Stockholms universitet

2016-10-21 Dnr SU FV-1.1.3-2936-16

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Remiss: EU-kommissionens förslag till modernisering av EU:s upphovsrättsreglering

EU-kommissionens förslag till modernisering av EU:s upphovsrättsreglering avser fyra lagstiftningsförslag:

1. Förslag till Europaparlamentets och rådets direktiv om upphovsrätt på den digitala inre marknaden, COM(2016) 593 final;

2. Förslag till Europaparlamentets och rådets förordning om regler för utövandet av upphovsrätt och närstående rättigheter tillämpliga på vissa onlineöverföringar av radio- och TV-företag och vidaresändning av TV- och radioprogram, COM(2016) 594 final;

3. Förslag till Europaparlamentets och rådets förordning om gränsöverskridande utbyte mellan unionen och tredje länder av särskilt anpassade exemplar av vissa verk och andra alster som skyddas av upphovsrätt och närstående rättigheter till förmån för personer som är blinda, synsvaga eller har annat läshandikapp, COM(2016) 595 final; samt

4. Förslag till Europaparlamentets och rådets direktiv om viss tillåten användning av verk och andra alster som skyddas av upphovsrätt och närstående rättigheter till förmån för personer som är blinda, synsvaga eller har annat läshandikapp och om ändring av direktiv 2001/29/EG om harmonisering av vissa aspekter av upphovsrätt och närstående rättigheter i informationssamhället, COM(2016) 596 final.

Juridiska fakultetsnämnden

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Fakultetsnämnden anför i huvudsak följande:

Initiativet till förslag till reformering av ramarna för EU:s upphovsrätt hade varit ett utmärkt tillfälle för kommissionen att reellt kurera en del brister i lagstiftningen som blivit synliga genom digitaliseringen och att ytterligare harmonisera skyddsnivån för rättshavarna. Men enligt Juridiska fakultetsnämnden innehåller det aktuella lagstiftningspaketet inte sådana riktlinjer som hade behövts för att lösa de brännande frågor som aktualiserats på upphovsområdet. Dessutom misslyckas föreslaget med både att göra den nödvändiga avvägningen mellan rättshavare och slutanvändare och att integrera förslaget i den nuvarande fungerande strukturen av upphovsrätt och EU-rätt.

Lagstiftningspaketet är således i behov av vissa förbättringar. Det gäller särskilt direktivet om upphovsrätt på den digitala inre marknaden. Gränserna för upphovsrättsligt skydd borde definieras genom införandet av lämpliga tvingande gränser på EU-nivå av upphovsrättshavarnas ekonomiska rättigheter, eller åtminstone av riktlinjer på EU-nivå i detta syfte, och eliminera konstgjorda gränser på EU:s digitala inre marknad. Dessutom skulle lagstiftningspaketet bli effektivare om de lagstiftningsåtgärder som föreslogs syftade till en fullharmonisering såsom sker genom förordningar.

Sammanfattningsvis kan fakultetsnämnden inte stödja förslaget till direktiv om upphovsrätt, som avstyrks. Fakultetsnämnden kan godta förordningen om genomförandet av Marrakechfördraget liksom direktivet om genomförandet av Marrakechfördraget. Nämnden skulle även kunna godta förordningen om regler för vissa överföringar på nätet (”online”) av radio- och TV-företag och vidaresändning av TV- och radioprogram efter vissa ändringar. En detaljerad motivering till fakultetsnämndens skilda synpunkter på engelska finns bilagt detta yttrande.

1) General

a) Background

The current EU wide legislative framework for copyright is fragmented in its nature. It consists of several legislative acts which can be described as a minimum harmonisation measure providing Member States opt ins and opt outs in their implementation. This in turn has created a different level of copyright protection in different Member States of the EU, and the aim of harmonising copyright at the EU wide level has not been met in its full form. Due to this fact, the Court of Justice of the European Union (“CJEU”) tried to fill the legal lacunae in the EU copyright legislation through its jurisprudence. The CJEU pointed to three issues in copyright that would need to be solved through policy changes at the EU level. These issues are (a) defining the scope of limits to copyright protection, (b) defining the scope of right holders’ economic rights, namely the right to communicate one’s work to the public, and (c) considering if there is there a need for geo blocking activities in creation of an online EU internal market.

