CENTRE FOR INTELLECTUAL PROPERTY & INFORMATION LAW

Articles 15 & 17 of the Directive on Copyright in the Digital Single Market

Questionnaire – Annex to the Comparative National Implementation Report

GERMANY

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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: GERMANY

National Experts: PROF. DR. MATTHIAS LEISTNER (Ludwig-Maximilians-Universität München (LMU))

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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.

Protection for press publications (through a so-called related right or sui generis right) was introduced by the Eighth Act Amending the Copyright Act of 7 March 2013, effective 1 August 2013 (BGBl. I 2013 No. 23 S. 1161 [Federal Law Gazette]). It was enshrined in ss 87f, 87g, 87h Copyright Act which were the first of their kind in Europe.

Under s. 87f (1), publishers of press publications had the exclusive right to make their press publications available to the public, in full or in part. Section 87g(2) limited the term of protection to one year from publication and s. 87h granted a right of participation to the author. Thus, as opposed to Article 15 CDSMD, the former German law did not provide a right of reproduction to the press publisher and granted a shorter term of protection. Furthermore, German law did not contain an equivalent to Article 15(1) subparagraphs 2 and 3.

The German law was nullified in 2019 by ECJ judgment, C-299/17, ECLI:EU:C:2019:716, *VG Media v Google*, because of a violation of the prior notification duty for 'technical regulations' under Article 8(1) of Directive 98/34, as amended by Directive 98/48 in conjunction with Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998) and was since then inapplicable. Consequently, Germany had to change its Copyright Act in order to implement the new, even broader protection right according to Article 15 CDSMD.

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).

The Act for the adaptation of copyright law to the requirements of the digital single market of 31 May 2021 (BGBl. I 2021 No. 27, S. 1204 [Federal Law Gazette]) transposed, inter alia, Article 15 into German law. The new provisions on the protection for press publications came into force on 7 June 2021. They can now be found in ss 87f – 87k German Copyright Act. This transposition can be considered a rather textual approach.

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.

The German provision can be found at https://www.gesetze-im-internet.de/urhg/index.html. The German Ministry of Justice provides a translation at https://www.gesetze-im-internet.de/englisch_urhg/index.html.

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

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.**

Section 87f (1) matches Article 2(4) CDSMD.

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 s. 87g(2) No. 4, rights of publishers of press publications do not encompass the use of individual words in or very short extracts from a press publication. The explanatory memorandum states that the exclusion must be interpreted in a way that press publishers' investments and the effectiveness of their rights is not impaired (explanatory memorandum 19/27426 p. 113). As press publications may also contain other types of works and protected subject matter in addition to text contributions, such as graphics, photographs, as well as audio and video sequences, in this respect, too, the use of very short excerpts is not covered by the scope of protection. The "very short excerpts" can also be composed of a combination of different types of works and protected subject matter. This militates in favour of a qualitative approach. There is no specific provision on headlines.

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

According to s. 87g(2) No. 1, the rights of publishers of press publications do not encompass the use of the facts contained in the press publication. Neither the law nor the explanatory memorandum contain a definition.

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

According to s. 87h(2) No. 2, the rights of publishers of press publications may not be asserted for the purpose of prohibiting third parties from using works or other subject matter which are no longer protected under the Act and were included in the press publication. Neither the law nor the explanatory memorandum contain a definition.

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

The German protection conditions do not go beyond the requirements of Article 15.

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.

Publishers of press publications, the beneficiaries of the protection, are defined as "any person who produces a press publication" (s. 87f(2)), i.e. the person who provides the economic, organisational and technical services required for the publication of a press release (explanatory memorandum 19/27426 p. 111)). If the press publication was produced by an enterprise, the owner of the enterprise is deemed to be the producer (s. 87f(2)).

The LNI does not employ a list of press publications or beneficiaries that are covered. The explanatory memorandum, however, states that press publications are both the online and print editions of daily newspapers, weekly or monthly magazines, including subscripted magazines of general or special interest, and news websites (explanatory memorandum 19/27426 p. 111). Press publications contain primarily text contributions, but also other types of works and protected subject matter, especially graphics, photographs, and audio and video sequences (explanatory memorandum 19/27426 p. 111). Scientific journals and blogs, on the other hand, are not considered press publications (explanatory memorandum 19/27426 p. 111).

