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

SPAIN

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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: SPAIN

National Expert: DR MIQUEL PEGUERA (Universitat Oberta de Catalunya)

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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.

Yes, prior to the adoption of the CDSMD, Spanish law provided protection for press publications. Such protection was introduced by means of Law 21/2014 of 4 November, which amended Art. 32(2) of Spanish Intellectual Property Act (**hereinafter, LPI**).[1] However, the law did not use the term "press publications"; rather, it described the subject matter as content divulgated in periodical publications or in websites periodically updated, and having the purpose of information, public opinion creation, or entertainment.

Under Art. 32(2) LPI, which entered into force on 1st January 2015, the making available of non-significant fragments of that subject matter by providers of electronic services of aggregation did not require authorization, and the publisher – or, as the case could be, other right-holders – had the right to perceive an equitable compensation. Such right was unwaivable and compulsorily managed by a collective management organization. However, images included in the subject matter were left out of that regime; therefore the making available of any image making part of the subject matter did need authorization.

That regime established an exception for search engines (as opposed to aggregators), which continues to be in force after the implementation of the CDSMD – now as a derogation from the new rights. That exception refers to the use of the subject matter by search engines, and it's laid down in the second paragraph of Art. 32(2) LPI. It must be noted that the provision doesn't actually use the term "search engines"; rather it refers to "service providers facilitating location tools of individual words included in [the subject matter]." According to this provision, the making available by those providers is neither subject to authorization nor to equitable compensation, provided that some conditions were met.[2] Namely, such making available to the public must be (i) carried out without commercial purpose on its own; (ii) limited to what is strictly needed to offer search results in response to search queries; and (iii) include a link to the origin web page.

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).

Yes, Art. 15 CDSMD has been transposed into Spanish national law by means of the Royal Decree-law 24/2021, of 2 November 2021 (**hereinafter, RDL 24/21**) which entered into force on 4 November 2021. In particular, RDL

[1] Please note that Spanish law and practice uses the expression *Intellectual Property* to refer exclusively to copyright and related rights, excluding the rights falling under the label of 'Industrial Property', such as patents, trademarks, or designs). An updated consolidated version of the LPI is available at https://www.boe.es/eli/es/rdlg/1996/04/12/1/con.

[2] The provision was – and continues to be – badly written. In particular it does not state *what* is made available by search engine providers. Apparently, it means the making available of fragments of press publications in the search results provided in response of a user's search query – that is, in the title of each result, and in the short snippet below it, which is taken from the page to which the result is pointing.

24/21 transposes Art. 15 CDSMD essentially by introducing a new Art. 129bis into the LPI. In this Part of the questionnaire we will use the term "the rights" to refer to the rights granted under the transposition of Art. 15 CDSMD.

The transposition is mostly textual, but it does introduce some peculiarities, such as the requirements for the granting of authorizations, or some tweaks in different elements, such as regarding the exclusion of individual words or very brief extract, as noted in this questionnaire.

A crucial caveat: while the LNI is currently in force, it will, in all likelihood, be superseded by a new transposition measure which is currently under discussion in Parliament. This is so because the government resorted to an exceptional type of instrument to carry out the implementation – a Royal Decree Law, which is reserved to situations of urgency. The urgency, in this case, was the fact that the deadline for transposition had already expired and Spain risked being sanctioned by the EU for that. A RDL is drafted and approved solely by the government. Only after its approval it is submitted for ratification by Parliament, which is necessary for it to keep its validity. The Spanish Parliament did ratify the RDL 24/21. Nonetheless, right after ratification, the government introduced the very same text as a new draft bill, so that it may be debated and, eventually, a new law is enacted that will supersede the original LNI. Whether this future law will introduce changes, big or small, remains to be seen.

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 Royal Decree-law 24/2021 is available at https://www.boe.es/eli/es/rdl/2021/11/02/24/con

There is no official translation of it into English.

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.

The subject matter is press publications, which are defined in the new Art. 129bis(5) LPI, following the Directive's language almost verbatim. Two small differences may be found, though. Art. 2(4) CDSMD states: "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter…" Instead of "which *also can include*...," the Spanish transposition says "which also includes". And when it mentions "other works", it adds: "in particular, photographs and videos." The exclusion of periodicals published for scientific or academic purposes is laid down in Art. 129bis(6)(e) LPI.

In addition, the LNI excludes from the scope of application the websites, such as blogs, which provide information but not as an activity carried out under the initiative and with the responsibility and control that characterize a news publisher [Art. 129bis(6)(f) LPI].

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.

