights and the lack of enforceability of principles.<sup>50</sup> In this regard, Broderick and Ferri note an uneven or asymmetrical engagement by the EU for a specific aspect of disability accommodations.<sup>51</sup> The asymmetrical approach can be seen in the Audiovisual Media Services Directive,<sup>52</sup> which recalls the CRPD and the goal of ‘ensuring the accessibility of audiovisual contract is an essential requirement in the context of commitments taken under the [CRPD]’ within the preamble. However, in the actual text under Article 11(1) of the Audiovisual Media Services Directive, the language appears to soften from a strict obligation of ‘ensuring the accessibility’ to ensuring ‘that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures’. While this may be supplemented with ‘accessibility action plans in respect of continuously and progressively making their services more accessible’, this serves as a

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<sup>49</sup> This success can be appreciated over a number of grounds, firstly, the (eventual) ratification by the EU indicated the success and belief in the Treaty itself as the EU was one of the leading figures in the international law area at the time. In particular, a strong and active proponent of increasing IP protection and enforcement levels. Secondly, stemming from the scale of the EU, this not only saw the ratification of the Marrakesh VIP Treaty across 28 countries in one go, this would apply the terms of the Treaty to French, English, and Spanish material. This would then make such material available in many Developing countries where these are the primary languages

<sup>50</sup> Judgment of the Court of 22 May 2014, *Glatzel*, Case C-356/12, EU:C:2014:350 paragraph 78. The CJEU held that ‘although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such (see, to that effect, as regards Article 27 of the Charter, Case C-176/12 *Association de médiation sociale* EU:C:2014:2, paras 45 and 47)’. See also Sionaidh Douglas-Scott ‘The European Union and Human Rights after the Treaty of Lisbon’ (2011) *Human Rights Law Review* 11(4) 645, 652-653 <<https://academic.oup.com/hrlr/article-abstract/11/4/645/618628>>; Sophie Robin-Olivier, ‘The Contribution of the Charter of Fundamental Rights to the Protection of Social Rights in the European Union: A First Assessment after Lisbon’ (2013) 1 *European Journal of Human Rights* 109. Robin-Olivier notes ‘the complexities of the normative structure of EU labour law, which combines the “principles” of EU law contributing to a logic of protection, with the “principles” according to the Charter, which have a much weaker legal status’. While discussed in the context of labour law, parallels can be easily drawn to other socially related areas of EU law such as human rights.

<sup>51</sup> Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge University Press 2019) 383. Broderick and Ferri note that ‘[c]ompared to the general trend evidenced in respect of transport, EU law indicates fewer obligations in relation to the accessibility of information and communication’.

<sup>52</sup> Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

method of encouragement rather than a strict obligation.<sup>53</sup>

Additionally, it is worth noting that the Treaty was the first to be ratified by the EU through the use of its exclusive external competence on copyright. The Marrakesh VIP Treaty was subsequently implemented through both the use of Regulations,<sup>54</sup> and Directives,<sup>55</sup> to address the various aspects following some internal resistance on the matter. At the same time, the inclusion of the Marrakesh VIP Treaty within the EU's external competence raises some interesting issues. Primarily, while the focus of the Treaty was a noble goal that seeks to uphold the human rights concerned in relation to persons with disabilities, there is still a significant impact on trade. In doing so, opens (or rather demands) the inclusion of the Marrakesh VIP Treaty within the EU's external trade policy. This new avenue and engagement with human rights confirms what Ferri suggested a decade ago, that 'the conclusion of the accession to the UN CRPD by the EC/EU represents a significant opportunity to seek to gain a deeper understanding of the evolving relationship between international human rights law and EU law'.<sup>56</sup> But this wasn't the final step, rather just one of many, which was then followed by the Marrakesh VIP Treaty. This has been the case since the EU has ratified the Marrakesh VIP treaty.

#### **4. The Human Rights Competence of the European Union**

Alongside conferring to the Charter of Fundamental Rights, the same legal value of the Treaties and providing for the EU's future accession to the European Convention on Human Rights (the ECHR), the Treaty of Lisbon introduced human rights obligations with regards to the EU's external action. Under which, Article 3(5) TEU affirms that the EU 'shall uphold and promote' its values (which include the respect for human rights, including the rights of persons belonging to minorities) in its relations with the wider world. This commitment is reiterated at various junctures in Article 21 TEU. This includes international agreements. However, in this regard, Bartels then notes that:

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<sup>53</sup> Article 11(3) of the Audiovisual Media Services Directive.

