

**Articles 15 & 17 of the Directive on  
Copyright in the Digital Single Market**  
Questionnaire – Annex to the Comparative  
National Implementation Report

**FRANCE**

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This comparative report is based on 11 national questionnaires prepared by national legal experts.

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The full study is available for download at: <https://informationlabs.org/copyright>

# Country: FRANCE

National Expert: PROF. VALÉRIE LAURE BENABOU (University Paris-Saclay)

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## PART I: Article 15 CDSMD

**Note:** The questions below concern the national implementation of Article 15 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

### Background information

- 1. Did your national jurisdiction provide protection (whether via copyright or a relevant targeted related right) for press publications prior to the adoption of the CDSMD? If so, please briefly describe this, indicating any differences from the protection provided by Article 15 CDSMD.**

Prior to the implementation of the CDSMS, French legislation had provided for a special regime for journalists and press publications within the copyright regime. This regime is still applicable and therefore cumulates with the PPR (Press Publisher’s Right). As to the journal itself, it is often qualified as a “collective work”, meaning that copyright lies with the person who took the initiative, directed, and published the work. Therefore, the press publisher normally has copyright over the work “as a whole”. This is often combined with a system of assignment of the contributions of the participants to the journal (over the parts), if they can claim a specific copyright on their contribution that can be distinguished from the rest.

In a nutshell, journalists are considered to be employees of the journal for which they are writing as concerns the first publication of their work and are therefore paid with a salary and can, consequently, benefit from social alimonies (e.g., social security and unemployment allowance). Contrary to the normal regime (where employees retain their copyright in the absence of a specific contract of assignment), copyright is assigned for this first use by the mere virtue of the employment contract. If the work is re-used within the same group (family of press), they can claim extra remuneration. If it is re-used but the exploitation is made outside this scope, they have to assign their rights for this new exploitation, giving rise to new royalties. Collective conventions are key in the negotiation of remuneration due for such re-use.

There is therefore a difference from the German system, as press publishers are, in most cases and by virtue of law, holders of the copyright in the press publications.

2. **Has Article 15 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

**If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.**

**Note: if there is no national implementation of Article 15 CDSMD, please process to Part II of the questionnaire.**

Article 15 was subject to a very quick implementation. This occurred before the end of the period of transposition, which is quite unusual in France. The rest of the directive was implemented later in several different texts. The reference for the text is : LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse  
<https://www.legifrance.gouv.fr/loda/id/LEGIARTI000038824113/2019-10-24/> The final implementation lies in the Intellectual Property Code from article L. 218-1 to L. 218-5.

Even if most of the text might be considered a textual transposition, there are some major differences between the directive and the French law that will be described below. Mainly: the scope of application is broader, in that it includes press agencies due to a different interpretation of “press publication”. Special provisions have been adopted in order to combine the PPR and the remuneration/copyright of journalists.

The litigation between Google and the press publishers before the French Competition Authority has also resulted in a quite extensive interpretation of the regime, broadening the scope of the PPR beyond the directive and giving rise to the question of the intensity of the harmonization.

### **AC 1: Subject matter**

3. **What is the subject matter (object) of protection by the LNI and how is this defined? Please focus on any differences (including additions) from the concept of “press publications” as defined by Art. 2(4) CDSMD.**

Though the definitions are quite similar (covering only journalistic and not scientific or academic publications, concerning a collection composed mainly of literary works but that may also contain other works or other subject matter constituting an individual item within a periodical or regularly updated publication under a single title), they also bare significant differences.

On the one hand, the French law is more explicit on the “other works”, specifying notably photos and videos. The debate has been important on the interpretation of this condition due to the claim of Press Agencies that are mainly providing photos and no literary works. Professor Jérôme Passa has issued a consultation where he has argued that according to the law n° 86-87 du 1st august 1986 the press publication is defined as “*any service using a written mode of diffusion of the thought made available to the public in general or to categories of publics and being published with a regular periodicity*”, which doesn’t match with the activity of a press agency. He also says it is impossible to consider that videos or photos which are incorporated within the press publications can be qualified as press publications themselves, independently from the press publication they belong to.

On the other hand, French law has not replicated the examples given in the Directive of a newspaper or a general or special interest magazine, staying vaguer on the type of publication covered. The most important difference lies in the public targeted. While the Directive clearly names the “general public”, no such reference is being made in the French law. Consequently, a press publication that is not aimed at being read by the general public might be covered under the French law, whereas it is possibly excluded under the Directive. The on-going dispute before the French Competition Authority has underlined this question due to the claims of the “specialized” press that they benefit from the NR. One might also interpret the Directive in this expansive sense, due to the example of “special interest magazines” mentioned above.

Finally, there is a core difference as regards the person who takes the responsibility of the publication: in the directive it is “a” service provider, while under the French law, it is some (“des”) press publishers or press agencies.

**4. Does the LNI protect against uses of individual words or very short extracts? If these are excluded from protection, how are they defined? Please note whether a qualitative or quantitative approach is taken and whether such short extracts may include non-literary content. Please note whether there are specific provisions on headlines.**

According to Article L. 211-3-1 CPI para 2, right-holders shall not prohibit the use of isolated words or very short excerpts from a press publication. This exception shall not affect the effectiveness of the rights provided for in Article L. 218-2. This effectiveness is affected, in particular, when the use of very short extracts replaces the press publication itself or exempts the reader from referring to it.

The last sentence was added by the French legislator with the aim of limiting the benefit of the exception by adopting, not a quantitative threshold dependent on the amount of words used, but rather a competition law standard related to demand in the market, i.e. to the substitutability of the use compared to the normal use of the press publication made by the reader. In other words, the exception does not apply when the use made by the professional user deters the end-user from reading the press publication.

During the discussion, some Members of Parliament suggested that it is for the courts to assess the concept of “very short extracts” in a qualitative rather than quantitative manner. Amendments consisting of excluding from protection granted by the neighbouring right only “very short extracts consisting of unrelated words” or “consisting of fewer than five words” (the position of the Agence France-Presse (AFP)) were rejected.

One may also recall the famous decision rendered (in the field of copyright) by the highest chamber of the *Cour de cassation* the 30 October 1987 in *Microfor /le Monde*, according to which:

“Publication for documentary purpose, by any mean whatsoever, of an index comprising the mention of titles, in order to identify the works listed, does not infringe the exclusive right of exploitation of the author.”

This question of the “free” use of the titles of press publications is a cornerstone in the battle between press publishers and search engines as to the application of LNI. The first relied on the fact that the mere reading of the title may deter the reader from accessing the article (e.g., for sports results), while the second on the right to information to justify this use.

There is also the article L. 211-3 CPI, a provision dedicated to the exceptions that are applicable to all neighbouring rights identified by the Intellectual Property Code, therefore encompassing the PPR. This includes an exception for analysis and short quotation, which reads:

“Beneficiaries of the rights provided for in the present title cannot prohibit, (...) subject to sufficient elements of identification of the source, analyses and short quotations that are justified by the critical, polemical, pedagogical, scientific or informational character of the work in which they are incorporated.”

**5. Does the LNI extend to mere facts reported in its subject matter? If these are excluded from protection, how are they defined?**

There is no explicit exclusion, but it is commonplace in the doctrine to say that, in the realm of copyright, mere facts are not protected. Yet, to my knowledge, no discussion has occurred on this question in the scope of the neighbouring right, also because there is no explanation of the underlying criteria that justify the protection (e.g., investment, originality, novelty, accuracy of the news or fact-checking burden). The only element that triggers the exclusive right seems to be the act of publication.