The LNI [Art. 129bis(6)(c) LPI] excludes from protection the use of individual words or extracts which are either very short or of little significance, both in quantitative and in qualitative terms, provided that the online use of them by ISSPs (i) does not harm the investments made by press publishers and news agencies for publishing those contents, and (ii) does not affect the effectivity of their exclusive rights granted by that provision. Establishing those conditions constitutes a remarkable departure from the Directive.

As to the definition, the LNI does not define "very short" extracts, nor "of-little-significance" extracts, but it does state that those characteristics may be satisfied either in quantitative or in qualitative terms.

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

The LNI does not mention, nor establish a particular regime for, mere facts reported in a press 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?

Just like the CDSMD, the LNI sets forth that the rights cannot be invoked to prohibit the use of works or other subject matter for which protection has expired [Art.129bis(7)(b) LPI].

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.

The beneficiaries are "press publishers" and "news agencies" which are established in Spain [Art.129bis(1) LPI] when they publish press publications in the sense of the provision. None of those entities is defined in the LNI.

AC 3: Restricted acts

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

Against acts of reproduction (direct or indirect, temporary or permanent, by any means and in any form, in whole or in part) and of making available (by wire or wireless means) of press publications by ISSPs [Art.129bis(1) LPI].

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

Acts of hyperlinking are expressly excluded from protection [Art. 129bis(6)(b) LPI]. Hyperlinking, however, is not defined.

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.

Yes, just like in the Directive, the LNI targets ISSPs. The rights only concern the use (reproduction and making available) of press publications by ISSPs. The LNI does not provide a definition of ISSP. Spanish law already has a definition of ISSP, in the same terms of Directive (EU) 2015/1535, which can be found in a different instrument – i.e., the 2002 law that transposed the E-Commerce Directive.

The private or non-commercial use of press publications by individual users is excluded from protection [Art. 129bis(6)(a) LPI].

The transposition of Art. 15 CDSMD does not mention in particular OCSSPs or other online platforms. However, as they fall within the definition of ISSP, they are also covered. That is: the rights include the online uses of press publications by online platforms.

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.

a) The rights cannot be invoked against authors and other right-holders, and shall not in themselves deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated. In this regard, the LNI follows the Art 15(2) CDSMD) but adds the tweak "in themselves" [Art.129bis(1), second paragraph, LPI].

b) Likewise, the LNI sets forth that the rights cannot be invoked to prohibit the use by other authorised users when a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence [Art.129bis(7)(a) LPI].

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.

The LNI states that the rights will not apply to content whose use is covered by an exception or limitation to copyright or to related rights [Art. 129bis(6)(g) LPI].

Spanish copyright law provides for many of the exceptions and limitations allowed under Article 5 of Directive 2001/29/EC. It has also implemented Directive 2012/28/EU on Orphan Works, and Directive (EU) 2017/1564 on the Marrakech Treaty. In addition, the LNI implemented Articles 3(1), 4(1), 5(1), 6(1) and 8(2) of the CSDMD. Moreover, the LNI established the exception of pastiche, which was not previously recognized in Spanish law.

The applicability of a particular exception or limitation, and whether it may be relevant for the type of uses comprised under the press publishers' right, will depend on the nature of that exception or limitation, and on the specific circumstances of the case. In any event, the transposition of the press publishers' right does not provide for a carve-out against the applicability of any exception or limitation.

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.**

Yes, the LNI includes some provisions on the licensing of uses of press publications. Those provisions are to be found in Art. 129bis(3)-(4) LPI, and can be summarized as follows.

- Press publishers and news agencies may authorize the use of their rights to ISSPs. The negotiations for granting those authorizations shall be carried out under the principles of contractual bona fide, due diligence, transparency, and respect for the rules on antitrust, excluding the abuse of a dominant position.

- The authorization shall be granted by means of an ad hoc agreement entered into with the ISSP, which must meet these requirements:

(i) the editorial independence of press publishers and news agencies must be respected.

(ii) in the context of the agreement, the ISSP shall inform in a detailed and sufficient form about the main parameters determining the classification of the contents, and the relative importance of those main parameters, in accordance with Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. Such information must be kept updated.

(iii) the agreement cannot be linked to other contracts or obligations which do not deal with the exploitation of the press publications.

(iv) the competence to deal with disputes about the authorization agreement will correspond to the First Section of the Intellectual Property Commission – an administrative body appointed by Government – whose decisions may be appealed before the competent courts.

- Press publishers and news agencies may also grant their authorizations by means of collective management organizations. In such a case, the requirements listed above must also be observed.

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.