<sup>54</sup> Regulation 2017/1563 of the European Parliament and of the Council of 13 September 2017 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, visually impaired or otherwise print-disabled.

<sup>55</sup> Directive 2017/1564 Of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain 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.

<sup>56</sup> Delia Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective' (2010) 2 European Yearbook of Disability Law 47, 48 <<https://mural.maynoothuniversity.ie/5556/1/DF-Conclusion.pdf>>.

Article 21(3) TEU imposes a clear obligation on the EU to 'respect' human rights, which means, according to the standard usage of this term, that it must not by its own conduct violate human rights.<sup>57</sup>

While introducing the requirement to respect human rights in relation to its trade policy and plan, the Treaty of Lisbon has left much how the actual application and scope up in the air. However, this approach in and of itself appears consistent with how the EU has operated. For example, the original economic nature of the Treaty of Rome did not provide guidance on how to address the human rights concerns internally,<sup>58</sup> let alone as an external policy.<sup>59</sup> In part, this can be attributed to a reluctance by the Member States to afford the EU additional competences. However, as with all questions regarding the upper limits of competence, this was addressed gradually through case law and Treaty revisions. It was not until the *Stauder* case,<sup>60</sup> which marked the end to the 'initial reluctance to explicitly articulate the EU's commitment towards human rights'.<sup>61</sup> Despite this shift, the inclusion of human rights as a litmus test for broader goals and agenda remained focused on the internal dimensions of EU policy.

Furthermore, at this juncture, there was no explicit reference to the EU's external policy to address the human rights concerns in relation to its broader goals. That said, the EU would (and continues to) evolve its ability to act in relation to external human rights matters to the current formulation under the Treaty of Lisbon. Article 2 TEU states that the:

Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Additionally, Article 3(5) TEU further stated that '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens'. The Treaty of Lisbon represented a significant milestone in placing human rights in a primary location of the EU legal order, both internally as well as within the

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<sup>57</sup> Lorand Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (German Institute for Human Rights, 2018) 17 <[https://www.ssoar.info/ssoar/bitstream/handle/document/37807/ssoar-2014-bartels-A\\_model\\_human\\_rights\\_clause.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2014-bartels-A\\_model\\_human\\_rights\\_clause.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/37807/ssoar-2014-bartels-A_model_human_rights_clause.pdf?sequence=1&isAllowed=y&lnkname=ssoar-2014-bartels-A_model_human_rights_clause.pdf)>. Bartels further notes that it is unclear 'whether there is a further obligation to 'protect' human rights in relation to the acts of third parties'.

<sup>58</sup> Stijn Smismans, 'Fundamental Rights as a Political Myth of the EU: Can the Myth Survive?' in Sionaidh Douglas-Scott (ed), *Research Handbook on Fundamental Rights in the European Union* (Edgar Elgar, 2019) <<https://orca.cardiff.ac.uk/132963/>>. Smisman argues that this omission was a deliberate action rather than an accidental development.

<sup>59</sup> For a comprehensive overview of this development, see Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649 <[https://www.jstor.org/stable/10.5305/amerjintellaw.105.4.0649?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/10.5305/amerjintellaw.105.4.0649?seq=1#metadata_info_tab_contents)>.

<sup>60</sup> Judgment of the Court of 12 November 1969, *Stauder v Stadt Ulm*, Case 29/69, EU:C:1969:57.

<sup>61</sup> Annabel Egan and Laurent Pech, 'Respect for Human Rights as a General Objective of the EU's External Action' (2015) Leuven Centre for Global Governance Studies Working Paper 161/2015, 2 <<http://classic.austlii.edu.au/au/journals/ELECD/2017/975.html>>.

external policy. This is further seen within Article 21(1) TEU and how this cemented human rights at the centre of the EU's external action.<sup>62</sup>

Following these changes brought into effect with the Treaty of Lisbon, the EU began to continue the shift seen internally following *Stauder* and take a more proactive and engaged focus on the inclusion of human rights within its external action policy. However, in doing so, the appropriateness of the inclusion of human rights within the trade policy of the EU has been rightfully questioned by many of its trading partners. As a result, the EU would subsequently begin measures to address this criticism, such as the Council's 2012 Strategic Framework and the corresponding Action Plan for Human Rights and Democracy.<sup>63</sup> The purpose was to provide a guide for the mainstreaming of human rights in 'all areas of its external action without exception'.<sup>64</sup>

Through Articles 3(5) and 21 TEU, the Treaty of Lisbon explicitly reinforces the EU's competence to act in commercial aspects of external trade. Still, in doing so, the EU must structure its trade policy to respect human rights. However, these Articles do not grant a competence for the EU to act in relation to human rights. This is further complicated by the lack of general competence for the EU to act in relation to human rights, which prevents the inclusion of more direct and enforceable obligations within the various agreements the EU has concluded with its trading partner, and in particular, created a shadow over its ability to conclude the Marrakesh VIP Treaty.