**6. Does the LNI extend to public domain content incorporated in its subject matter? If these are excluded from protection, how are they defined?**

The law doesn't provide for any direction on this question. The problem is that, due to the absence of criteria for triggering the protection, one doesn't know if the protection can cover the elements included in the press publication on the mere basis that they were "published" within the press publication even if they are not, *per se*, protectable under other IP rights. It seems that only express exclusions from the scope of application of the NLI – such as the one named in the directive – can clearly "protect" the public domain. Yet, if we emphasise the condition of a "collection" in the definition of press publication, one may argue that it is only the structure that is being protected and not the individual elements of this collection (a comparison can be made with database rights). From this perspective, reproducing an element of the public domain extracted from the collection should not be problematic.

Yet, opinions among commentators diverge on the condition of "collection". According to Prof. J. Lapousterle, because the right covers a collection within which some items can be individualized and protected, those items are also covered by the right. In this sense, the decision of the ECJ in *Pelham* is relevant, as, according to the judges, a short piece of a phonogram may be protected without any threshold to the extent that it is not modified in such a way that it is not recognizable.<sup>1</sup> Professor J. Passa, on the other hand thinks that when there is no press publication at the origin, in the sense of the Directive (i.e. a "collection" that is "published", etc.), no right can apply to the "parts". The reproduction in part supposes that the whole was a press publication.

**7. Does the LNI include any other threshold conditions for protection?**

No.

**AC 2: Right-holders**

**8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.**

This question has been highly discussed in France, where the AFP (French Press Agency) has claimed that it benefits from the PPR for their photos. Two law professors have provided two opposite opinions on this subject. There is consensus that the national legislator may grant a neighbouring right to a news agency, as they are targeted in the recitals of the Directive as a category of publisher of press publications, while a "press publication" must be published to trigger the right. But there has been disagreement on the issue of the conditions required to benefit from the protection. According to Professor J. Passa, the right shall be granted to the person who publishes their press publication. Favouring a cumulative approach (and quoting Professor Caron and Lucas), he considers that the beneficiary is the person publishing its own content.

According to Professor J. Lapousterle, there is no requirement of identity between the beneficiary of the right and the person who realizes the publication. The benefit shall, then, go to the person who "produces" the content and invests in its production (see the provision on the remuneration that should take into account the level of investment L. 218-4 CPI) when the content is released, even by someone else. The French Competition Authority favoured the second interpretation in its first interim decisions in litigation against Google.

There are still open questions as to the beneficiaries. Two, among others, can be raised.

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<sup>1</sup> According to this, "Article 2(c) of Directive 2001/29/EC must, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear".

If article L. 218-1 CPI para IV mimics article 15 para 1 concerning the geographical origin, so that the beneficiaries shall be the publishers of press publications and press agencies established in a Member State, there is still a lack of clarity on the concrete implementation of the provision, because the French law doesn't establish a connecting factor for its application: is it the place of publication, the place of investment, the place of "making" the content? Another question is: shall the right apply to any news/press agencies established in other Member States even if the right has not been extended to them in their country of origin?

What are the consequences of the "first publication" criteria? There is a difference in the wording of the French law and of the Directive concerning the term of the right. According to article L. 211-4 V. CPI, the duration of the exploitation rights of the press publishers and of the press agencies is two years starting from the 1 January of the year following that of the first publication of 'one' press publication" ("*[l]a durée des droits patrimoniaux des éditeurs de presse et des agences de presse est de deux ans à compter du 1er janvier de l'année civile suivant celle de la première publication d'une (one) publication de presse*"), whereas Article 15(4) of the Directive states that "[t]he rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published."

Therefore, it is subject to discussion whether the right is granted only to the first publisher of a specific piece of content or each time that a specific publisher publishes for the first time this piece of content. In the second hypothesis, the duration of protection of a specific piece of content would not be limited to two years (the protection could re-triggered each time the content is published for a duration of two years after the publication). This would, I suggest, conflict with the rationale of the directive, which is focused more on the protection of the content than on the protection of the beneficiaries.

### **AC 3: Restricted acts**

#### **9. Against what kind of acts does the LNI protect? Please provide any relevant definitions.**

According to Article L218-2 CPI, the authorisation of the press publisher or of the press agency is required before any reproduction or communication to the public in whole or in part of its press publication in digital format by an online communication to the public service provider.

There is a very important difference in the wording of the French version, which covers any reproduction or communication of the press publication in digital format. The right is not therefore limited, as it is in the Directive, to online use. Even if "online" is not further defined in the Directive, it seems to refer to the situation where works can be accessed after being made accessible to the public by electronic means. Press publications in digital format may be subject to other uses (offline). There is no current discussion upon this potential difference (what are the exploitations made offline by an online communication to the public service provider?) nor on the intention of the legislator in the choice of the terms.

There is no description of the rights provided for by the article, but this does implicitly refer to the concepts of reproduction or communication to the public otherwise mentioned within the French/European body of laws. According to this contextual interpretation, the scope of the right in France is broader compared to the European version.

Without further detail, one may notice that the perimeter of the reproduction right in France is potentially wider than the European notion: with the theory of the "right of destination", it covers the right of distribution (rental, lending) and the right of adaptation. So, potentially, the French beneficiaries of the NR can claim a broader protection in that respect.

The reference of Article 15 to Article 3, paragraph 2, of Directive 2001/29/CE is "translated" by the wide expression of any act of communication to the public, whereas it only covers the right to authorize or prohibit the making available to the public according to the directive. This difference is, once again, puzzling. There is no general right of communication to the public in the French intellectual property code. For copyright there is only a right of "representation" that covers any communication of the work to the public by any means, whereas the rights provided vary from one neighbouring right to another. If you combine this with the fact that offline uses are covered, the communication to the public may be, again, wider than in the European framework.

Yet, in case of conflict, I believe that as far as exclusive rights are concerned the Directive has established maximum harmonization. Consequently, I believe the European scope of the right should prevail according to the recital 57 of the Directive:

The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as online uses by information society service providers are concerned.

NB. The provision does not apply to press publications published for the first time before the date of the entry into force of the Directive.

**10. Does the LNI cover hyperlinking to the protected subject matter? If not, how is hyperlinking defined?**

Hyperlinks: rightholders shall not prohibit acts of hyperlinking (see article L. 211-3-1 CPI mentioned above).

**AC 4: Targeted users**

**11. Does the LNI target use by a specific kind of user (provider)? Please provide any relevant definitions. Specifically, please indicate whether private or non-commercial uses by individual users are covered. Please also indicate whether online platforms (OCSSPs) are covered.**

According to **article L218-2 (LOI n°2019-775 du 24 juillet 2019 – art. 4)** :

The authorisation of the press publisher or press agency shall be required before any reproduction or communication to the public of all or part of its press publications in digital form *by an online public communication service*.

An “online public communication service” is defined in the French law (“LCEN”) as “*any transmission, on individual request, of digital data not having the character of private correspondence, by means of an electronic communication method allowing a reciprocal exchange of information between the provider and the recipient*”.

**The notion seems wider than the one used within the CSDM “Information society service providers”,** which has been defined by Directive (EU) 2015/1535 as any information society service, that is to say, any service **normally provided for remuneration**, at a distance, by electronic means and at the individual request of a recipient of services.

There is no specific transposition of the limitation relating to private or non-commercial uses by individuals as it is considered that this is already covered by both the exception for free and private representations within the family circle and the private copying exception laid out in Article L. 211-3 CPI. Still modalities may be different as private copying exception requires a fair compensation and therefore French law might not be consistent with the Directive.

According to Article L. 219-2 CPI, OCSSPs are covered as long as they correspond to the definition of OCSSP laid down by article L. 137-1 CPI.

By giving access to works or other subject matter protected by a neighbouring right uploaded by its users, the OCSSP performs an act of exploitation covered by the right of communication to the public or right of broadcasting of the right-holders of neighbouring rights mentioned in the present title (which includes the PPR). The OCSSP must obtain authorisation for this act of exploitation from the right-holders of neighbouring rights mentioned in the present title, notwithstanding the authorisations he must obtain on behalf the right of reproduction for the reproductions of the latter subject matter he performs.