In its second legislative package of EU copyright measures, the EU Commission introduced new measures that do not address the above highlighted issues. The new measures consist of (a) mandatory exceptions on use of copyright in research, education and inclusion of people who are visually or print impaired, (b) new neighbouring right for online press publications, (c) a stricter liability regime for internet service providers ("ISPs"), and (d) measures that implement the Marrakesh Treaty. The new measures can be characterised as problematic, due to the fact that they either, in effect, might not reach the harmonising aim for which they are introduced, or that their introduction clashes with the current legislative practice of the CJEU as well as the other EU legal instruments. These issues will be analysed in more detail under the specific headings of part 3–5 for each of the proposed measures.

However, before starting the analysis of the new proposed legislative measures, a brief outline of issues that were not addressed by the current measures will be discussed.

b) Defining the Scope of Limits to Copyright Protection

Defining the limits as well as the scope of copyright protection provides both the right holders as well as end users with legal certainty on how to use copyright protected works and not infringe upon them. Providing equal level of copyright protection in all Member States, has proven to be a daunting task at the EU wide level.

The InfoSoc Directive,[1] as a part of the EU copyright framework, introduced optional list of exclusions and limitations to copyright, and enabled each and every Member State to pick and choose the level of protection it wants to afford to copyright. This in turn created difficulties when it came to proliferation of copyrighted works, such as music or films, in the internal market, because the different scope and level of copyright protection in every Member State, had an effect of barrier to trade in the internal market. This issue was only exacerbated with the advent of internet, when this lack of legal certainty on the limits to copyrighted work, was placed in an online user friendly community.

With this copyright reform, the EU Commission was given an opportunity to set clear cut limits to copyright protection, in the form of either (a) making all or vast majority of the InfoSoc Directives' list of optional limits mandatory, or (b) introducing new mandatory limits to copyright protection in the online arena. By this, an EU wide legal certainty would be achieved, because it would create a balance between the right holders and end users. EU wide mandatory limits, would provide both parties with the knowledge when a work is copyright protected, and when and under what conditions end users are free to use and proliferate other persons' work. However, this opportunity was not seized by the EU Commission.

It should be noted that the recent trend in online protection of copyrighted work, reflected in the case law of the CJEU, points to a shift from a right-holder friendly perspective to a

[1] 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 (the 'InfoSoc Directive').

user-friendly perspective. Setting clear guidelines and limits on what copyright is and what copyright is not, enables the much needed balance between right holders and end users.

c) Defining the Scope of Right Holders' Economic Rights

At the moment, there exists an EU wide debate on the scope of right holders' economic rights, namely what does a right to communicate or make available to the public entails, especially in the digital markets. The discussion can be summarised in three questions: firstly, what does communication/making available entails, secondly what is public, and thirdly where and to which geographical position are these actions directed. The notion of communication to the public has been increasingly relevant to the functioning of the digital markets because communicating to the public entails the first step to distribution or production of works online. In the event that the work is distributed or produced on the digital market, two issues come to play; the first issue is the targeted audience and the second issue is the exhaustion of right principle (i.e. additional limit to copyright protection which enables the end user to freely dispose with the work). If there are insecurities on how the first step is envisaged and regulated it is hard to set parameters to the following two issues.

The issue of defining the scope of *communication to the public*, for the last several years, keeps resurfacing in front of the CJEU, begging the question of either (a) legislative action in providing a uniform answer across the EU copyright legislation on what does this right entail, or (b) providing modifications on the scope of this right depending on the medium through which the copyrighted work is proliferated.

However, the EU Commission, in this legislative package failed to engage with this problem, or even refer to the current judicial practice of the CJEU in this matter. Thus, there still exists an open policy question of the level of the protection that the EU affords to right holders, as well as of, what is the scope of their economic rights.

d) Geo Blocking

Online arena and the digital market is by its nature borderless. Which in turn makes it easier to copy the ideal of EU internal market from the physical world onto the digital world. However, there exist different levels of copyright protection in Member States, and these levels create artificial online borders in a borderless world. These borders are often time safeguarded with geo blocking measures.

In this legislative package, the EU Commission did not take the opportunity to either (a) explain why geo blocking measures are needed, (b) scrap them from online use, or (c) provide for a hybrid transitional measure which would preserve the current state until EU wide copyright harmonisation is achieved.

2) Directive on Copyright in the Digital Single Market

The Directive on Copyright in the Digital Single Market[2] is considered to be an updated version of the InfoSoc Directive for the digital environment. In this response, three issues that might prove problematic with this proposal for a legislative act, will be highlighted.