At present, the EU enjoys explicit external competences in a wide array of matters, including the commercial elements of IP, as defined under Article 3(1) TFEU. Moreover, the *ERTA* doctrine,<sup>65</sup> i.e., the existence of implied powers for fields in which the EU does not have express external competence, has been expressly codified under Article 3(2) TFEU:

[t]he 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.

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<sup>62</sup> Article 21(1) TEU states that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

<sup>63</sup> Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12.

<sup>64</sup> Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12, 2.

<sup>65</sup> Judgment of the Court of 14 July 1976, *Cornelis Kramer and others*, Case C-3, Case C-4 and C-6-76, EU:C:1976:114; Opinion of the Court of 19 March 1993, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty*, Opinion 2/91, EU:C:1993:106; Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384; Judgment of the Court of 5 November 2002, *Commission v Germany*, Case C-476/98, EU:C:2002:631.

Article 3(2) TFEU is complemented and expanded upon under Article 216(1) TFEU. While Article 216(1) TFEU does not specify if this competence is a shared competence or an exclusive competence, it does indicate that exclusive competence will arise when the agreement has the potential to impact the common rules of the EU or risks of alterations of their scope. Scholars have noted that while this list of competences has not fully clarified the division of competence between the EU and the Member States,<sup>66</sup> the current position is still a significantly clear process.<sup>67</sup>

While the EU's exclusive competence recognised by the Court was relatively clear, it did not completely rule out the possibility of mixity in relation to IP matters casting doubt over the EU's ability to ratify certain IP matters under as an exclusive competence. The issue came under the scrutiny of the CJEU with regards to the Marrakesh VIP Treaty in *Opinion 3/15*, casting doubt over the EU's ability to ratify it under as an exclusive competence.<sup>68</sup> While significant from the perspective of the availability of material for the visually impaired, the impact on trade, according to the CJEU, is still minimal in a broader trade sense.<sup>69</sup> In addition, the CJEU held that the Marrakesh VIP Treaty's focus 'is not intended to promote, facilitate or govern, generally, all exchanges of accessible format copies, but rather those exchanges that take place between authorised entities'.<sup>70</sup>

The Court held that the rules of the Marrakesh VIP Treaty governing the export and import of accessible format copies, there is no doubt that those rules relate to international trade of such copies. However, the CJEU examined the non-profit aspect of the Marrakesh VIP Treaty.<sup>71</sup> Overall, the CJEU found that the Marrakesh VIP Treaty 'intended to improve the position of beneficiary persons by facilitating their access to published works, through various means, including the easier circulation of accessible format copies'.<sup>72</sup> The CJEU concluded that:

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<sup>66</sup> Allan Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?' in Inge Govaere, Erwan Lannon, Peter Van Elsuwege, and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Marc Mareceau* (Leiden: Martinus Nijhoff Publishers 2013) <[https://brill.com/view/book/edcoll/9789004259140/B9789004259140\\_003.xml](https://brill.com/view/book/edcoll/9789004259140/B9789004259140_003.xml)>.

<sup>67</sup> Friedrich Erlbacher, 'Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty' CLEER Working Paper 2017/2, 9 <<https://www.ceps.eu/ceps-publications/recent-case-law-external-competences-european-union-how-member-states-can-embrace-their/>>.

<sup>68</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114.

<sup>69</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 92. Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 53. Advocate Wahl put forward a similar finding that 'the fact that some goods or services may ... be exchanged for purposes other than for making a profit ... does not imply that those goods or services are not traded'.

<sup>70</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 92.

<sup>71</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 93.