The entry into force of this provision is 7<sup>th</sup> of June 2021, but it applies also to press publications uploaded before this date (see under article L. 137-1 CPI)

**12. Does the LNI allow for the rights it provides to be invoked against:**

- a) **right owners whose content is incorporated in the protected subject matter?**
- b) **holders of licenses to exercise rights in content that is incorporated in the protected subject matter?**

**Please describe the applicable rules.**

There is no specific provision in French law, which would correspond to the fact that “Publishers **cannot invoke the protection** granted to them **against authors and other rightholders or against other authorized users** of the same works or other subject matter” (Recital 59) and that according to Article 15: “*When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users*”.

Still according to article L. 211-1 ICP, that is a general provision for all neighbouring rights: “Neighbouring rights shall not affect the rights of authors. Accordingly, nothing in this Title shall be construed as limiting the exercise of copyright by its owners. Neighbouring rights shall not infringe the rights of authors”. This general statement may be used to interpret French law in conformity with the Directive even if the provision is less precise than in article 15.

There is also provisions according to which authors of works in press publications are entitled to an appropriate and **equitable** share of the remuneration (see Q.15), which ascertain the need to negotiate with the authors. More generally, the relation between the journalists and the press publishers are organized according to the so-called Law HADOPI II (LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (1)), which has been incorporated in the IPC, Section 6 : Droit d'exploitation des œuvres des journalistes (Articles L132-35 à L132-45).

**AC 5: Exceptions and limitations**

**13. Does the LNI recognise exceptions or limitations to the protection it provides? If so, please indicate what these are.**

As already mentioned in Qs 4 and 10, according to Article L. 211-3-1 CPI, right-holders shall not prohibit hyperlinks, nor the use of isolated words or very short excerpts from a press publication. This exception shall not affect the effectiveness of the rights provided for in Article L. 218-2. This effectiveness is affected, in particular, when the use of very short extracts replaces the press publication itself or exempts the reader from referring to it.

There is also the article L. 211-3 CPI, a provision dedicated to the exceptions that are applicable to all neighbouring rights named by the Intellectual Property Code. According to this:

“Beneficiaries of rights under this title may not prohibit:

1° Private and free representations made exclusively within a family circle;

2° Reproductions made from a lawful source, strictly reserved for the private use of the person who makes them and not intended for collective use;

3° Subject to sufficient elements of identification of the source :

a) Analyses and short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated;

b) The press reviews;

c) The diffusion, even integral, as information of current events, of the speeches destined to the public in the political, administrative, judicial or academic assemblies, as well as in the public meetings of political order and the official ceremonies;

d) The communication to the public or the reproduction of extracts of objects protected by a related right, with the exception of objects designed for educational purposes, for the exclusive purpose of illustration in the context of research, excluding any recreational or leisure activity, provided that the public for which this communication or reproduction is intended is composed mainly of researchers directly concerned, that the use of this communication or reproduction does not give rise to any commercial exploitation and that it is compensated by a remuneration negotiated on a flat-rate basis;

e) The communication to the public or the reproduction of extracts of objects protected by a neighbouring right, for the exclusive purpose of illustration within the framework of teaching and professional training under the conditions provided for in article L. 122-5-4. For the application of this article, the author means the beneficiary of the similar rights, the works mean the objects protected by a similar right and the representation means the communication to the public;

4° The parody, the pastiche and the caricature, taking into account the laws of the genre;

5. Provisional reproduction of a transitory or accessory nature, where it is an integral and essential part of a technical process and its sole purpose is to permit the lawful use of the subject matter protected by a neighbouring right or its transmission between third parties by means of a network involving an intermediary; however, such provisional reproduction shall not have any economic value of its own

6° The reproduction and communication to the public of a performance, a phonogram, a videogram, a program or a press publication under the conditions defined in 7° of article L. 122-5, in 1° of article L. 122-5-1 and in article L. 122-5-2 ; (archives & visually impaired)

7° The acts of reproduction and representation of a performance, a phonogram, a videogram, a program or a publication of press carried out for purpose of conservation or intended to preserve the conditions of its consultation for purpose of research or private studies by private individuals, in the buildings of the establishment and on dedicated terminals, carried out by libraries accessible to the public, by museums or by services of archives, provided that they do not seek any economic or commercial advantage;

8° Digital copies or reproductions of a performance, a phonogram, a videogram, a program or a press publication for the purpose of text and data mining carried out under the conditions provided for in Article L. 122-5-3. For the application of this article, the author means the performer, the producer, the audiovisual communication company, the press publisher or the press agency benefiting from a neighbouring right, the works mean the performances, phonograms, videograms, programs or press publications and the copyright means the neighbouring rights;

9° The reproduction and communication to the public of a performance, a phonogram, a videogram or a program or a press publication under the conditions defined in 13° of article L. 122-5. (out of commerce works)

The exceptions enumerated in this article may not interfere with the normal exploitation of the performance, phonogram, videogram, program or press publication nor cause unjustified prejudice to the legitimate interests of the performer, producer, audiovisual communication company, press publisher or press agency.

The modalities of application of the present article are specified by decree in Council of State.”

## AC 6: Licensing

14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

There are no specific provisions on extended collective licensing and no mandatory regime for collective rights management. Yet, a new CMO (the Société des Droits Voisins de la Presse (DVP)<sup>2</sup>) has recently emerged to conduct the negotiations with the targeted users. It is administered by the SACEM. The CFC (French centre for the exploitation of the right of copying) has recently joined the organisation in order to conduct the discussion and the distribution of royalties.<sup>3</sup>

Yet, according to article L. 218-4 IPC, specific criteria shall be taken into account in order to fix the remuneration due to the Press Publisher (and Press Agency).

“Art. L. 218-4 - The remuneration due in respect of neighbouring rights for the reproduction and communication to the public of press publications in digital form **shall be based on the revenue from exploitation of any kind, whether direct or indirect**, or, failing that, assessed on a flat-rate basis, particularly in the cases provided for in Article L. 131-4.

The fixing of the amount of this remuneration shall take into account elements **such as the human, material and financial investments made by publishers and press agencies, the contribution of press publications to political and general information and the extent to which press publications are used by online public communication services.**

The online public communication services are required to provide press publishers and press agencies with all the information relating to the use of press publications by their users as well as all the other information necessary for a transparent evaluation of the remuneration mentioned in the first paragraph of this article and its distribution.”

As already mentioned, after the French Competition Authority decided to fine Google (in an interim decision) 500 million<sup>4</sup> euros for not complying with the LNI and abusing its dominant position by forcing the press publishers to accept the use of their publication for free, there has been an on-going process of negotiation under the supervision of the FCA. Google has a duty to negotiate for the subject matter it exploits within its actual services. The issue of the procedure is still uncertain, although some agreements have already been concluded.<sup>5</sup> Specially, there is no long-term obligation to keep all the content in Google services. Consequently, a further evolution of the situation is probable.

The 21 June 2022 the FCA accepted Google’s commitments<sup>6</sup> which closes the proceedings on the merits initiated in November 2019 by SEPM, APIG and AFP, which denounced practices implemented by Google following the adoption of Law No. 2019-775 of 24 July 2019.