Following the language of the Directive, the LNI establishes that authors of works incorporated in a press publication shall receive an appropriate share of the revenues that press publishers and news agencies receive for the use of their press publications by ISSPs. The LNI adds that authors may also, optionally, resort to collective management organizations to exercise that right [Art. 129bis(8) LPI].

AC 8: Term of protection

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

The term of protection is two years, calculated from 1 January of the year following the date on which the press publication is published [Art. 130(3) LPI].

AC 9: Waiver

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

The LNI does not explicitly prohibit right-holders waiving their rights, or granting the authorization for free. Nonetheless, it does require that the authorizations are granted by means of an agreement which is subject to the requirements noted in question 15 above.

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 effect on 4 November 2021. It does not apply to press publications which were published for the first time 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.

A small point: the LNI does not include the provision laid down in Art. 15(3) CDSMD, according to which Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 shall apply mutatis mutandis in respect of the rights.

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).

Yes, Art. 17 CDSMD has been transposed into Spanish national law by means of the Royal Decree-law 24/2021, of 2 November 2021 (**hereinafter, RDL 24/21**) which entered into force on 4 November 2021. In particular, the transposition was made in Art. 73 of RDL 24/21, outside the LPI.

The transposition is mostly textual, but it does introduce some remarkable departures from the Directive, including the possibility of bringing unjust enrichment actions seeking compensation against OCSSPs which have complied with all the requirements for the immunity provided for in Art. 17(4) CDSMD, or that works and other subject matter which are the subject of the complaint and redress mechanism must be kept down during the processing of the complaint.

As already noted in question 2 of Part I, while the LNI is currently in force, it will, in all likelihood, be superseded by a new transposition measure which is currently under discussion in Parliament, which may or may not bring about relevant changes.

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.

There is no official translation into English.

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?

Same as in the CDSMD: copyright-protected works and other protected subject matter [Art. 73(1) RDL 24/21].

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.

Same as in the CDSMC: copyright and related rights' owners [Art. 73(1) RDL 24/21].

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")?

Same as in the CDSMC: against the act of giving the public access to copyright-protected works or other protected subject matter uploaded by OCSSPs' users; such acts are legally qualified as acts of communication to the public or acts of making available to the public for the purposes of the LNI [Art. 73(1) RDL 24/21].

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").

The LNI targets OCSSPs, which are defined in Art. 66(6) RDL 24/21. Unlike the CDSMD, which requires those providers to store and give access to a *large amount* of copyright protected subject matter, the LNI requires them to store and give access to protected content *either* in big numbers *or* having a large audience in Spain. Apart from that, the definition is the same than the one provided by the CDSMD. No elements taken from the recitals are added to the definition.

The carve-outs are the same as those in the second paragraph of Art. 2(6) CDSMD, the only difference being that for both online encyclopaedias, and educational and scientific repositories, it is required that they have *neither direct nor indirect* for-profit intent [Art. 66(6) RDL 24/21]. The carve-outs are listed in the same way as in the Directive, i.e., preceded by the words "such as". Thus, they are arguably an open list.

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.

Before the LNI, the law did not state whether OCSSPs would perform an act of communication to the public or an act of making available to the public when giving access to content uploaded by their users. It was thus an open question that would depend on the application of the CJEU criteria on a case-by-case basis.

Indirect or secondary infringement was introduced into Spanish copyright law in 2014. Law 21/2014 extended the status of infringers to: (i) those who knowingly induce the infringing conduct; (ii) those who, knowing or having reason to know about the infringing conduct, cooperate with it; and (ii) those who, with a direct economic interest in the outcome of the infringement have the capacity to control the infringer's conduct [Art. 138 LPI, as amended by Law 21/2014 of 4.11.2014]. Under those criteria it can't be ruled out that an OCSSP could be deemed indirect infringer, depending on the circumstances of the case.

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?

Yes, before the adoption of the LNI, Spanish courts held, in a copyright infringement case, that a platform like YouTube was shielded from liability under the national implementation of the ECD hosting safe harbour.[3]

Under the LNI, the national implementation of the ECD hosting safe harbour no longer applies to OCSSPs regarding the liability arising from carrying out acts of communication or making available to the public. This is established in Art. 73(3) RDL 24/21. This provision also establishes – apparently, although the actual wording is very bad and confusing – that, just like in Art 17 CDSMD, this will not affect the applicability of the safe harbour for purposes other than communication or making available to the public.

[3] Madrid Court of Appeals, Section 15th, Judgment of 14.01.2014, *Telecinco v. YouTube*, ECLI:ES:APM:2014:4. The hosting safe harbour was implemented in Art. 16 of Law 34/2002 on Information Society Services and Electronic Commerce.

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.