According to s. 127b(2), enterprises which have no principal place of business within Germany, enjoy the protection if their head office or main establishment is located within the German territory or within the territory of another Member State of the European Union or of another Contracting Party of the Agreement on the European Economic Area.

AC 3: Restricted acts

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

The rights of publishers of press publications encompass the exclusive right to make their press publications available to the public and to reproduce them, in full or in part, for online use (s. 87g (1)). Thereby, the law refers to the general rights of reproduction and making available to the public also provided for authors. However, the right of reproduction is explicitly limited to online use by the providers of information society services (see Thomas Dreier, § 87g recital 4, in Thomas Dreier and Gernot Schulze (eds), *Commentary on the Copyright Act* (2022)).

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

According to s. 87g (2) No. 3, the rights of publishers of press publications do not encompass the creation of hyperlinks to a press publication. Hyperlinking is not defined in the text of the statute. However, according to the explanatory memorandum, it includes links set for commercial and non-commercial purposes (explanatory memorandum 19/27426 p. 113).

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 s. 87g(2) No. 2, the rights of publishers of press publications do not encompass the private or non-commercial use of a press publication by individual users. The rights of publishers of press publications only target uses by providers of information society services (s. 87g(1)).

OCSSPs are covered. However, private posts by individuals on these platforms fall within the exception of s. 87g(2) No. 2 (explanatory memorandum 19/27426 p. 113).

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.

According to s. 87h(1), (2) No. 1, rights of publishers of press publications may neither be asserted to the detriment of the author or related right-holder, whose work or other subject matter protected under the Copyright Act is contained in the press publication, nor for the purpose of prohibiting third parties from making authorised use of such works or such other subject matter which were included in the press publication based on a non-exclusive right of use.

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.

Exceptions and limitations are provided by s. 87g (2), 87h (see above). They do not go beyond the specification on exceptions and limitations in Article 15.

Furthermore, s. 87i implements all general limitations on copyright (s. 44a et seq.) for the press publishers' right including the implementations of Art. 3(1) CSDMD (i.e. s. 60d), Art. 4(1) CSDMD (i.e. s. 44b), Art. 5(1) CSDMD (i.e. s. 60a), Art. 6(1) CSDMD (i.e. s. 60e, 60f), Art. 8(2) CSDMD (i.e. s. 61d), of the Marrakech Treaty Directive (s. 45a(3), 45b–45d), and provisions on Orphan Works (i.e. s. 61–61c).

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.**

Section 87g(3) sentence 2 refers to two general provisions on licences (called rights of use) in the German Copyright Act, i.e., s. 31 and s. 33. Section 31 distinguishes between exclusive and non-exclusive licences and states that if the types of use were not specifically designated when a right of use was granted, the types of use to which the right extends are determined in accordance with the purpose envisaged by both parties to the contract. According to s. 33, licences remain effective both with respect to rights of use granted subsequently and if the right-holder, who has granted the right of use, changes or if the right-holder waives the right. However, these provisions do not involve any of the precepts enumerated in the question. Also, s. 87g(3) sentence 2 does not refer to s. 32 which guarantees an equitable remuneration.

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.

According to s. 87k, authors and the holders of rights in other subject matter protected under the Copyright Act are entitled to an equitable share of the income which publishers of press publications generate from the use of their rights, this being set at a minimum a share of one third of that income. Derogations from that rule to the detriment of authors and the holders of rights in other protected subject matter are permitted only by an agreement

which is based on a collective agreement (labour agreement) or a joint remuneration agreement with authors' associations. The amount of the participation in the income of the press publisher from the use of the ancillary copyright is thus placed within the discretion of the associations of creators and press publishers (explanatory memorandum 19/27426 p. 114).

In order to ensure that the participation of authors and holders of related rights in the revenues of the press publisher is implemented in a practicable manner, the claim can only be asserted by a collecting society.

AC 8: Term of protection

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

According to s. 87j, the rights of publishers of press publications lapse two years after a press publication is first published.

AC 9: Waiver

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

Section 87g(3) sentence 2 refers to, *inter alia*, s. 33, thus stating that licences remain effective if the right-holder waives the right (see above). Hence, it can be concluded that waiver is possible. Section 31, to which s. 87g(3) sentence 2 also refers, allows licencing without payment.

AC 10: Entry into effect

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

The protection came into force on 7 June 2021. According to s. 137r, the provisions to the protection of publishers of press publications (i.e. s. 87f–87k and s. 127b) do not apply to press publications which were first published before 6 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.