<sup>72</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15,

that the conclusion of the Marrakesh Treaty does not fall within the common commercial policy defined in Article 207 TFEU and, consequently, that the European Union does not have exclusive competence under Article 3(1)(e) TFEU to conclude that treaty.<sup>73</sup>

The Court, however, followed the line of *Broadcasting Rights*,<sup>74</sup> in which the CJEU looked to the *ERTA* case and how it 'defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions'.<sup>75</sup> From this position, they further held that 'words must therefore be interpreted in the light of the Court's explanation with regard to them in the judgment in *ERTA*'.<sup>76</sup> This conclusion was reached through a detailed analysis of the rules adopted by the EU, and the possibility that international commitments endanger those rules determines the existence of the exclusive competence of the EU. It is important to note that *Broadcasting Rights* follows the rationale in recent case law. The CJEU confirmed a broad interpretation of the exclusive external competence and the harmonisation of IP within the EU.<sup>77</sup>

In sum, the CJEU found that the Marrakesh VIP Treaty would not entirely fall within the CCP as defined under Article 207 TFEU on the grounds of trade. As such, the EU would not have the exclusive competence to conclude the Marrakesh VIP Treaty under Article 3(1)(e) TFEU.<sup>78</sup> However, following the *ERTA* doctrine and its case law, Article 3(2) TFEU would give the EU the required competence.

## 5. Development within the EU's Trade Policy

Building on the development towards the Marrakesh VIP Treaty and the EU's ability to ratify it, this section looks at what the EU has done regarding adapting and implementing the Treaty within the external trade policy. One key aspect to examine is the language in relation to the accessibility for persons with disability through limitation and exceptions to

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EU:C:2017:114 paragraph 70.

<sup>73</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 101.

<sup>74</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151.

<sup>75</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 66.

<sup>76</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 67.

<sup>77</sup> Judgment of the Court 26 November 2014, *Green Network*, Case C-66/13, EU:C:2014:2399; Opinion of the Court of 14 October 2014, *Opinion pursuant to Article 218(11) TFEU*, Opinion 1/13, EU:C:2014:2303; Judgment of the Court of 16 July 2009, *Infopaq International*, Case C-5/08, EU:C:2009:465; Judgment of the Court of 4 October 2011, *Football Association Premier League and Others*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631; Judgment of the Court 13 February 2014, *Svensson and Others*, Case C-466/12, EU:C:2014:76; Judgment of the Court 7 March 2013, *ITV Broadcasting and Others*, Case C-608/11, EU:C:2013:147.

<sup>78</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 101.

the protections afforded to copyrighted works, in that, do these allowances scale in proportion with the increased levels of protection sought. From this, it is important to recall the position prior to the Marrakesh VIP Treaty that within the various trade agreements,<sup>79</sup> disability accommodation general held a position of 'mutual indifference'.<sup>80</sup> At the same time, the same could be said for the position of IP, and its relegation to a single clause of affording adequate protection to 'industrial, commercial, and intellectual property' in many trade agreements concluded by the EU. Similarly, once the commercial value of IP was brought to the forefront of trade agreement, the human right and non-commercial aspects of IP were left in the dust or merely given passing discussion to fulfil obligations and policy optics vaguely. And in both instances, this was despite international obligations to protect such rights.

This economic focus can be rationalised to a degree, as the agreements are trade focused agreements. However, as discussed above, human rights do not exist in a vacuum, sealed away from trade issues. In that connection, the argument can be made that by including the human rights and disability-related concerns in a trade agreement, and specifically in connection with trade terms, there is a high impetus and pressure on the contracting Parties to conclude the agreement in comparison to strictly human rights or disability-related international agreements. This is something the EU is aware of and has used as justification for the inclusion, favouring the use of trade agreements 'as levers to promote, around the world, values like sustainable development, human and social rights, fair and ethical trade and the fight against corruption' where they may otherwise remain under negotiation.<sup>81</sup> Reflecting on the 'Brussels Effect',<sup>82</sup> the development and success of the EU on the matter of sustainable development, 'the EU has been leading the way in integrating sustainable development objectives....environmental standards around the world'.<sup>83</sup> This serves to highlight the inclusion of general human rights terms as part of preambles, and later in more substantial provisions within the agreements.

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<sup>79</sup> The informal term refers to the various bilateral and multilateral agreements the EU has completed with its various Third Countries. This term includes but is not limited to Free Trade Agreements, Stabilisation and Association Agreements, Economic Partnership Agreements, or Partnership and Cooperation Agreements. Whilst acknowledging the diverse legal basis that will be engaged for each of these categories (as well as within each category), this collective classification recognises common trade and trade adjacent elements across all agreements and allows for a comprehensive discussion.

<sup>80</sup> Sondra Faccio, Disability in EU Trade and Investment Agreements, in Delia Ferri and Andrea Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar 2020) 396 <<https://www.e-elgar.com/shop/gbp/research-handbook-on-eu-disability-law-9781788976411.html>>.