The first issue is the effect of the mandatory exceptions and limitations to copyright. The Directive on Copyright in the Digital Single Market aims to introduce three mandatory exceptions when it comes to digitisation and online use, however these exceptions consist either of mechanisms that allow for Member State opt ins when determining the level of their exercise or use vague terms that makes them in practice quite hard to enforce.

Secondly, it introduces the neighbouring right in online publications, which against the current background of protection seems redundant.

And lastly, this legislative act introduces stricter liability regime for ISPs, which is contrary to the current liability regime established under the E-Commerce Directive,[3] and might have a negative effect on the enforcement of rules in the recently adopted Regulation on Net Neutrality[4] and data protection in the EU.

a) Mandatory Exceptions and Limitations

The Directive on Copyright in the Digital Single Market introduces three mandatory exceptions and limitations to copyright in the digital and cross-border environment. These are: (i) text and data mining (Article 3), (ii) use of works and other subject-matter in the digital and cross-border teaching activities (Article 4), and (iii) preservation of cultural heritage (Article 5).

As a general point, it should be noted that this piece of legislation still leaves the unsolved issues of exceptions and limitations provided in Article 5 of the InfoSoc Directive in the spotlight. Primarily, this is the issue of the InfoSoc Directive being a minimum harmonising measure that provided for an opt in list of exceptions and limitations to copyright for Member States to choose from when setting limits to the copyright protection. Practically, this means that we are still facing different levels of copyright protection for the right holders, depending on each Member State. Additionally, this issue

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[2] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 593 final, 2016/0280 (COD) ("Directive on Copyright in the Digital Single Market").
[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal C 178, 17.07.2000 (the 'E-Commerce Directive').
[4] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), Official Journal L 310/1, 26.11.2015. ('Regulation on Net Neutrality).

was recognised by the CJEU when interpreting the exception to use a copyrighted material in a form of parody.[5]

Against this background, the proposal of this directive introduces three mandatory exceptions and limitations that might have the same effect as an opt in or an optional exception to copyright protection. Moreover, in order not to create more confusion in the scope of application of copyright, and providing guidance and harmonisation at the EU wide level, these "mandatory exceptions" would need to be mandatory not only in their name, but in their subject-matter as well.

Firstly, the exception of text and data mining in Article 3 provides for a hybrid mandatory mechanism, by which text and data mining by research organisations is allowed. However, the right holders are allowed to apply measures to ensure security and integrity of networks and databases where the copyrighted material is hosted. In practice this means that the right holders are allowed to prevent this extraction via technical means due to safety issues, and consequently this exception becomes unenforceable.

Secondly, the exception of use of works and other subject-matter in the digital and cross-border teaching activities in Article 4, also provides for a hybrid mandatory mechanism, by which this use is recognised as an exception, however the level or the shades of this exception are determined by Member States, thus, enabling different level of copyright protection. Essentially, this mechanism consists of a mandatory exception, however, Member States are free to decide whether this exception will apply to use of all works, or some works, or works in specific sectors, as well as whether right holders will be provided with fair remuneration for the harm they incurred from use of their copyrighted material.

Finally, the exception on preservation of cultural heritage in Article 5, provides for an exception of digitisation of any works that are in a permanent collection of a cultural heritage institution, including the out of commerce works. However, the defining of key vague terms of "permanent collection" or "out of commerce work" is left to Member States, thus again, enabling different levels of copyright protection and discrepancy of copyright application across the EU.

In conclusion, the effect of the proposed mandatory exceptions and limitations to copyright is optional in nature, by way of consisting either of mechanisms that allow for Member State opt ins when determining the level of their exercise or use of vague terms that makes them in practice quite hard to enforce. By this, the idea of setting limits to copyright use and creating EU wide legal certainty for both right holders and end users when dealing with copyright is not met.

[5] Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen and Others*, [2014] ECR I-000, para. 15 and 16.

b) Rights in Publications

The Directive on Copyright in the Digital Single Market introduces in Article 11 and Article 12, a new neighbouring right for publishers of press publications, such as newspapers, with the exclusive economic rights of making their work available to the public as well as an exclusive right of reproduction in digital use.

Against this background, several issues need to be taken into consideration. The first one is that neighbouring rights are usually granted to parties that have no copyright protection for their work and secondly, to parties that are considered economically weaker and unprotected in the creative industries, such as singers or actors as public performers. Bearing this in mind, granting this right at the EU wide level to publishers of online press publications would seem redundant.

Firstly, as already confirmed by the CJEU in the case of *Infopaq*,[6] publishers of press publications have copyright protection of their material in digital use. There is no substantial need for adding a neighbouring right to copyright for their protection, because unlike singers, their work does fall in the scope of copyright protection.