No, the implementation is largely identical in wording.

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).

The Act for the adaptation of copyright law to the requirements of the digital single market of 31 May 2021 (BGBl. I 2021 No. 27, S. 1204 [Federal Law Gazette]) transposed, inter alia, Article 17 into German law. To this end, Germany did not amend its Copyright Act but introduced a new law called Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz, in short UrhDaG). This act came into force on 1 August 2021. This transposition pursues an intentionalist approach and contains many additions and differentiations compared to Article 17 CDSMD.

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.

The German provision can be found at https://www.gesetze-im-internet.de/urhdag/. The German Ministry of Justice provides a translation at https://www.gesetze-im-internet.de/englisch_urhdag/index.html.

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

AC 1: Subject matter

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

The subject matter is uploaded copyright-protected works (s. 1(1) UrhDaG) and the subject matter of related rights within the meaning of the Copyright Act (s. 21(1) UrhDaG).

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.

Authors and holders of related rights (see s. 21 UrhDaG with some small differentiations) are beneficiaries. Furthermore, under German law, holders of exclusive licences are also entitled to assert claims for copyright infringement (BGH [Federal Court of Justice), Apr 29, 1999 – I ZR 65/96 – Laras Tochter). Hence, a holder of an exclusive licence to communicate to the public may sue for infringement of UrhDaG (so long as communication to the public in Art. 17 CDSMD is interpreted as communication to the public within the meaning of Art. 3 InfoSoc Directive). By contrast, all statutory remuneration claims foreseen in the UrhDaG pertain directly to the original authors or artists.

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")?

S 1(1) UrhDaG refers to a communication to the public without further specification. According to the prevailing view in German literature, the terms in Art. 3 InfoSoc-Directive and s. 1(1) UrhDaG coincide in their field of application, as s. 1 (1) UrhDaG provides for a sector-specific definition of communication to the public (cf. Leistner, 'Der Referentenentwurf zur Umsetzung der DSM-RL und die Theorie vom Sui-generis-Charakter des Art. 17 DSM-RL', ZUM 2020, 897; Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int., also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3989726)). Although the first governmental draft was based on the view that Art. 17 is to be understood as a *sui generis* right, the German governmental later on changed its view. Since the concerned provisions specifically define and adapt general copyright law concepts for the specific area of OCSSPs and therefore are systematically rooted in copyright law proper, they should be viewed as *leges speciales*, not *sui generis* (Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int.; Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive', ZGE 2020, 123, 134 et seq.; different opinion Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive', GRUR Int. 2021, 325, 331 et seq.).

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").

Section 2(1) UrhDaG matches the definitions in Article 2(5), (6) subparagraph 1, but adds the element of necessary competition for the same targeted groups from recital 62 sentence 2 CDSMD. Thus, service providers are the providers of services within the meaning of Article 1(1)(b) Directive (EU) 2015/1535 which have as their main purpose, exclusively or at least in part, the storage and making available to the public of a large amount of copyright-protected content uploaded by third parties, organise content, advertise content for the purpose of making a profit, and compete with online content services for the same target groups.

The UrhDaG does not apply to non-profit online encyclopaedias, non-profit educational or scientific repositories, platforms for the development and distribution of open source software, the providers of electronic communications services within the meaning of Article 2 no. 4 of Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services, and cloud services which allow their users to upload content for their own use (s. 3 UrhDaG). Those carve outs are listed in an open way ("such as"). Moreover, a service provider whose main purpose is to participate in or facilitate copyright infringements may not rely on the liability relief provided by s. 1(2) UrhDaG which parallels, by and large, Article 17(4) CDSMD (s. 1(4) UrhDaG).

Furthermore, s. 2(2), (3) UrhDaG provide definitions for "Start-up service providers" and "Small service providers", for which special rules apply (see below).

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.

Providers generally did not perform any act of communication to the public themselves (except on the basis of the ECJ's case law on Art. 3 InfoSoc-Directive). Prior to the UrhDaG, the subject matter of that act was largely ruled by the concept of *"Stoererhaftung"* which included duties of care for providers and a notice-and-takedown and staydown procedure. The safe harbours provided by the ECD (Directive 2000/31/EC)) applied. In addition, providers were rarely liable for damages. Hence, liability shifted from secondary to primary.

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?

S 10 Telemedia Act (TMG) transposes Article 14 of the ECD. However, this provision is no longer applicable to service providers within the scope of the UrhDaG (s. 1(3) UrhDaG).