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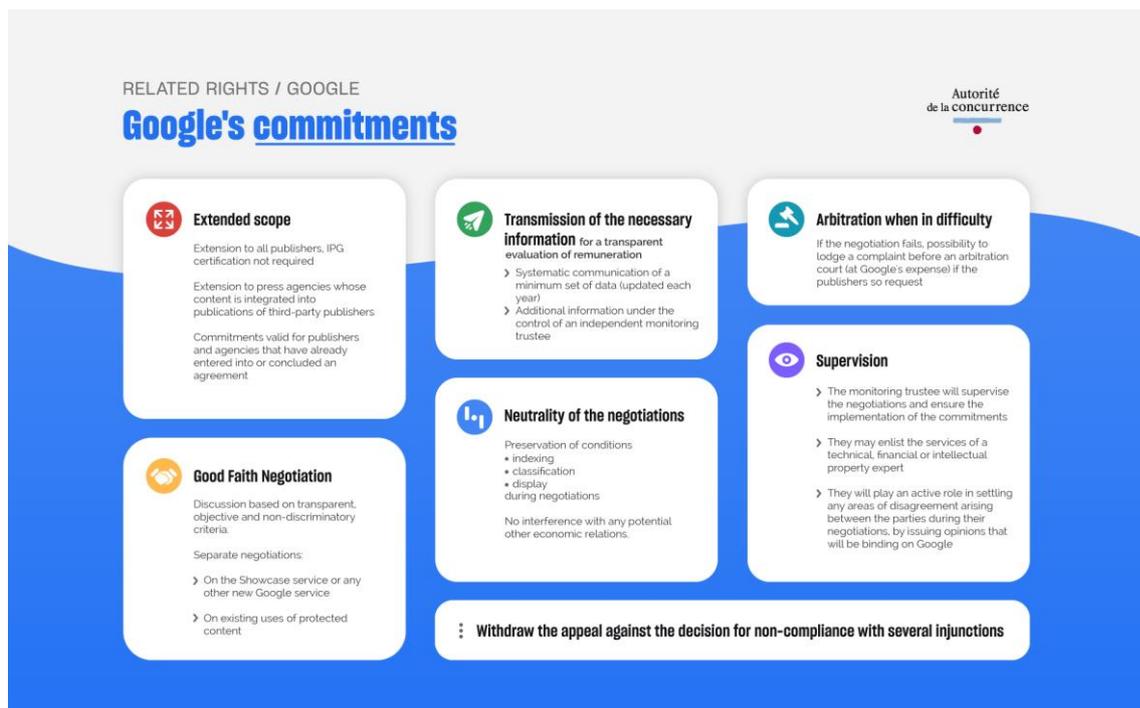
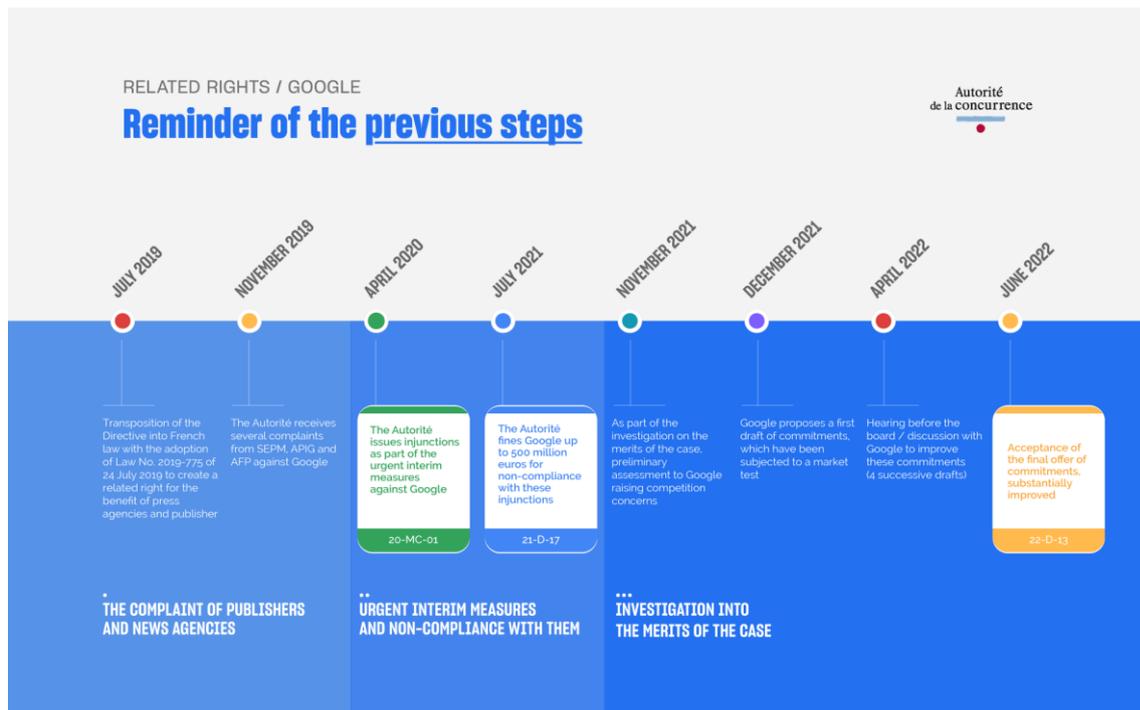
<sup>2</sup> See [bit.ly/3LP8apU](https://bit.ly/3LP8apU).

<sup>3</sup> <https://www.cbnews.fr/medias/image-cfc-rejoint-sacem-au-sein-societe-droits-voisins-presse-68837>

<sup>4</sup> <https://www.autoritedelaconurrence.fr/en/press-release/remuneration-related-rights-publishers-and-agencies-autorite-fines-google-500>

<sup>5</sup> [https://www.euractiv.com/section/digital/news/google-launches-tool-to-extend-licensing-deals-to-more-eu-publishers/?\\_ga=2.54286888.1616922479.1653576396-1819274023.1653576396](https://www.euractiv.com/section/digital/news/google-launches-tool-to-extend-licensing-deals-to-more-eu-publishers/?_ga=2.54286888.1616922479.1653576396-1819274023.1653576396)

<sup>6</sup> <https://www.autoritedelaconurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments>



According to the FCA:

As a result of the preliminary assessment, Google submitted a set of commitments on 9 December 2021. These commitments were the subject of a market test and were discussed during a hearing before the *Autorité*. Following this hearing, Google released four successive versions of commitments, ultimately resulting in a substantially improved final proposal on 9 May 2022.

### *Scope of application*

Google has extended the scope of application of its commitments to all publishers covered by Article L. 218-1 of the Intellectual Property Code ("IPC"), whether or not they have IPG certification. The same applies to related rights of press agencies that are integrated into third party publications and which are now expressly covered.

Google also proposes extending the provisions of its commitments to press agencies and publishers that have already entered into negotiations or concluded a contract with Google for related rights, either directly or through a professional association. Press agencies and publishers with existing agreements will be able to amend or terminate those agreements at no cost to them so they can engage in new negotiations with Google, with the understanding that the compensation agreed to under their pre-existing agreements will continue to apply until the date of this amendment or termination.

### *Good faith negotiation*

Google undertakes to "negotiate in good faith" with press publishers and news agencies that so request, the remuneration for any reproduction of protected content on its services in accordance with the modalities laid down in Article L.218-4 of the IPC and according to transparent, objective and non-discriminatory criteria. Google expressly agrees to conduct separate and independent negotiations regarding the Showcase service or any other new Google service, and regarding existing uses of protected content.

### *Transmission of the information necessary for the transparent evaluation of the remuneration*

Google undertakes to communicate the information necessary for a transparent evaluation of the proposed remuneration, as provided for in Article L.218-4 of the IPC.

To this end, Google has planned to transmit, as a first step, a "base" of minimum information to each negotiating party within ten workdays for individual negotiations and 15 workdays for collective negotiations. This base includes the number of printings and click-through rates of protected content on Google Search, Google News and Google Discover, as well as data relating to Google's revenues in France, whether direct, indirect or resulting from its role as an intermediary in online advertising.

As a second step, Google will provide the additional relevant information requested by press agencies and publishers within 15 workdays, under the supervision of an independent trustee. The trustee may issue an opinion, which will be binding on Google, on the technical feasibility or relevance of such requests. It will take measures to preserve the confidentiality of the information, where necessary. The most sensitive data (such as Google's Search ads and Display ads revenues in France) will only be shared with the trustee and its experts. This mechanism will reconcile Google's legitimate request to protect its business secrets with the need for press agencies and publishers to obtain the information necessary to assess Google's direct and indirect revenues from the display of their protected content.