Secondly, unlike other beneficiaries of neighbouring rights, publishers of press publications cannot be considered an economically weaker and unprotected party. This is largely so, due to the fact, that publishers of press publications operate on what is called a two-sided market. This means, that publishers of press publications operate on two distinctive markets, one is the market that targets the end user, and the other is a market that targets advertiser. Essentially, the more end users they have, the more they will be lucrative for advertisers to advertise their products in their press publication. By this, publishers of press publications receive the majority of their revenue. Granting this right would enable them to yield more profit from the end user side of the market, while still receiving the majority of their revenue from advertisers, and consequently boosting their revenue stream. In turn, this right would not be used to protect an economically weaker and unprotected party, but to add on to another layer of protection to a beneficiary which is already protected under copyright and aid this beneficiary to have more options when deciding on a manner in which it can boost its profits.

Lastly, it should be noted that works contained in press publications enable end users to exercise their fundamental rights provided under the Charter of Fundamental Right of the European Union, namely, Article 11 Freedom of expression and information. The whole point of press publications, is that they provide relevant information for the end user, and access to them is of great importance for proliferation of knowledge and ideas. The statutory right that provides for an additional effective monopoly over relevant information for twenty years might have as an effect, stifling of shared knowledge and might potentially breach the end users right to access relevant information.

[6] Case C-5/08, *Infopaq International v Danske Dagblades Forening*, [2009] ECR I-6569.

In conclusion, adding this additional layer of protection for publishers in press publications would be redundant, because they already have copyright protection in their works and are not an economically weaker party that would be deprived of their livelihood if they do not have this additional layer of protection. Additionally, the introduction of this new right might interfere with the end users' freedom of expression and information.

c) ISP Liability Regime

The Directive on Copyright in the Digital Single Market introduces in Article 13 a stricter liability regime for ISPs. Thus, it provides that ISPs that store and give access to large amount of works and other subject-matter uploaded by their users, monitor the activity of their users by implementing measures of content recognition technologies, report to the right holders how their works are used and recognised on their service platforms, and introduce complaints and redress mechanisms.

There are several issues with this liability mechanism. The first one is that it contradicts the current liability scheme provided in the E-Commerce Directive, which provides (i) "safe harbour" provisions that exclude liability of ISPs, and (ii) exonerates ISPs from a general obligation to monitor information. Secondly, this monitoring obligation might affect net neutrality rules provided in the Regulation on Net Neutrality. Lastly, the monitoring obligation might infringe both the ISPs fundamental freedom to freely conduct business, and the end users right to privacy and processing of private data.

Firstly, it should be noted that the E-Commerce Directive in its key provisions of Articles 12 to 15 provides for an ISP liability regime. These articles provide for ISPs liability in the form of exclusions, or limitations, from liability that may arise at the national level. These liability exclusions, or "safe harbour" provisions of the E-Commerce Directive, have been widely incorporated into national legislation of Member States for both civil and criminal matters. In order to satisfy the requirements for exclusion from liability, an ISP must either qualify as a "mere conduit"[7] or "hosting provider"[8] or only be involved in "caching"[9] activity. Additionally, there is no general obligation to monitor the content that is stored and transmitted by the ISP under the aforementioned three categories, as confirmed by the CJEU in the case *SABAM*.[10] As the safe harbour provisions only apply to ISPs when they are intermediaries of the information, and not the originators of the information, their contributory liability is negatively defined. This means that there are situations where liability cannot be inferred, and essentially ISPs are only liable if they have control over content on their service platforms. In the case law of the CJEU, most

[7] ISPs that transmit information from one point on a network to another at the request of the recipient of the service or that simply provide access to a communication network.
[8] ISPs that store information provided by a recipient of a service.
[9] The automatic, intermediate and temporary storage of information for the sole purpose of making more efficient the onward transmission of that information.
[10] *SABAM v Scarlet* (C-70/10); *SABAM V Netlog* (C-360/10) 2 C.M.L.R. 18 and *Scarlet v Sabam* [2012] (C-70/10) E.T.M.R. 4.

notably *Google France*[11] and *L'Oreal vs. E-Bay*,[12] search engines such as Google and sale and purchase websites such as eBay were identified as intermediaries, and not originators of information, thus falling under the safe harbour provisions. In the case law of Member States, the liability has been excluded for ISPs such as YouTube in Italy[13] and Spain,[14] as well as Google in France.[15]

However, under the new proposal, ISPs that store and give access to large amount of works and other subject-matter uploaded by their users (such as YouTube or Google) would have an active obligation to monitor, register and share the traffic and data information with the right holders, thus contradicting the current case law of CJEU and its practical application in Member States.