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.

If the service provider fulfils its obligations under s. 4 and s. 7 to 11 UrhDaG in accordance with the high standards which are customary in the industry, taking into account the principle of proportionality, it is not liable under copyright law for an act of communication to the public. s. 4 UrhDaG contains an obligation to acquire licences. Every service provider is obliged under s. 8(1) UrhDaG to terminate the communication to the public of a work by blocking as soon as the right-holder so requests and gives a duly substantiated notice of the unauthorised communication to the public of the work (so-called simple blocking). This is equivalent to a takedown approach. Moreover, most service providers, under s. 7(1) UrhDaG, must ensure, as far as possible, by blocking or removal that a work is not communicated to the public and will in future not be available for this purpose (staydown approach), as soon as the right-holder so requests and provides the information required for such purpose (so-called qualified blocking). In any case, service providers have to immediately inform the user of the blocking of the content uploaded by the user and must advise the user of the right to lodge a complaint (s. 7(3), 8(2) UrhDaG).

However, s. 9 UrhDaG modifies those blocking obligations significantly since, in order to avoid disproportionate blocking by automated procedures, uses presumably authorised by law must be communicated to the public up until the conclusion of a complaints procedure. Uses presumably authorised by law refer to certain minor uses or flagged as legal user-generated content. It is rebuttably presumed that such content is legal if (1) it contains less than half of a work or several works by third parties, (2) combines the part or parts of a work with other content, and (3) uses the works of third parties only to a minor extent (which is specified by s. 10 UrhDaG) or is flagged as legally authorised. Furthermore, service providers must immediately inform the right-holder of the communication to the public and must advise the right-holder of the right to lodge a complaint.

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 s. 1(2) UrhDaG, the service provider must fulfil its obligations in accordance with high standards customary in the industry. Neither the law nor the explanatory memorandum contain a more precise definition. There are, however, four examples of parameters to consider: (1) the nature, audience and scope of the service, (2) the nature of the works uploaded by users of the service, (3) the availability of appropriate means of fulfilling the obligations, and (4) the costs incurred by the service provider for the means. s. 1(2) UrhDaG, thereby, adopts the term *"branchenübliche Standards*" (standards customary in the industry) from the German version of Article 17(4) lit. b.

A best efforts standard is imposed on acquiring licences in s. 4(1) and on the qualified blocking obligation in s. 7(1) UrhDaG (see below). The term *"bestmögliche Anstrengungen*" used in s. 4(1) and *"bestmöglich sicherzustellen"* in 7(1) UrhDaG can be translated or understood, respectively, as "best efforts" and resembles the term *"alle Anstrengungen"* ("all efforts") used in Article 17(4) of the German version of the CDSMD. Overall, on a high level the wording seems to be in line with the directive's stipulation.

However, with regard to the obligation of best efforts to acquire licenses, s. 4 (2) contains certain specific limitations of the obligation of the targeted service providers (duty to take licenses only in regard to content which, by its nature, is manifestly communicated to the public by the service provider in more than minor quantities, and duty to consider only licensing offers which cover a considerable repertoire of works and right-holders), which effectively are more limited than the Directive's standard and which, while promoting collective management of rights, might work at the disadvantage of individual licensing offers by small right-holders with non professionally managed small individual repertories.

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

The principle of proportionality is enshrined in s. 1(2) UrhDaG on the providers' immunity (see above). Furthermore, the best efforts standard in s. 4(1) and 7(1) UrhDaG can be considered a manifestation of the principle of proportionality. Moreover, there are less stringent obligations for start-ups and small service providers in line with the Directive's graduated approach (see below).

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.

Generally, the nature and scope of the service have to be considered in specifying obligations. More specifically, as also prescribed by Article 17(6), start-up service providers are not required to block removed content in the future (stay down), as long as the average monthly number of unique visitors to the service's websites does not exceed five million (s. 7(4) UrhDaG). Start-up service providers are service providers with an annual turnover within the European Union of no more than 10 million euros whose services have been available to the public in the European Union for less than three years (s. 2(2) UrhDaG).

Based on the proportionality requirement in Article 17(5) CDSMD, German law also rebuttably presumes that small service providers are not obliged to block removed content in the future (staydown). Small service providers are service providers with an annual turnover within the European Union of no more than 1 million euros (s. 2(3) UrhDaG). Hence, service providers in this category are usually not required to use automated technologies to detect protected content or other methods of proactive blocking (explanatory memorandum 19/27426 p. 138).