### *Neutrality of negotiations*

Google undertakes to take the necessary steps to ensure that the negotiations do not affect the crawling, ranking or presentation of the protected content and do not affect any other economic relationship that may exist between Google and the news agencies and press publishers;

### *Withdrawal of the appeal against the decision for non-compliance with injunctions*

Google undertakes to withdraw its appeal against the decision on non-compliance with injunctions. The fine of 500 million euros imposed by the *Autorité* on 12 July 2021 is therefore final.

### *Arbitration procedure in the event of difficulties*

Google undertakes to make a proposal for remuneration within three months of the start of negotiations. In the event that the parties are unable to reach an agreement at the end of this negotiation period, the negotiating parties will have the option of referring the matter to an arbitration tribunal to determine the amount of remuneration. To take into account the limited financial resources of press agencies and publishers, they may, if they wish, ask Google to pay the arbitrators' fees in full, both for the first proceedings and for any appeal proceedings.

### *Monitoring of commitments by an approved independent trustee*

An independent trustee approved by the *Autorité* will ensure the implementation of the commitments taken and may, if necessary, call on the services of a technical, financial or intellectual property expert.

The trustee will oversee the negotiations between Google and the press agencies and publishers and will also be involved in the annual review and update of the minimum information that Google must provide to press agencies and publishers.

The trustee will, where appropriate, play an active role in resolving any points of disagreement that arise between the parties in the course of their negotiations, by issuing opinions to the *Autorité* or making proposals on any dispute relating to the certification of a press publisher or agency, on whether a press publisher's domain contains protected content, on the technical feasibility or appropriateness of a request for additional information, and on the manner in which responses to requests for additional information should be communicated to press publishers and agencies. While the opinions and proposals are not binding on press agencies and publishers, Google has committed to comply with them. This mechanism provides a quick way to resolve disputes that, while binding on Google, preserve the freedom of press agencies and publishers to pursue their claims through other legal avenues if they see fit.

### **AC 7: Revenue sharing**

#### **15. Does the LNI require that any revenue it provides be shared with authors of works incorporated in its subject matter? If so, does it provide details on e.g., the size of the share or modes of collection and distribution or transparency obligations on press publishers? Please describe the applicable rules.**

Yes, professional or other relevant journalists, as identified in the Labour Code, and other authors of works included in press publications are entitled to an appropriate and fair share of the remuneration mentioned in article L. 218-4. Recently, the AFP announced the first royalties to be paid to its authors.<sup>7</sup>

According to article L. 218-5:

“I.-Professional journalists or those treated as such, within the meaning of Articles L. 7111-3 to L. 7111-5 of the Labour Code, and other authors of works in the press publications referred to in Article L. 218-1 of this Code are entitled to **an appropriate and equitable share of the remuneration referred to in Article L. 218-4**. This share as well as the modalities of its distribution among the authors concerned shall be fixed under conditions determined by a company agreement or, failing that, by any other collective agreement within the meaning of Article L. 2222-1 of the Labour Code. For other authors, this share shall be determined by a specific agreement negotiated between, on the one hand, the representative professional organisations of press enterprises and press agencies and, on the other hand, the professional organisations of authors or the collective management bodies mentioned in Title II of Book III of this Part. In all cases, this additional remuneration shall not have the character of a salary.”

In case the parties don't reach a proper agreement, there is the possibility to refer to a specific committee that would try to find a compromise solution and finally to fix the appropriate share and the modalities of distribution to the authors. The nomination of the members of the committee has been adopted in the *Arrêté du 31 janvier 2022 portant nomination des membres de la commission prévue aux articles L. 132-44 et L. 218-5 du code de la propriété intellectuelle*.

“II.-In the absence of an agreement within six months of the publication of Act No. 2019-775 of 24 July 2019 tending to create a neighbouring right for the benefit of press agencies and publishers and in the absence of any other applicable agreement, one of the parties to the negotiation of the company agreement or specific agreement mentioned in I of this article may refer the matter to the commission provided for in III. The committee shall seek a compromise solution with the parties in order to reach an agreement. In case of persistent disagreement, it shall determine the appropriate share provided for in I as well as the modalities of its distribution between the authors concerned.

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<sup>7</sup> <https://www.afp.com/fr/au-fil-de-lafp/lafp-premier-media-en-france-reverser-des-droits-voisins-ses-journalistes>

III - For the implementation of II, a commission is created, chaired by a representative of the State and composed, in addition, for half of representatives of professional organisations of press companies and press agencies and for half of representatives of organisations representing journalists and other authors mentioned in I. The State representative is appointed from among the members of the Court of Cassation, the Council of State or the Court of Auditors, by order of the Minister responsible for communication.

In the absence of a compromise solution found between the parties, the commission shall render its decision within four months from the date of referral.

The intervention of the commission's decision does not prevent new collective bargaining from taking place in the companies concerned. The collective agreement resulting from this negotiation replaces the decision of the commission, after it has been filed by the most diligent party with the administrative authority, in accordance with Article L. 2231-6 of the Labour Code.”

There is also a transparency obligation provided for in paragraphe IV, according to which:

“Professional journalists or similar and other authors mentioned in I of this article shall receive at least once a year, if necessary, by an electronic communication process, **updated, relevant and complete information on the methods of calculating the appropriate and equitable share of remuneration due to them in application of the same I.**”

#### **AC 8: Term of protection**

##### **16. What is the term of the protection afforded to press publications by the LNI?**

For PPs published after the 6th of June 2019, the only indication is that PPRs expire 2 years after the press publication was published.

- The duration of the PPR is dependent on the first date of publication (an objective criterion). This is a reference to first publication.
- If a piece of content that has been published previously is re-published, the duration of the second PPR on this press publication is dependent on this date (for example, if first publication was 2021, only one year would be left by 2022).
- There is a distributive approach, which is difficult to manage because each element of the press publication may have different duration if it was not included in the first publication.
- It is impossible therefore to identify the expiry date of the content.
- Prof. Passa has suggested a solution that may help, that is to limit the protection to the first publication of a press publication, although it would not solve the problem of identifying the “first” publication.

#### **AC 9: Waiver**

##### **17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?**

Nothing has been said on these questions. Nevertheless, it is possible to reason by analogy. There is no prohibition to waive one’s right in the Intellectual Property Code except for moral rights. The rationale being different here, there is no reason to apply the exceptional regime to the LNI. So, right-holders can potentially waive their rights.

The Intellectual Property Code in its Article L122-7-1 establishes that the author is free to make his works available for free to the public, subject to the respect of the rights of any co-authors or of third parties and of the agreements he has concluded. This provision does not exist in the chapter dedicated to neighbouring rights, but it seems that nothing precludes its application to the LNI.

**AC 10: Entry into effect**

**18. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

The entry into force of the law was three months after the law was enacted. It doesn't apply to press publications published for the first time before the entry into force of the Directive.

By contrast, Article 15 of the Directive provides that paragraph 1 does not apply to press publications published for the first time before to the 6 of June 2019.

**Additional information**

**19. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 15 of the CDSMD that you have not already addressed above? If so, please elaborate.**

N/A.

## PART II: Article 17 CDSMD

**Note:** The questions below concern the national implementation of Article 17 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

### Background information

- 1. Has Article 17 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Article 17 has been transposed by ordinance *n° 2021-580* of 12 May 2021. This procedure means that the text has not been subject to amendments and discussion before the Parliament, because the text is issued by the government and only approved as a whole by the Parliament. There is no clear trace of the legislator intent, the motivation of the ordinance being scarce. Nevertheless, France is always claiming its involvement in the defence of right-holders and has oriented the implementation in this direction.