Secondly, this obligation might interfere with the net neutrality principle enshrined in the Regulation on Net Neutrality, due to the fact that this obligation creates an undue burden for ISPs, which in effect slows down the broadband speed of internet services, and lowers their quality. This happens, due to time and resources that are needed to process all the traffic data in order to comply with the new proposal on ISP liability.

Finally, it should be noted that monitoring obligation might interfere with the exercise of fundamental rights provided under the Charter of Fundamental Right of the European Union, both for the ISPs and the end user as was stressed by the CJEU in the case *SABAM*.[16] For ISPs this is the freedom to conduct business, enshrined in Article 16 of the Charter and for end users this is the right for protection of personal data enshrined in Article 8 of the Charter. Moreover, and in the light of the recent CJEU judgment in the case of *Google Spain*,[17] as well as the incorporation of this judgment in the recent General Data Protection Regulation[18] and Data Protection Directive,[19] the ISPs due to their

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[11] Joined cases C-236/08 to C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)* [2010] ECR I-02417.

[12] Case C-324/09, *L'Oréal SA,Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi* [2011] ECR I-0000.

[13] Tribunale ordinario di Torino, causa n.r.g. 15128/2014, Delta TV programs srl c/a Google Ireland Holdings, Google Inc, YouTube, 23 January 2014.

[14] Madrid Civil Court of Appeal, case no 505/2012, Gestevision Telecinco c/a YouTube LLC, 14 January 2014.

[15] Cour de cassation, chambre commerciale, Audience publique du mardi 29 janvier 2013 , N° de pourvoi: 11-21011 11-24713.

[16] Ibid [10].

[17] Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja* [2014] (Not reported yet).

[18] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119/1, 4.5.2016 ("General Data Protection Regulation").

[19] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of

monitoring obligation might be considered as "data controllers" which would place additional burden of notification on data collection to the competent authorities, as well as keep records of the collected data on their end users. Paradoxically, this qualification as data controllers might prevent them to share the information on traffic data about their end users with right holders (an obligation stemming from this proposal of the directive), because such sharing of data might be considered in breach of data privacy rules.

In conclusion, Article 13 proposes a stricter liability regime for ISPs under which ISPs that are not originators of information, but offer storage and access services for end users (such as YouTube or Google), would have an obligation to monitor the traffic on their services, report to the right holders on the usage of their works, and introduce complaints and redress mechanisms. This obligation is inconsistent with three sets of EU legislation, ie, E-Commerce Directive, Regulation on Net Neutrality, and General Data Protection Regulation and Data Protection Directive, as well as the current case law of the CJEU.

3) SatCab Regulation

The SatCab Regulation[20] in its provisions extends the country of origin principle of rights clearance to the broadcasting organisations on ancillary online services by or under their control and responsibility for transmission and retransmission of TV and radio programmes. This means that the broadcasting organisations need to clear copyright rights only in one Member State in order to proliferate their business activity of online transmission and retransmission in all other Member States of the EU.

This extension can be deemed quite narrow, because it does not take into consideration other organisations that provide services online, such as music or video on demand services like Spotify or Netflix, that do not transmit TV or radio programmes, which still need to employ the country of reception principle when clearing their rights. For clarification purposes, the country of reception principle entails that these business models need to clear copyright in each and every Member State of the EU. Effectively, the lack of this extension creates a geo blocking measure, which then serves to partition the internal market of the EU, and create barriers to entry of these new business models in different Member States. By this, the end users in different Member State are deprived and exempted from accessing different types of online copyrighted material through legitimate business models.

Additionally, the SatCab Regulation failed to address the problem of defining of the scope of copyrights holder economic rights, ie the right to communicate ones' work to the

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criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89, 4.5.2016 ("Data Protection Directive").

[20] Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM (2016) 594 final, 2016/0284 (COD) ("SatCab Regulation").

public, by providing some guidelines or parameters to delimit this right. Moreover, it did not even incorporate or make a reference to the current CJEU case law that sheds some light in the delimitation of this right.

In conclusion, the SatCab Regulation could have introduced the country of origin principle for clearance of rights of all types of business models and broadcasting, and not only TV and radio programmes, and by this eliminated the artificial geo blocking measures in an online digital market. Furthermore, it could have shed light on the notion of communication to the public, and provided some policy guidelines on harmonisation of this economic right.