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.

According to s. 13(1), (2) UrhDaG, participation in complaints procedures and alternative dispute resolution is voluntary for right-holders. However, in order to pursue their rights, right-holders must give a duly substantiated notice of the unauthorised communication to the public (s. 8(1) UrhDaG) and provide the information required for blocking or removal of the work (s. 7(1) UrhDaG). Service providers are only obliged to block future unauthorised uses of the work after the right-holder has provided the information required for such purpose (s. 8(3) UrhDaG).

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.

In course of the internal complaints procedure, right-holders can earmark content: if, following a review by a natural person, a trustworthy right-holder declares that the presumption of presumably authorised use is to be rebutted and that the continued communication to the public substantially impairs the economic exploitation of the work, the service provider is obliged to immediately block the work up until the conclusion of the complaints procedure (s. 14(4) UrhDaG). Thus, a trustworthy right-holder, such as right-holders with larger and/or premium repertories, qualified personnel, a case history of justified notice and takedown requests etc., can make the provider derogate from the general rule of upholding presumably authorised user-generated content until the conclusion of

a complaints procedure (so-called "red button", Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int.)).

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.

The UrhDaG does not explicitly provide a specific rule. However, the general principle according to s. 7(2) Telemedia Act (TMG) contains such an immunity and is still applicable to service providers, since s. 1(3) UrhDaG only excludes s. 10 TMG.

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.

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.

Section 51 Copyright Act enshrines rules on quotations and mainly requires a purpose of quotation or artistic examination insofar as such use is justified to that extent by the particular purpose. Caricature, parody or pastiche, prior to the adoption of the new law, was covered in case law based on s. 24 German Copyright Act, the so-called doctrine of flexible 'free use' which contained a general standard for certain fair use resulting in creative works. However, that doctrine was effectively nullified by the CJEU in its judgment, C-476/17, ECLI:EU:C:2019:624, *Pelham v Hütter* (because as such it is not contained in the closed-shop catalogue of permissible exceptions to copyright in the InfoSoc Dir.). Therefore, when implementing the Directive, the German legislator deleted s. 24 German Copyright Act (with some elements of the doctrine remaining in a new s. 23 (1) sentence 2 German Copyright Act), and regulated caricature, parody and pastiche in the new provision of s. 51a, which was introduced along with the UrhDaG, and now expressly permits caricature, parody and pastiche. The understanding of parody now follows the ECJ's *Deckmyn* decision.

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

Pursuant to s. 5(1) No. 3 UrhDaG, the general limitations on copyright apply. Also, s. 23 (1) sentence 2 might arguably apply in certain cases where transformative use by users is highly creative so that the original used work is in essence no longer based on the original used work because it is sufficiently distant from that original used work.

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.**

Under s. 4(2) UrhDaG, rights of use must apply to content which, by its nature, is manifestly communicated to the public by the service provider in more than minor quantities, covers a considerable repertoire of works and right-holders, covers the territorial scope of this Act, and allows for use under reasonable terms and conditions (see for a discussion on these requirements from the perspective of the Directive's best efforts standard **above Question 9**). In order to ensure the authors' adequate remuneration for OCSSP uses, s. 4(3) provides a complementary direct claim to adequate remuneration, where the author has granted a right to communication to the public to a third party. This direct claim is unwaivable and can only be enforced by collecting societies (Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int.)). Moreover, service providers must pay the author appropriate remuneration for the communication to the public (s. 5(2) UrhDaG).

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.

Section 6 UrhDaG states that both the service provider's licence also extends to the user, provided that the user is not acting on a commercial basis or does not generate a substantial income, and that the user's licence extends to the service provider.

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?

Section 9 modifies the providers' blocking obligations (see above). Presumably authorised uses must be communicated to the public up until the conclusion of a complaints procedure. The entire mechanism is therefore limited in time until the end of the complaint and redress procedure. It is rebuttably presumed that user-generated content is legal if (1) it contains less than half of a work or several works by third parties, (2) combines the part or parts of a work with other content, and (3) uses the works of third parties only to a minor extent (which is specified by s. 10 UrhDaG) or is flagged as legally authorised (which is specified by s. 11 UrhDaG).