<sup>81</sup> EU Commission, Trade for All: Towards a More Responsible Trade and Investment Policy <[https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)>

<sup>82</sup> The Brussels Effect refers to the broader regulatory changes at the global level as a direct result of the economic and political power of the EU. See generally Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) <<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190088583.001.0001/oso-9780190088583>>.

<sup>83</sup> Sondra Faccio, Disability in EU Trade and Investment Agreements, in Delia Ferri and Andrea Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar 2020) 402 <<https://www.e-elgar.com/shop/gbp/research-handbook-on-eu-disability-law-9781788976411.html>>.

While concluded prior to the Marrakesh VIP Treaty, a number of agreements were concluded under its shadow and in part reflect the spirit of the upcoming Treaty while not directly referencing it. The first of which was the Economic Partnership Agreement with the Cariforum nations was concluded in 2008,<sup>84</sup> and some lessons can be drawn from the agreement. While the language of the provisions indicates an obligation towards achieving a balance between adequately protecting IP rights and ensuing their accessibility to the general public, it must be noted at this point, the limitations and exceptions operate at a more general level to 'provide a balance of rights and obligations between rightsholders and users'.<sup>85</sup> A similar vagueness appears within Article 10(11) of the Free Trade Agreement between the EU and South Korea in relation to limitations and exceptions regarding accessibility and a balance between rights holders and users.<sup>86</sup> This approach would again continue in the Association Agreement between the EU and Nicaragua, Honduras, Panama, El Salvador, and Costa Rica,<sup>87</sup> as well as the Free Trade Agreement with Colombia and Peru.<sup>88</sup> Both contained an obligation for the parties to 'ensure the balance between the rights of the right-holders and public interest'.<sup>89</sup> While not ratified until 2018 due to questions regarding the competence of the inclusion of an investment chapter,<sup>90</sup> during this period, the EU concluded a Free Trade Agreement with Singapore.<sup>91</sup> Similar to other agreements of the day, the Parties are obligated to re-affirm their 'commitments under the international treaties dealing with intellectual property, including the TRIPS Agreement'

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<sup>84</sup>Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 10 October 2009, OJ L 289, 30 October 2008. Hereafter the EU-Cariforum Agreement. The Cariforum nations are a collection of Caribbean nations engaged in economic dialogue with the EU. It includes Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago.

<sup>85</sup> Article 139(2) of the EU-Cariforum Agreement.

<sup>86</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part signed 12 October 2010, OJ L 127, 14 April 2011. Hereafter the EU-Korea Agreement.

<sup>87</sup>Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, signed 29 June 2012, OJ L 346, 15 December 2012. Hereafter the EU-Central America Agreement. This agreement was originally negotiated by the EU and Nicaragua, Honduras, Panama, El Salvador, and Costa Rica.

<sup>88</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June 2012, OJ L 354, 21 December 2012. Hereafter the EU-Colombia & Peru Agreement.

<sup>89</sup> Article 78(g) of the EU-Central America Agreement and Article 4(g) of the EU-Colombia & Peru Agreement.

<sup>90</sup> While the text of the agreement has been finalised, due to the original nature of the agreement to include investment and dispute resolution, presented some issue regarding the EU's competence to act on the matter. This led to the delay of the signature of the EU-Singapore agreement until *Opinion 2/15* held the EU held sufficient competence to conclude the agreements following the splitting of the Foreign Direct Investment and the associated settlement mechanism separate agreement due to lingering questions regarding their competence.

<sup>91</sup> The Free trade Agreement between the European Union and the Republic of Singapore signed 19 October 2018. OJ L 294, 15 November 2019. Hereafter the EU-Singapore Agreement.

but does not delve into the precise approach in this regard.<sup>92</sup>

In 2014, the EU continued its trade and development agenda as part of its European Neighbourhood Policy (ENP).<sup>93</sup> Under the ENP, the EU completed Association Agreements with the Ukraine,<sup>94</sup> Moldova,<sup>95</sup> and Georgia.<sup>96</sup> Unlike the previous South and Central American agreements, there are no obligations to consider the public interest or human rights in the implementation of IP provisions. While the Marrakesh VIP Treaty was concluded, the EU had not ratified it due to competence issues as discussed above. The broad purpose of these agreements was to align the respective Parties to trading on EU terms for potential accession. As such, in aligning to future EU standards, when the EU ratified the Marrakesh VIP Treaty, this would require the Parties to assess their positions with the agreement in mind.