Yes, it provides an immunity in the same terms than Art. 17(4) CDSMD, which is implemented essentially verbatim by the LNI in Art. 73(4) RDL 24/21. A small difference, already present in the Spanish version of the Directive, regards the type of efforts required, which are the OCSSP's *biggest* efforts, instead of *best* efforts.

Obligations to take action against infringing content are laid down in the same terms than in Art. 17(4) CDSMD, without further clarification, except for the fact that the LNI establishes an additional requirement when it comes to the retransmission of live events. Namely, regarding live events, OCSSPs must remove, or disable access to, the content *during the retransmission* of the concerned live event [Art. 73(4) RDL 24/21].

On top of that, the LNI adds a remarkable provision to the effect that, even if the OCSSP meets the conditions for the immunity, right-holders may still bring an action for unjust enrichment against it, if unauthorized content continues to be available and that harms right-holders. This is laid down in a final paragraph within Art. 73(4) RDL 24/21. My own translation is as follows:

> "Without prejudice to the above [essentially, the text of Art. 17(4) CDSMD, plus the noted requirement regarding live events], right-holders will be able to exercise legal actions aiming to re-establish [arguably, it really wanted to say "compensate" instead of "re-establish"] the economic harm, such as the action of unjust enrichment, where, even though the service providers had made their biggest efforts to remove the unauthorized content, such content continues to be exploited by them, causing a significant prejudice to right-holders."[4]

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.

The Spanish language version of the CDSMD uses in Art. 17(4) the term "the biggest efforts" instead of "best efforts". In this vein, the LNI sticks to the Spanish version of the Directive, although the LNI says "their biggest efforts", instead of "the biggest efforts" [Art. 73(4) RDL 24/21].

As noted, Art. 17(4) CDSMD is implemented essentially verbatim, and thus, the LNI also says, in point (b), that the efforts must have been done "in accordance with high industry standards of professional diligence" – actually, it uses the same language of the official Spanish version of the Directive [Art. 73(4) RDL 24/21].

No additional clarification or standard of care is provided by the LNI.

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

The LNI implements Art. 17(5) CDSMD exactly in the same terms, in Art. 73(6) RDL 24/21. No further specifications are provided.

[4] Art. 73(4) RDL 24/21, last paragraph. The paragraph refers to "their biggest *efforts to remove* the unauthorized content", which is not the exact language of the condition for immunity – the Art. 17(4) CDSMD, and the LNI, establishes the duty of *acting expeditiously* to remove, not of making *best efforts* to remove. The best efforts clause is used in connection to *ensuring the unavailability* of content (point (b)), and in connection to *preventing future uploads* (point (c)). Nonetheless, my understanding is that the provision does *not* mean that the unjust enrichment action will be available where the provider failed to act expeditiously to remove content upon notice (actually, that would make no sense, as in that case the immunity would not be available and thus an infringement action would be feasible in the first place); rather, I read it as meaning that the action for unjust enrichment will be possible where the infringing content keeps being available, causing harm to right-holders, even if the OCSSP has met all the conditions laid down in Art. 17(4) CDSMD.

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.

The LNI implements Art. 17(6) CDSMD exactly in the same terms, in Art. 73(7) RDL 24/21. No further specifications are provided as to the characteristics of the specific OCSSP.

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.

Yes, in the same terms than in Art. 17(4) CDSMD. That is, right-holders must provide the OCSSP with the relevant and necessary information so that the latter may make best (biggest) efforts to ensure the unavailability of unauthorized content and send sufficiently substantiated notices so they can expeditiously disable access to, or remove from their websites, specific works or other subject matter [Art. 73(4) RDL 24/21].

Therefore, no relevant differences may be noted between the Directive and the LNI in this regard.

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 provision in this regard in the LNI.

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.

It does not. The Directive states that "[t]he application of this Article shall not lead to any general monitoring obligation". The LNI says, instead, "[OCSSPs] won't have a general monitoring obligation" [Art. 73(9) RDL 24/21].

Just like the Directive, the LNI does not define general monitoring.

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.

It does not.

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.

Prior to the adoption of the LNI, Spanish copyright law already provided for a limitation for the purposes of quotation, analysis, commentary or criticism – but only for education or research. These limitations continue to apply to uses on OCSSPs. It also provided for a limitation for uses of parody. No limitation for caricature or pastiche was provided for.

The LNI introduces pastiche as a new copyright limitation meant both for online and offline uses. It is established in Art. 70 RDL 24/21. My own translation is as follows:

> "No authorization from the author or right-holders is needed for the transformation of a divulgated work consisting of taking certain characteristic features from an artist's work and combine them so that they give the impression of being an independent creation, provided that this neither comports risk of confusion with the original works or subject matter, nor inflicts harm to the original work or to its author. This limitation will also be applicable to uses other than digital uses."