Under s. 10 UrhDaG, uses of works are deemed to be minor within that meaning (provided that they do not serve commercial purposes or only serve to generate insignificant income) in event of up to 15 seconds in each case of a cinematographic work or moving picture, of up to 15 seconds in each case of an audio track, of up to 160 characters in each case of a text, and up to 125 kilobytes in each case of a photographic work, photograph or graphic. In the event of minor use in that sense, the user is not liable under copyright law for the communication to the public of uses presumably authorised by law until the conclusion of a complaints procedure (s. 12(3) UrhDaG).

If user-generated content does not constitute minor use as per s. 10 UrhDaG, the user may flag the use as authorised by law upon a provider's information about a right-holder's blocking request (s. 11(1) UrhDaG). If user-generated content is to be blocked automatically only after it has already been uploaded, the content is deemed to be a use presumably authorised by law for 48 hours even without any flagging (s. 11 (2) UrhDaG).

Service providers must pay the author appropriate remuneration for the communication to the public of uses presumably authorised by law under s. 9 to 11 (s. 12(1) UrhDaG). Service providers are not liable under copyright law for the communication to the public of uses presumably authorised by law under s. 9 to 11 until the conclusion of a complaints procedure, at the latest until the expiry of the time limit for a decision on the complaint according to s. 14 (3). After the decision on the complaint has been made, service providers are only liable for damages under copyright law if they have negligently violated the obligations under s. 14 UrhDaG as regards the carrying out of the complaints procedure; claims for injunctive relief and removal remain unaffected (s. 12(2) UrhDaG).

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, it does not. But effectively the LNI regulation of permitted minor uses or permitted flagged legal uses reduces the role of *ex ante* filtering with regard to blocking or stay down to manifestly infringing uses since for the specifically defined minor uses or flagged legal uses effectively only delayed takedown will apply, whereas only for uses which go beyond the statutorily defined quantitative thresholds for minor uses or flagged legal uses immediate blocking and stay down applies.

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.

Users may flag their user-generated content as legal under s. 11 UrhDaG (see above). Trustworthy right-holders, for certain economically valuable content can reach immediate blocking or stay down (even if it is minor or flagged content under the quantitative thresholds of the German Act) on condition that there has been human review on their side before the request for such qualified stay down. Also, the Act provides for the possibility to immediately block certain time sensitive content (live sports events, film premieres etc.), see s. 7 (2) sentence 2 UrhDaG. The German Act also provides further regulation of the legal consequences if right-holders or users repeatedly misuse either the earmarking mechanism (for the right-holders) or the flagging mechanism (for the users); effectively in such cases of misuse, right-holders or users will have to be blocked from the earmarking or flagging mechanism by the service providers for a proportionate amount of time; see s. 18 UrhDaG and Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int. on the details).

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.

Part 5 of the UrhDaG (s. 13-17) establishes rules for legal remedies including an internal complaints procedure (s. 14 UrhDaG). Pursuant to s. 13 (1), participation in that procedure is voluntary for users and right-holders. Furthermore, the right to appeal to the courts remains unaffected by the UrhDaG (s. 13 (4)).

Service providers must make available internal complaint procedures in respect of the blocking and the communication to the public that are effective, free and expeditious (s. 14 UrhDaG). According to s. 14 (3) UrhDaG, service providers are obliged to immediately notify the complaint to all the parties involved, give all the parties involved the opportunity to comment, and decide on the complaint, at the latest within one week after its submission. Decisions on complaints must be made by humans who are impartial (s. 14(5) UrhDaG). s. 15 UrhDaG states that service providers may also use recognised external complaint bodies to fulfil their obligations under s. 14.

Section 16 UrhDaG states that right-holders and users may also call upon a private law arbitration body for alternative dispute resolution or – if there is no such body – an official arbitration body pursuant to s. 17 UrhDaG.

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.

Part 5 of the UrhDaG (s. 13-17) establishes rules for legal remedies including alternative dispute resolution by private arbitration bodies (s. 16) and alternative dispute resolution by an official arbitration body (s. 17). Pursuant to s. 13 (2), participation is voluntary for users and right-holders. Furthermore, the right to appeal to the courts remains unaffected by the UrhDaG (s. 13 (4)).

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.

If an alleged right-holder repeatedly requests that the service provider block a work belonging to a third party as the right-holder's own work or a work in the public domain, the service provider must exclude the alleged right-holder from the procedures under s. 7 and s. 8 for an appropriate period of time (s.18(1) UrhDaG).

