

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

CROATIA

Last Updated: 21 July 2023

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This comparative report is based on 25 national questionnaires prepared by national legal experts.

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Branka Marušić is a Senior lecturer in EU law at Stockholm University and a qualified Croatian lawyer with diverse professional experience working as a practising lawyer, academic, and legal consultant in projects involving harmonisation and codification of laws in the EU. Branka's primary work interest is the harmonisation of laws in the EU for which she has participated in over 40 projects for the EU Commission in various capacities. She holds an LL.D. and an L.L.M. degree from Stockholm University, and a mag.iur. degree from Zagreb University. Her new book titled *The Autonomous Legal Concept of Communication to the Public: Interpretation in EU Copyright Law* discusses harmonisation in copyright – specifically copyright in an online context. The major bulk of her research revolves around creative industries and how digitalisation, legislation as well as interpretation of that legislation influences them. In the academic year 2023/2024 Branka will be based at Oxford University as a research fellow at the Institute of European and Comparative Law.

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

Country: CROATIA

National Expert: DR BRANKA MARUŠIĆ (Stockholm University)

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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.

Original press publications in Croatia are regarded as separate works of authorship.¹ This status was recognised through the Croatian system for collective management of rights. More specifically, since 2007/2008² the Society for the Protection of Journalists’ Copyright (DZNAP)³ was granted authorisation by the Croatian State Intellectual Property Office to collectively manage the rights of journalists and photojournalists in original press publications and original photographs. The economic rights that are managed by the DZNAP in the original press publications are (a) the right of communication to the public, including the making available right, (b) the right of distribution, and (c) the right of reproduction.

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).

Article 15 CDSMD has been transposed in the Croatian Copyright Act (CCA)⁴ in Title 6 on the Press Publishers Right, which includes the range of articles from Art. 163 to Art. 172 of the CCA. The CCA was adopted on 1 October 2021, made public in the Official Gazette on 14 October 2021, and entered into force on 22 October 2021. The transposition takes a textual approach – the vast majority of provisions have been transposed in an almost literal manner.

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 link for the official version of the CCA in Croatian can be found here: https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1941.html

¹ Branka Marušić, ‘The implementation of Article 15 of the DSM Directive in Croatia: a gold-plating provision’ (2022) 17(9) *JiPLP* 741, 742.

² Državni zavod za intelektualno vlasništvo *Rješenje* klasa: UP/I-612-01/2008-010/0018, ur.br: 559-02/1-11/11.

³ ‘Društvo za zaštitu novinarskih autorskih prava’ <www.dznap.hr> accessed on 17 May 2023.

⁴ Zakon o autorskom pravu i srodnim pravima NN 111/21 (“CCA”).

The link for the unofficial English translation of the CCA can be found here: https://www.dziv.hr/files/file/zastita/zakon_autor_2021_ENG.pdf (it seems that some provisions have been google translated so parts of the provisions are missing – nevertheless it is a useful translation).

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.**

Art. 163(1) and (2) of the CCA contains the definition of the press publications. The definition in the CCA incorporates certain elements that can be found in the recital 56 of the CDSMD. For illustrative purposes the provision of Art. 163(1) and (2) can be seen in the text below. The parts that were taken from recital 56 and inserted in the text of the articles are marked in bold. Additionally, since the press publishers right applies both for offline and online situations,⁵ the transposition of Art. 2(4)(c) of the CDSMD in Art. 163(1) of the CCA identified different types of service providers: newspaper or publication editors, newspaper publishers, media publishers and media service providers. In this regard, the definition has been broadened. This difference is also marked in bold in the text below.

Article 163

“(1) A press publication is a collection composed mainly of literary works of a journalistic nature, which may also include other works or other subject matter of related rights, **including photographs and video content, (recital 56, 3rd sentence)** and which represents an individual element within a periodical or regularly updated publication, published under a single title, with the purpose of providing the public with information related to current news or other topics, such as newspapers or magazines of general or special topics, and which is published in any media under the initiative, editorial responsibility and control of the **newspaper or publication editor or newspaper publisher or media publisher or media service provider.**

(2) Periodicals published for scientific or academic purposes, such as scientific journals, shall not be considered publications referred to in paragraph (1) of this Article.”