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

The LNI establishes as follows (my own translation):

> "The cooperation between online content-sharing service providers and rights owners shall not prevent users from uploading and making available to the public contents from works or other subject matters which do not infringe such rights or which are made for the purposes of quotation, analysis, commentary or criticism, review, illustration, parody or pastiche." [Art. 73(8) RDL 24/21].

It must be noted that, in addition to the specific exceptions mentioned, this paragraph also refers generally to the situations where the uploading and making available by the user do not infringe copyright or related rights. Therefore, the paragraph arguably means that any exception or limitation to those rights currently recognized under Spanish law – and not only those expressly mentioned – will apply.

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.**

When establishing that OCSSPs shall obtain an authorization from right-holders, the LNI adds that the negotiation of those authorizations shall be carried out under the principles of contractual bona fide, due diligence, transparency, and respect for free competition, excluding the exercise of a dominant position [Art. 73(1) RDL 24/21]. Other than that, the LNI does not include provisions on the licensing of relevant uses.

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.

The LNI establishes that when an OCSSP obtains a license, such license will also include, within the scope of the authorization granted and under the same conditions, the acts of communication or making available to the public carried out by the OCSSP's users, provided that those users are not acting on a commercial basis or where their activity does not generate significant revenues [Art. 73(2) RDL 24/21]. The LNI follows the language of Art. 17(2) CDSMD, with the added precision that this will be "within the scope of the authorization granted and under the same conditions".

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?

The LNI implements Art. 17(7) CDSMD by establishing that the cooperation between OCSSPs and rights holders shall not prevent users from uploading and making available to the public works or other subject which do not infringe those rights, or are made for the purposes of quotation, analysis, commentary or criticism, review, illustration, parody or pastiche [Art. 73(8) RDL 24/21]. Other than that, the LNI does not provide for a concept of "legitimate uses".

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?

It does not.

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.

It does not.

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. Please include information on the applicable time limits and decision-makers.

The LNI sets forth that OCSSPs must put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of a dispute over the disabling of access to, or the removal of, works or other subject matter uploaded by them [Art. 73(10) RDL 24/21].

In addition – unlike the Directive – the LNI establishes that the works and other subject matter which are the subject of the complaint and redress procedure will not be accessible on the provider's service while the procedure is being dealt with [Art. 73(10) RDL 24/21].

Complaints submitted under that mechanism provided shall be processed in no more than 10 business days [Art. 73(11) RDL 24/21].

Like in the Directive, the LNI establishes that decisions to disable access to or remove uploaded content shall be subject to human review, and then adds: "that is, without automatic intervention of robots or other analogous means." [Art. 73(11) RDL 24/21].

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.

While there's no specific reference to that, it goes without saying that all parties are able to resort to the courts in defence of their rights.

Art. 17(9) CDSMD obliges Member States to ensure that out-of-court redress mechanisms are available for the settlement of disputes. In this vein, the LNI provides that "the First Section of the Intellectual Property Commission will exercise the functions of mediation or arbitration in the disputes related to the access and taking down of works under this article." [Art. 73(12) RDL 24/21].

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 applicable, please include information on the applicable time limits, decision-makers, procedural steps and whether any review is performed by humans.

It does not.

AC 13: Information obligations

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

Yes. Firstly, regarding information to right-holders, the LNI transposes verbatim the second paragraph of Art. 17(8) CDSMD. The only tweak refers to the timing – the LNI says that OCSSPs shall provide right-holders, at their request, with adequate information, every six months, on the functioning of their practices with regard to the cooperation referred to in paragraph 4 [Art. 73(9) RDL 24/21].

Secondly, regarding users, the LNI establishes provides that OCSSPs "will inform their users about their terms and conditions, and about the limitations to [copyrights] for the purposes established in this article and in the [LPI]" [Art. 73(13) RDL 24/21] – a wording slightly different than that in the last paragraph of Art. 17(10) CDSMD, where OCSSPs are explicitly required to inform users "*that they can use* works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law."

AC 14: Waiver

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

The LNI does not explicitly prohibit right-holders waiving their rights or granting the authorisation for free. Nonetheless, it does require that the negotiation of those authorisations is carried out under the principles of contractual bona fide, due diligence, transparency, and respect for free competition, excluding the exercise of a dominant position [Art. 73(1) RDL 24/21].

AC 15: Entry into effect

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

The protection came into effect on 4 November 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)?

It does not.

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.