If an alleged right-holder intentionally or negligently requests that the service provider block either a work belonging to a third party or a work in the public domain as the right-holder's own work, then said right-holder is obliged to compensate the service provider and the user concerned for the resulting damage (s. 18(2) UrhDaG).

If a right-holder repeatedly and wrongly demands the immediate blocking of uses presumably authorised by law during the complaints procedure or simple blocking on account of a distortion of his or her work, then the right-holder must be excluded from the relevant procedure for an appropriate period of time (s. 18(3) UrhDaG).

After an abusive blocking request in respect of works in the public domain or works whose use is authorised by anyone free of charge, service providers must ensure, to the best of their ability, that these works are not blocked again (s. 18(4) UrhDaG).

If a user repeatedly and wrongly flags a use as authorised by law, service providers must exclude the user, for an appropriate period of time, from the possibility of flagging authorised uses (s. 18(5) UrhDaG).

If a service provider repeatedly and wrongly blocks authorised uses, a registered association whose purpose is to promote the interests of users on a non-commercial and not merely temporary basis may claim injunctive relief against the service provider (s. 18(6) UrhDaG).

AC 13: Information obligations

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

According to s. 5(3) UrhDaG, service providers must, in their general terms and conditions, draw the user's attention to the uses authorised by copyright law.

Pursuant to s. 7(3) UrhDaG, the service provider has to immediately inform the user of the blocking of the content uploaded by the user and must advise the user of the right to lodge a complaint.

In case of uses presumably authorised by law (s. 9), the service provider has to immediately inform the right-holder of the communication to the public and must advise the right-holder of the right to lodge a complaint in order to have the presumption reviewed (s. 9 (3) UrhDaG).

Moreover, s. 19 UrhDaG provides specific rights to information: right-holders may demand information from service providers regarding the use of their repertoire authorised by contract pursuant to s. 4 (s. 19(1) UrhDaG). Right-holders may also request appropriate information from service providers regarding the mode of operation of the procedures for blocking unauthorised uses of their repertoire pursuant to s. 7 and 8 (s. 19(2) UrhDaG). Furthermore, the service provider grants authorised persons pursuant to s. 60d (2) of the Copyright Act access to data on the use of procedures for the automated and non-automated detection and blocking of content for the purpose of scientific research, insofar as overriding interests of the service provider meriting protection pose no obstacle thereto; thereby, the service provider is entitled to reimbursement of the resulting costs in a reasonable amount (s. 19(3) UrhDaG).

AC 14: Waiver

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

UrhDaG's provisions may not be derogated from by contract (s. 22 UrhDaG). However, under German copyright law, a right-holder can grant non-exclusive rights to all free of charge (s. 33(3) sentence 3 Copyright Act).

AC 15: Entry into effect

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

The UrhDaG came into force on 1 August 2021.

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.

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.

As opposed to many other member states, Germany did not transpose Article 17 literally but instead added many provisions and details. Almost all noteworthy divergences have been expounded above.

Effectively, the German implementation widely derogates from the wording of Art. 17 but from my point of view it represents a viable and very considerate way to effectively comply with the requirements to implement Art. 17 in line with the EU Charter of Fundamental Rights as set out in the ECJ's judgment in Case C 401/19, of April 26, 2022, ECLI:EU:C:2022:297, and in particular in the Opinion of Advocate General Øe in the said case, as well as in the Commissions Guidance on the implementation of Art. 17, Communication of the Commission, Guidance on Article 17, COM(2021) 288 final of 4.6.2021. In fact, the German implementation is in line with the requirements set out in this judgment and these documents, albeit some smaller issues could arise in regard to the specific protection for certain time sensitive content (see s. 7 (2) sentence 2 UrhDaG) and for trustworthy right-holders (in regard to economically important content and on condition that there was human review on the side of the right-holder, see s. 14 (4) UrhDaG), because in these German Act provides for immediate blocking and stay down even if presumably legal (minor or flagged uses) are concerned.

Further, it should be mentioned that s. 5(2) UrhDaG requires service providers to pay the author appropriate remuneration for the communication to the public of caricatures, parodies and pastiches even though the new general limitation on caricatures, parodies and pastiches in s. 51a Copyright Act does not contain any statutory remuneration right. Apart from that discrepancy, UrhDaG does not declare quotations subject to a remuneration claim which causes additional delineation issues (Leistner, 'The implementation of Art. 17 DSM-Directive in Germany – a primer with some comparative remarks' (forthcoming GRUR Int.)).