- 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.**

Art. 166(3)(3) of the CCA contains an exclusion from the protection of individual words or very short extracts. The national legislation uses this terminology verbatim and provides a clarification on the content of this exclusion. The national legislation is worded in the following manner: ‘individual words or very short extracts, which are no more than a few words that do not contain any photos or video content’. Furthermore, the transposition includes a proportionality assessment. More specifically, the use of individual words or very short extracts should not prejudice the effectiveness of exclusive economic rights. Two examples of such prejudice – mentioned in Art. 166(3)(3) of the CCA – are when individual words or very short extracts substitute a press publication or a situation where the reader is dissuaded from referring/reading the press publication. There are no specific provisions on headlines. Here, the CCA takes a qualitative approach which focuses on short extracts that include literary content. For illustrative purposes text of Art. 166(3)(3) of the CCA can be found below.

⁵ Marušić (n 1) 741.

“Article 166.(3).

(3) The rights referred to in paragraph (1) of this Article shall not apply to:

1. individual users who use press publications and parts thereof for private and non-commercial purposes;
2. actions of hyperlinking;
3. the use of individual words or very short excerpts, which are no more than a few words that do not contain any photos or video content, from press publications, provided that such use does not prejudice the effectiveness of the exclusive rights referred to in paragraph (1) of this Article. The effectiveness of the exclusive rights shall in particular be prejudiced where the use of very short excerpts substitutes the press publication itself or where a reader is dissuaded from referring to it.”

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

The CCA is silent on this matter. It can be inferred from a lack of provision that regulates this matter, that mere facts reported are not excluded from the protection. That said, if it is described in a ‘few words’, a mere fact might fall under the exclusion of Art. 166(3)(3) of the CCA described above.

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

The CCA is silent on this matter. It can be inferred from a lack of provision that regulates this matter, that public domain content is not excluded from the protection. Article 15(2), final sentence has therefore not been transposed. As above, if it contains a ‘few words’, public domain content might fall under the exclusion of Art. 166(3)(3) of the CCA described above.

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

As indicated above, Art. 166(3)(3) of the CCA uses the threshold of a ‘few words that do not contain any photos or video content’. No other threshold can be found in the national legislation.

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.

Art. 163(4) of the CCA defines who a press publisher is by listing the beneficiaries of the press publishers’ right. This is a newspaper publisher, a media publisher or a media service provider (for example, a news publisher or news agency) when they are publishing press publications – under their initiative, editorial responsibility and control. Moreover, Art. 164 of the CCA provides for a rebuttable presumption on the identification of the press publisher. The identification is attributed to the press publisher whose name or title is regularly indicated in the press publication or alongside it – for example, by highlighting a visual mark.

Under Article 7 – which contains the general applicability clause for right-holders – the CCA only applies to EU nationals (natural and legal persons).

“Article 7

(1) Protection under this Act shall be enjoyed by the authors and holders of related rights who are nationals of the Republic of Croatia or of another Member State of the European Union or have their principle place of establishment in the Republic of Croatia or in another Member State of the European Union.

(2) Natural or legal persons who are third-country nationals or have their principle place of establishment in third countries (hereinafter: foreigners) shall enjoy the same protection as is enjoyed by the persons referred to in paragraph (1) of this Article, within the scope of obligations assumed by the Republic of Croatia under international agreements or on the basis of factual reciprocity. Until proven otherwise, factual reciprocity is considered to exist.”

AC 3: Restricted acts

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

In Croatia, the press publishers’ right applies both for offline and online situations.⁶ Therefore, there are two different catalogues of acts and pertaining economic rights that the LNI protects. In online situations, Art. 166 of the CCA incorporates both the right of reproduction and the right of making available to the public for press publishers – in line with Art. 15(1) of the CDSMD. Nevertheless, it also adds a right – the right of communication to the public. In offline situations, Art. 165 of the CCA provides a generous catalogue list of economic rights that includes almost all economic rights found in the CCA – save from public recitation and public performance. To be specific these are (a) the right of reproduction, (b) the right of distribution, (c) the right of renting and lending, (d) the right of communication to the public, including the making available right, and (e) the right of adaptation.