4) Regulation and the Directive on the Implementation of the Marrakesh Treaty

The Regulation and the Directive on the Implementation of the Marrakesh Treaty[21] provide for a mandatory limit to copyright when it comes to proliferation of material which is used by persons who are blind or visually or print impaired. There is one issue that should be noted, and that is the fact that the EU widens the scope of a definition of a "beneficiary person", i.e. a person who can benefit from this mandatory limit, by introducing dyslexia as a print impairment.

This issue might only come to play under the Regulation, due to the fact that the Regulation provides for cross-border exchange of accessible format copies between the EU and third countries. The cross-border exchange of accessible format copies is an optional provision in the Marrakesh Treaty, stemming from Article 5, which was incorporated in the Regulation. However, the Faculty of Law notes that other contracting member states to the Marrakesh Treaty might not incorporate dyslexic persons as beneficiaries of this mandatory limit to copyright, and there might be a possibility of discrepancies in the cross-border exchange of accessible format copies.

5) Final Conclusions

The issues that were not addressed in this set of the legislative package for EU wide copyright reform, speak volume on the difficulty to address harmonisation of copyright on an EU wide level. Furthermore, this legislative package poses a question on the level of systematic investigation on the legal consequences of the proposed measures, as well as on the level of preparation for the potential problems that might arise from proposing measures that might not necessarily be functional in the current fibre of enacted EU acts, as well as current judicial practice of the CJEU and Member States.

[21] 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, visually impaired or otherwise print disabled, COM (2016) 595 final, 2016/0279 (COD) ("Regulation on the Implementation of the Marrakesh Treaty");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, 2016/0278 (COD) ("Directive on the Implementation of the Marrakesh Treaty").

As stated in the beginning, the reform of the EU copyright framework was an opportunity for the EU Commission to fill in the legal lacunae and harmonise the level of protection afforded to right holders. Unfortunately, these legal lacunae as well as the uneven level of afforded copyright protection in Member States, were not adequately addressed by the current proposals. Consequently, the lack of harmonising tools that would bring about greater security for both right holders and end users, is the primary reason to the negative comment by the Faculty Board on this legislative package.

The lack of guidelines or policy decisions on the issues of defining the limits to copyright protection with the inclusion of proper mandatory limits at the EU wide level, defining the scope of right holders' economic rights, or at least providing guidelines for them on an EU wide level, and scraping of artificially created borders on the EU digital single market, might be an indicative of a wider problem of absence of a will to strike balance between the right holders and end users.

The new proposed measures that consist of (a) mandatory exceptions on use of copyright in research and education, (b) new neighbouring right for online press publications, (c) a stricter liability regime for ISPs, and (d) measures that implement the Marrakesh Treaty, can be characterised as problematic, due to the fact that they either, in effect might not reach the aim of harmonisation of copyright on an EU wide level for which they are introduced, or that their introduction clashes with the current legislative practice of the CJEU as well as the other EU legal instruments.

The most problematic proposed measure, the Directive on Copyright in the Digital Single Market, has three areas that might cause more discrepancies in the harmonisation of copyright on an EU wide level, than aid with the current problems. These are the mandatory exceptions and limitations to copyright use on line, which are in effect optional in nature, and by way of which, the idea of setting limits to copyright use and creating EU wide legal certainty for both right holders and end users when dealing with copyright is not met. Furthermore, introduction of the neighbouring right for press publishers seems to be redundant, because press publishers already have copyright protection in their works and are not an economically weaker party that would be deprived of their livelihood if they do not have this additional layer of protection. Finally, the proposal for a stricter ISP liability, would be inconsistent with three sets of EU legislation, namely, E-Commerce Directive, Regulation on Net Neutrality, and **General Data Protection Regulation and Data Protection Directive, as well as the current case law of the CJEU.**

Additionally, the SatCab Regulation, which could have harmonised and extended the country of origin principle for clearance of rights of all types of business models and broadcasting, and not only TV and radio programmes, as well as provided some guidelines to an economic right to communicate ones' work to the public did not provide any policy solutions to this effect.

In line with this, the Faculty Board cannot support the Proposal for a Directive on Copyright in the Digital Single Market, specifically current proposal of Articles 3, 4, 5, 11, 12 and 13; it can accept the Regulation on the Implementation of the Marrakesh Treaty and Directive on the Implementation of the Marrakesh Treaty; and it could equally accept SatCab Regulation after some amendments.