This was followed by the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU was completed in 2017.<sup>97</sup> While Canada had ratified the Marrakesh VIP Treaty and CETA comprehensively addressed IP, this was primarily from a commercially focused perspective and focuses strongly on protecting the IP. While enforcement measures are required to be 'fair and equitable', Article 20(30) does not include a reference to specific broader concerns and public interest aspects. The EU and Japan completed an FTA in 2018.<sup>98</sup> Similar to CETA, the EU-Japan Agreement seeks higher and more expansive IP protection measures. However, Article 14(2) includes the obligation to take into account the public policy objectives of the Parties across the goal of promoting innovation and creativity, fostering competition through IP, and facilitating the diffusion of information, knowledge, technology, culture, and the arts. Significantly, Article 14(2) ends with the obligation to take 'into account the interests of relevant stakeholders including rightsholders and users'. While this agreement is still strongly operating from the perspective of the commercial interests of IP, it is nonetheless an important inclusion as it brings users to the forefront of seeking a balance between the interests of the

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<sup>92</sup> Article 10(2) of the EU-Singapore Agreement.

<sup>93</sup> While those agreements may differ in a few parts, they are largely identical from an IP perspective. Hence, they will be discussed together.

<sup>94</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, signed 21 March 2014, OJ L161, 29 March 2014. Hereafter the EU-Ukraine agreement.

<sup>95</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part signed 27 July 2014, OJ L 260, 30 August 2014. Hereafter the EU-Moldova Agreement.

<sup>96</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, signed 27 July 2014, OJ L 261, 30 August 2014. Hereafter the EU-Georgia agreement Article Agreement.

<sup>97</sup> Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14 January 2017.

<sup>98</sup> The Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part signed 30 October 2016 OJ L 11, 14 January 2017. Hereafter CETA.

<sup>98</sup> Agreement between the European Union and Japan for an Economic Partnership signed 17 July 2018 OJ L 330, 27 December 2018. Hereafter the EU-Japan Agreement.

rightsholders and the broader public interest. Finally,<sup>99</sup> the Free Trade Agreement between the EU and Vietnam,<sup>100</sup> recalls the focus on ensuring the balance between ‘the rights of intellectual property holders and the interest of the public’.<sup>101</sup> However, it does not specify how this balance may be achieved. Furthermore, as Vietnam has not yet ratified the Marrakesh VIP Treaty, the current balance would likely not reflect a strong level of encouragement to do so without external prompting.

## 6. Conclusion

As illustrated above, there has been significant development not only regarding the scope, purpose, and function of disability and accessibility provisions within the EU’s external trade policy, but the last decade has resulted in a significant expansion in the related competence. As such, there has been robust discussion by all manners of interested parties, and as a result, it has radically increased the visibility of the underlying discussion. In doing so, this has generated tangible results in assessing the balancing act of meeting accessibility requirements and obligations to protect IP rights. However, as seen within the various agreements discussed in this paper, this is an ongoing and ever-developing and will continue as more agreements are negotiated.

While the current agreements operate on a broad interpretation of what constitutes the ‘public interest’ utilizing the existing international consensus and Treaties rather than specifically addressing questions of accessibility, it would appear that there is scope within them to incorporate the terms while not directly acknowledging the Marrakesh VIP Treaty. However, it must also be noted that many of the agreements discussed above were negotiated prior to the EU’s ability to ratify and thereby include the Marrakesh VIP Treaty within its external trade policy. The language found in the various agreements often required an explicit balance between the rights of the rights holders and those related to the public interest, but to allow the broad scope of the IP element, this is framed as a proportional balance. This would enable the Marrakesh VIP Treaty to be inserted as a tool in testing the public interest position. Still, it would be possible for the parties to include limitations or qualifying terms in the absence of an expressed connection.

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<sup>99</sup> Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part signed 30 December 2020 OJ L 444, 21 December 2020. The UK Withdrawal Agreement is omitted from discussion, as the UK as part of the EU has ratified the Marrakesh VIP Treaty prior to leaving the EU. The IP focus within the Withdrawal Agreement was minimal, broadly confirming existing IP standards rather than any significant engagement or discussion.

<sup>100</sup> The Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam signed 30 June 2019 OJ L 186, 12 June 2020. Hereafter the EU-Vietnam Agreement.

<sup>101</sup> Article 12(2)(1) of the EU-Vietnam Agreement.

As a result of the expanded competence afforded to the EU to ratify the Marrakesh VIP Treaty, it is now further empowered to conclude similar international Treaties without delay or contestation by the Member States. As such, this may prompt the EU to include such matters more proactively, thereby further increasing the visibility and importance associated with the area.