**If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.**

**Note: if there is no national implementation of Article 17 CDSMD you can end the questionnaire at this point.**

N/A

### AC 1: Subject matter

- 2. What is the subject matter (object) of protection by the LNI?**

For the French doctrine, there is not really a specific subject matter of protection; it is a question of who – i.e., OCSSP – is supposed to perform an act of exploitation, that is qualified according to current qualifications. Most of the authors consider that it is a mere confirmation of the possible application of copyright to platforms. But this may be conflicting with a possible interpretation of the ECJ *Cyando* case (22 June 2021 C-682/18, C 683/18) and with previous French jurisprudence, which never clearly acknowledged the existence of such a qualification at the level of the Cour de cassation.

### AC 2: Right-holders

- 3. Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.**

Copyright holders and holders of neighbouring rights (performers, producers, publishers).

### AC 3: Exclusive rights

#### **4. Against what kind of act does the LNI protect right-holders? Is a legal qualification given to those acts (e.g., “communication to the public”)?**

Two different ranges of provisions were created to implement the new regime respectively for copyright and neighbouring rights. Even if they are substantially similar, the substance of the right they refer to may introduce modifications.

For copyright, according to article L. 137-2, para. 1 IPC:

I.- By giving access to works protected by copyright uploaded by its users, the provider of an online content sharing service performs an act of representation of these works for which it must obtain the authorisation of the rights holders, without prejudice to the authorisations that it must obtain under the reproduction right for the reproductions of the said works that it makes.

For neighbouring rights, according to article L. 219-2, para. 1 IPC:

I.-By providing access to objects protected by a related right uploaded by its users, the provider of an online content sharing service performs an act of exploitation that falls within the scope of the right of communication to the public or the broadcasting right of the holders of related rights mentioned in this title. The provider of an online content sharing service must obtain authorisation for this act of exploitation from the holders of related rights provided for in this Title, without prejudice to the authorisations that he must obtain under the reproduction right for the reproductions of the said protected objects that he makes.

Therefore, platforms are subject to the right of representation and to the right of reproduction (which is not mentioned in the Directive) for copyright and of communication to the public or broadcasting as regards neighbouring rights. As said previously in the questionnaire on Article 15, the scopes of the rights are different, as France has never implemented the right of making available considering that it was already embedded within the right of “representation”. The French conception of exclusive rights is very inclusive, not being linked to any specific technology. As regards right of reproduction, it covers various forms of distribution – sale, rental, lending, donation) and adaptation.

As to the neighbouring rights, this is supposed to be included within the right of communication to the public. Yet, some acts of communication to the public are covered by the right to equitable remuneration for performers and phonograms producers and not by the exclusive right.

#### AC 4: Targeted providers

5. Does the LNI target a specific kind of service provider? Please provide any relevant definitions, including any exclusions (“carve-outs”). Please focus on any differences from the concept of “online content sharing providers” (OCSSPs) as defined by Article 2(6) CDSMD and any elements taken from the recitals (e.g., facilitating piracy, definitions of “large amounts”).

Art. 2 para 6 CDSMD	L. 137-I IPC
<p>‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.</p> <p>Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive</p>	<p>For the purposes of Articles L. 137-2 to L. 137-4, a provider of an online content sharing service is defined as a person who provides an online public communication service whose main purpose or one of its main purposes is to store and give the public access to a <u>significant quantity</u> of works or other protected subject matter uploaded by its users, which the service provider organizes and promotes <u>with a view to deriving a direct or indirect profit</u>.</p> <p>This definition <u>does not include</u> non-profit online encyclopedias, not for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communications service providers within the meaning of Directive (EU) 2018/1972 of December 11, 2018 establishing the European Electronic Communications Code, online marketplace providers, business-to-business cloud services, and cloud services that allow users to upload content for <u>strictly personal use</u>.</p> <p><u>The provisions of article L. 137-2, III, do not apply to online public communication services whose purpose is to infringe copyright and related rights.</u></p> <p><u>The evaluation of the significant quantity of protected works and objects mentioned in the first paragraph takes into account in particular the number of files of protected contents uploaded by the users of the service, the type of uploaded works and the audience of the service. The terms of application of this paragraph are defined by decree in the Council of State.</u></p>

Main differences between the two texts are:

- “Significant quantity” instead of “large amount”, which makes no difference as the two notions are vague and need to be further specified. The law states that “significant quantity” will take into account, in particular, the number of files, types of works, audience, and that this should be fixed by a further decree (see below);
- the broader expression of the commercial purpose of the platform in the French law, which refers to the vague notion of “**indirect**” profit;
- The list of exclusions is open in the Directive “such as” when the French list is closed, but the wording of the directive doesn’t provide for the wider category to which these examples belong;
- The own use becomes strictly personal in the French version.

Main change is the exclusion from the alleged regime of liability of the platforms that intentionally infringe copyright. This is, to our opinion, compliant with the CJEU case law related to the definition of the act of communication to the public.

As to the concept of “significant quantity”, the abovementioned decree was adopted on 20 of October 2021 (n°2021-1369) introducing a new Article R136-1 to the administrative part of the IPC that refers to a future order of the Ministry of Culture:

“The evaluation of the significant quantity of works and protected objects mentioned in the first paragraph of Article L. 137-1 is assessed on a case-by-case basis under the conditions and according to the criteria mentioned in the last paragraph of that Article.

The significant quantity of works or protected objects mentioned in Article L. 137-1 may be deemed to have been reached when the service’s audience exceeds a threshold set by order of the minister responsible for culture and the number of content files uploaded by users of the service exceeds one of the thresholds set by that order.”

The order of the French Ministry of Culture was adopted the same day (20 October 2021):

- The threshold of the audience is 400,000 unique visitors in France by month, by service.
- As to the thresholds of the number of files uploaded by the users of the platform, they vary according to the nature of the works: 100 for audiovisual works, radio works, written works including the press, video games / 5000 for musical works / 10,000 for visual art works/10,000 for files including all times of works, meaning that you cannot cumulate all the previous thresholds.

**6. Were the targeted service providers considered to infringe the relevant exclusive rights in your country prior to the adoption of the LNI? Please indicate whether any liability was primary or secondary.**

This has been a huge controversy in France as some decisions have rejected the regime of hosting providers to consider that some platforms were performing an act of exploitation. The most well-known decisions are “*Au Féminin.com*” / *Bac* rendered the same day (12 July 2012) where the *Cour de cassation* overruled the decision of the Paris Court of Appeal that had considered that Google was responsible for the re-appearance of notified content. In these decisions, the higher jurisdiction decided that the acts performed by Google, namely reducing the format of an image and storing it, was not compatible with the qualification of caching provider that was previously retained in a *Google / SAIF* decision, but nevertheless examined the compliance with the duty of the hosting provider after a notification of infringing material being made. Therefore, there was a dissensus on the possible interpretation of the decision: application of copyright rules for right-holder / regime of hosting provider for Google.

In the absence of certainty, most procedures relied on the possibility provided for by Article 336-2 IPC, which is the implementation of Article 8 para. 3 of the Infosoc Directive to ask the intermediary to limit/block the access to the infringing items.

## **AC 5: Scope of protection**

- 7. In your national jurisdiction prior to the transposition of the CDSMD did the service providers targeted by the LNI benefit from the protection of an immunity (e.g., the national implementation of the hosting safe harbour provided by Article 14 of the ECD (Directive 2000/31/EC))? If so, does this provision continue to apply?**

They were benefiting from this protection of 6-2 of the LCEN (Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique) that has implemented the ECD (article 14).  
(Below a DeepL translation):

“2. The natural or legal persons who ensure, even on a purely free basis, for provision of the public by services of communication to the public on line, the storage of signals, writings, images, of signals, writings, images, sounds or messages of any kind provided by recipients of these services may not be held liable for the activities or information stored at the request of a recipient of these services if they were not actually aware of their manifestly illicit nature or of facts and circumstances revealing this nature or if, as soon as they became aware of this, they acted promptly to remove this data or to make access impossible.

The preceding paragraph does not apply when the recipient of the service is acting under the authority or control of the person referred to in that paragraph.”

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

According to Article L. 137-2 IPC, in the absence of authorisation of right-holders, the OCSSP is “liable for unauthorized acts of exploitation of works protected by copyright (same thing for neighbouring rights), unless he demonstrates that it has met all the following conditions:

- a) It has made its best efforts to obtain the authorisation from the right-holders who wish to grant such authorisation;
- b) it has made his best efforts, in accordance with the industry's high standards of professional diligence, to ensure the unavailability of specific works for which the rights holders have provided him, directly or indirectly through a third party designated by them, with the relevant and necessary information;
- c) It has in any case acted promptly, upon receipt of a sufficiently reasoned notification from the rights holders, to block access to the notified works or to remove them from its service, and has made its best efforts to prevent the works from being uploaded in the future, pursuant to (b);”

**9. Does the LNI identify a standard of care to which targeted service provider should adhere in relation to the conditions of the immunity? For example, the Directive makes reference to “best efforts” and to “high industry standards of professional diligence”. Please also discuss whether you consider any such terms used in the LNI to represent accurate translations of the corresponding terms in the EU provision, preferably taking into account both the English language and the national language versions.**

According to Article L. 317-2 IPC, to determine whether the provider of the online content sharing service has complied with its obligations under 1, the following shall be taken into account in particular:

- (a) The type, audience and size of the service, as well as the type of works uploaded by users of the service;
- (b) The availability of adequate and effective facilities and their cost to the service provider.

There is no further decree or explanation as to these conditions.

**10. Are the conditions for the immunity in the LNI subject to the principle of proportionality? If so, please describe any specified implications.**

There is no specific reference to the principle of proportionality within the law, but judges do generally apply this principle when they have to balance two fundamental rights.

**11. Do the conditions of the immunity differ depending on the characteristics of the specific service provider (e.g., size or age)? If so, please describe those differences, providing any relevant definitions.**

By way of derogation from the conditions set out in 1, for a period of three years from the date on which the service is made available to the public within the European Union and provided that it has an annual turnover of less than ten million euros calculated in accordance with European Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, in the absence of authorisation from the right-holders, the provider of an online content sharing service is liable for unauthorized acts of exploitation of copyrighted works, unless it demonstrates that it has met the following conditions:

- (a) It has used its best efforts to obtain permission from rights holders and has acted promptly, upon receiving notification as provided in c of 1, to block access to or remove from its service the works that are the subject of the notification;
- (b) In the event that the average monthly number of its unique visitors in the European Union exceeded five million during the previous calendar year, it has also made its best efforts to avoid further uploads of the notified works for which the right-holders have provided it, directly or indirectly via a third party designated by them, with the relevant and necessary information.

The provider of the online content sharing service who invokes the application of the present 3 to his service shall provide evidence of the audience and turnover thresholds required.

## **AC 6: Right-holder cooperation**

**12. Does the LNI depend the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.**

There is a duty to cooperate for right-holders. According to article L. 137-2 III., 4°, the OCSSP acts on the sole basis of the necessary and relevant information or notifications provided for, directly by right-holders or indirectly via a third-party designated by them. Consequently, the OCSSP is not required to block or remove a piece of content without prior information coming from right-holders. There is no description in the law of the way the information should be brought to the OCSSP's attention, but this is not only by way of "notification".

**13. Does the LNI allow right-holders to " earmark" content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.**

There is no such regime.

## **AC 7: General monitoring**

**14. Does the LNI permit the conditions of the immunity to result in general monitoring? If not, please explain how "general monitoring" is defined.**

General monitoring is contrary to the LCEN / E-Commerce Directive. There is a reference to the "best efforts" clause within the LNI, therefore there is no duty to reject all infringing.

**15. Does the LNI recommend or dissuade from using any specific kind of technology in order to adhere to the conditions for immunity? If so, please describe.**

No. French law is generally reluctant to name certain specific technologies in the IPC.

## **AC 8: Exceptions and limitations**

**16. Prior to the adoption of the LNI, did national law provide for an exception or limitation to copyright for uses for the purpose of a) quotation, criticism, and review; and b) caricature, parody or pastiche? If not, has it now introduced such exceptions or limitations? Please describe the conditions under which such exceptions or limitations apply.**

Yes. Exceptions for the purposes quotation and parody pre-existed, but the notion of a quotation is limited, and the case law has developed a very strict interpretation of the exception.

"Analyses and short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated;"

Many decisions have consequently rejected the exception, for example for visual art or audiovisual works because of the condition of "shortness" (snippet is not a short piece) or because the use did not match with the enumerated purposes (sample for music). The requirement of incorporation in a work can also possibly limit the scope of the exception. This very narrow interpretation of the quotation does not seem to be in line anymore with the decisions of the CJEU (in *Painer* and *Pelham inter alia*).

Conversely, the scope of the exception for caricature, parody or pastiche is rather loose, as long as the use "makes laugh" and is made according to "*les lois du genre*". The whole work can be used if these criteria are fulfilled, even if the risk of confusion must be avoided. Certain decisions have even accepted the exception of parody for political purposes.

**17. Do other exceptions or limitations apply to the protection provided by the LNI? If so, please describe.**

The LNI has introduced in the IPC, within the chapter dedicated to platforms a Section 4 named “Users' rights” (Article L137-4) (LAW n°2021-1382 of 25 October 2021 - art. 1), according to which:

“I.-The provisions of this chapter cannot oppose the free use of the work within the limits of the rights provided for by the present code, as well as those granted by the holders of rights. **In particular, they must not have the effect of depriving users of online content sharing services of the effective benefit of the exceptions to copyright provided for in this Code.**”

At first sight, the scope of the provision is unusually wide and welcoming for exceptions. It is to our knowledge, the first time that the French law enforces so clearly the idea of user’s rights, whereas exceptions have always been considered as mere defence in the case of infringement (except when claimed before the later HADOPI in case of Technical Protection Measures that were preventing users from accessing to the work or using it on the ground of exceptions but the procedure has been barely triggered twice within 16 years). This benefit is not limited only to the exceptions named in the Directive, but concerns all the exceptions provided for in the Code.

Yet, the system doesn’t provide for a high level of protection for “exceptions”. Firstly, this is an *ex post* system, as all the mechanism does is allow the user to restore a legitimate use in case of over-blocking and in no way prevents such situation. Secondly, authors have already underlined that no real sanction accompanies the implementation of the provision, meaning that if the “exception” has been violated by way of excessive blocking or filtering, the right-holder doesn’t bare any special liability and only common liability regime would apply (Art. 1240 Civil Code). Thirdly, there is an asymmetry between the right-holders and the users in the procedure, the first being professionals whereas the second are mainly individuals, who don’t have any knowledge of law and procedure. This *de facto* difficulty has already proven to be an unsurmountable obstacle for users to benefit from this formal protection.

It is also questionable whether such a procedure complies with the recent decision of the Court of Justice in the “Poland” Case.

The procedure has three “layers”. It is not clear whether the different venues can be taken simultaneously or step by step.

- It is mentioned that it is always possible to apply to the judge (“without prejudice to their right to apply to the judge”), yet for the time being, since the *Mulholland Drive* case, the user that benefits from an exception cannot go to court to claim his rights, therefore this way can be a quite hypothetical one unless the judges change their position as to legal standing;
- The user can benefit from a mechanism for appealing and processing complaints for blocking or removal implemented by the OCSSP. The system should be quick, efficient and, finally, the decision of blocking or removing content are subject to human review in the context of the complaint.

Article L.137-4 continues as follows:

“II - The provider of an online content sharing service makes available to users of its service a mechanism for appealing and processing complaints relating to situations of blocking or removal, resulting from the actions mentioned in III of Article L. 137-2, of works uploaded by these users.

III.-The system mentioned in II allows for a quick and efficient processing of the complaint by the provider of the online content sharing service, without unjustified delay. The copyright owner who, following a complaint from a user, requests the continued blocking or removal of a work, shall duly justify his request. Decisions to block access to uploaded works or to remove them, taken in the context of the processing of complaints, are subject to control by a natural person. A Decree mentioned to implement the whole procedure has not yet been adopted.”

There is a possibility to refer to the **ARCOM** (Independent Administrative Authority) that will first try to conciliate the parties. In the absence of conciliation, the ARCOM shall make its decision. Delays may vary according to the emergency of the case. It is mentioned that the ARCOM is not obliged to follow up on abusive referrals, particularly in terms of their number, repetitive or systematic nature. See Article L137-4, para IV:

“IV - Without prejudice to their right to refer to the judge, the user or the copyright-holder may refer to the ARCOM (Regulatory Authority for Audiovisual and Digital Communication) in the event of a dispute over the action taken by the service provider on the user's complaint.

The Audiovisual and Digital Communication Regulatory Authority shall proceed in accordance with the provisions of Article L. 331-32. However, in the absence of conciliation within a period of one month from the date of referral, it shall have a period of two months from the date of referral to make its decision. Where the urgency or the nature of the case so warrants, the chairman of the authority may reduce these time limits. In the event of an injunction, it shall prescribe the appropriate measures to ensure the blocking or withdrawal of a work uploaded or the lifting of such a blocking or withdrawal.

The appeal provided for in the last paragraph of article L. 331-32 does not have suspensive effect.

A decree of the Conseil d'Etat shall specify the conditions of application of this IV.”

According to Article L137-4, para V:

“V.- The Regulatory Authority for Audiovisual and Digital Communication is not obliged to follow up on abusive referrals, particularly in terms of their number, repetitive or systematic nature.”

According to Article L. 331-32 (translation by DeepL), version in force since 1 January 2022:

“With due regard for the rights of the parties, the ARCOM (Autorité de régulation de la communication audiovisuelle et numérique) shall promote or encourage a conciliatory solution. When it draws up a conciliation report, it shall be enforceable; it shall be filed with the clerk of the court.

In the absence of conciliation within a period of two months from the date of referral, the authority, after having given the interested parties the opportunity to present their observations, issues a reasoned decision rejecting the request or issues an injunction prescribing, if necessary, under a penalty payment, the appropriate measures to ensure the effective benefit of the exception. The fine imposed by the authority shall be paid by the latter. From the date of referral, the authority has a period of four months, which may be extended once for a period of two months, to render its decision.

These decisions, as well as the conciliation report, are made public in accordance with the confidentiality of the law. They are notified to the parties, who may appeal to the Paris Court of Appeal. The appeal has a suspensive effect.”

## **AC 9: Licensing**

**18. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:**

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

There are no such provisions (except for the transparency duties already mentioned).

**19. Under the LNI, do licenses obtained by a platform cover the platform's users and/or the other way around? If so, please explain.**

According to article L. 137-2 IPC:

“IV-The contracts by virtue of which the authorisations mentioned in I are granted are, within the limits of their object, also deemed to authorize the acts of representation accomplished by the user of this service on the condition that the latter does not act for commercial purposes or that the income generated by the contents uploaded by this user is not significant.”

There is no reciprocity: the authorisation granted to the user does not eliminate the obligation for the platform to get an authorisation. It is unclear whether there is one communication to the public with potentially two debtors or if there are two separate acts of communication to the public, each of which shall be subject to special authorisation. We can suppose that two separate acts of communication are identified as the regime is different for the user and for the platform (remuneration being paid by the platform for the sake of the user).

#### **AC 10: Legitimate uses: *ex ante* safeguards**

**20. Does the LNI include a concept of “legitimate uses”? If so, how are these defined? How are legitimate uses treated?**

No. See answer on the “exceptions”.

**21. Does the LNI include a concept of “manifestly infringing uploads”? If so, how is this defined? How are “manifestly infringing” and “non-manifestly infringing” uploads treated?**

No definition in the LNI. There has been a previous discussion upon this criterion according to the liability of hosting providers as regards the LCEN. Most of the comments were advocating that, contrary to other criminal offenses (pedo-pornography, for example), copyright infringement could never be considered as manifestly infringing due to the margin of manoeuvre for exceptions, limitations, originality threshold, ownership. Yet, the OCSSPs have concluded partnership with well-known right-holders and CMOs in order to speed up the removal of content that were signalled by them without formal notifications (so called fast track systems).

**22. Does the LNI include other *ex ante* mechanisms for the avoidance of action against legitimate content? If so, please describe these citing the relevant provisions of national law.**

No. See Q. on the exceptions.

#### **AC 11: Legitimate uses: *ex post* safeguards**

**23. Does the LNI provide for effective and expeditious complaint and redress mechanisms in the event of disputes? If so, please describe these. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.**

Yes. See Question on the exception.

**24. Does the LNI foresee for any other ways of settling disputes over content posted on their platforms (e.g., out-of-court mechanisms or recourse to the courts, incl. collective redress)? If so, please list these.**

Yes. See Question on the exception.

## **AC 12: Sanctions**

### **25. Does the LNI foresee sanctions in cases of abuses of the procedures it introduces by right-holders, users and/or platforms? If so, please describe these.**

The only sanction is the possibility for the ARCOM to refuse to “ear” the case. See Q. on the exception.

## **AC 13: Information obligations**

### **26. Does the LNI impose information obligations on platforms? If so, please describe these.**

French law imposes specific obligations of “transparency” in article L. 137-3 (and Article L219-3 ) on platforms as regards the actions they took to comply with their obligation to monitor.

“I.-The provider of an online content sharing service shall provide, at the request of copyright-holders, relevant and precise information on the type and operation of the measures taken by it for the application of III of Article L. 137-2. This obligation is exercised with due respect for trade secret duly justified by the service provider and is without prejudice to more detailed obligations contracted between the service provider and the rights holder.

II.- Contracts authorizing the use of works by a provider of online content sharing services shall provide for the transmission by the latter to copyright-holders of information on the use of these works, without prejudice to the provisions of Article L. 324-8.”

There is also a general obligation of transparency in Article L.324-8 IPC, when the authorisation is granted by a CMO, which applies on the information made on the use of the rights.

“When an authorisation for exploitation is granted, the user is obliged to communicate to the collective management organization, in a format and within a period of time agreed between the parties or pre-established, the relevant information on the use he has made of the rights, so that the organization is able to ensure the collection and distribution of the revenues derived from the exploitation of these rights.

In defining the format for the communication of such information, organizations and users shall take into account, to the extent possible, voluntary industry standards, in particular standard identifiers for works and other protected subject matter. In the absence of an agreement between the parties within a reasonable period of time, this information is that defined by an order of the minister in charge of culture for the sector of activity concerned.”

Finally, in article L. 137-4 VI IPC dedicated to “exceptions”, the Code provides that:

“For the purpose of informing users, the provider of an online content sharing service shall include in its general conditions of use adequate information on the exceptions and limitations to copyright provided for in this code and allowing for the lawful use of works.”

## **AC 14: Waiver**

### **27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?**

This is the general regime that applies, which is that right-holders can waive their exploitation rights but not the moral right. According to article L. 122-7 IPC, the right of representation and the right of reproduction are transferable free of charge or against payment. According to article L. 122-7-1 IPC, the author is also free to make his works available to the public free of charge, subject to the rights of any co-authors and those of third parties and in compliance with the agreements he has concluded.

**AC 15: Entry into effect**

**28. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

According to ordinance n° 2021-580 of 12 May 2021, the provisions are applicable from 7 June 2021 to works and other subject matter protected from the date of publication of the ordinance, included ones uploaded before this date.

**Additional information**

**29. Does the LNI explicitly address the relationship between the protection it provides as against OCSSPs and fundamental or human rights (whether of OCSSPs or third parties)?**

No. Only exceptions within the IPC are mentioned.

**30. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 17 of the CDSMD that you have not already addressed above? If so, please elaborate.**

No.