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

Art. 166(3)(2) of the CCA contains an exclusion from the protection for actions of hyperlinking. The CCA does not contain a definition of hyperlinking. Nevertheless, the Croatian E-Commerce Act (CEA)⁷ contains a linking safe harbour in Art.19, which defines linking as: “...opening access to third party data through electronic referral...”

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.

The press publishers’ right under Art. 166 of the CCA that applies to online situations explicitly targets information society service providers. Art. 163(3) of the CCA literally transposes the definition of information society service providers from Art. 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market.⁸ Since this definition is quite broad it can be inferred that online platforms (OCSSPs) are covered. Furthermore, Art. 166(3)(1) of the CCA contains an exclusion from the protection for individual users who use press publications and parts thereof for private and non-commercial purposes.

⁶ Ibid.

⁷ Zakon o elektroničkoj trgovini NN 173/03, 67/08, 36/09, 130/11, 30/14, 32/19NN 111/21 (‘CEA’).

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (‘Directive on electronic commerce’) [2000] OJ L 178/1 (‘ECD’).

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.

Art. 172 of the CCA contains a general provision that stipulates that the press publishers' rights shall leave intact and in no way prejudice the rights of authors. This general provision specifically refers to articles of the CCA that are left intact by this right. These are Art. 5 of the CCA – which provides definitions for disclosure, publication, the public and public use; Art. 17 of the CCA – which regulates out-of-commerce copyright works; Art. 26(3) of the CCA – which stipulates a right of an author to receive remuneration for his or her work; Art. 33, 34, 36, 41 and 46 of the CCA – that regulate the economic rights of authors, namely, right of reproduction (Art. 33 of the CCA), right of distribution, rental and lending right (Art. 34 of the CCA), right of communication to the public (Art. 36 of the CCA), right of public presentation (Art. 41 of the CCA), and the right of making available to the public (Art. 46 of the CCA); Art. 48 to 54 of the CCA – which regulate the ancillary online services of a broadcasting organisation and the application to ancillary online services (Art. 48 and 49 of the CCA), the provisions implementing Art. 17 of CDSMD (Art. 50 to 53 of the CCA), and the right to adaptation (Art. 54 of the CCA); Art. 58 to 63 of the CCA – that regulate the disposition with economic rights in copyright; Art. 65 to 71 of the CCA – that regulate contractual disposition of copyright; Art. 96 to 114 of the CCA – that regulate contracts on commissioned copyright work or copyright work done in the course of employment; and Art. 126 and 127 of the CCA – that regulate term of protection and effect of expiration of term of protection.

Other right-holders have been omitted from the national transposition – contrary to the provision of Art. 15(2) of CDSMD – save from other press publishers. This general provision applies to press publishers unless the law provides special provisions that derogate from this general rule or these special provisions derive from the legal nature of press publishers' right. There is no specific explanation for what the last sentence should mean or what situations it governs.

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.

Under the structure of the CCA exceptions and limitations are in general linked with the economic rights ascribed to the right-holder, rather than the individual right-holder. In this respect Art. 181 of the CCA stipulates that exceptions and limitations apply to authors and right-holders alike.

As explained above, in Croatia, the press publishers' right applies both to offline and online situations, and these come with two different catalogues of acts and pertaining economic rights that the LNI protects. Consequently, different exceptions and limitations apply for online and offline uses. Nevertheless, since exceptions and limitations are linked with economic rights, for the sake of completeness the below list includes them all, even the ones that seem counterintuitive. For example, the exception for transient copies in offline situations (please see below).

For online uses the following exceptions and limitations apply: Art. 182 of the CCA – temporary acts of reproduction; Art. 182 of the CCA – private use; Art. 188 of the CCA – text and data mining for other purposes; Art. 194 of the CCA – limitation for the benefit of persons with disabilities; Art. 195 of the CCA – limitation for the benefit of persons who are blind, visually impaired or otherwise print-disabled; Art. 197 of the CCA – collections intended for teaching and scientific research; Art. 199 of the CCA – use of the works in digital and cross-border teaching activities; Art. 200 of the CCA – use of the works for judicial, administrative or other official proceedings; Art. 201 of the CCA – use of the works to inform the public; Art. 202 of the CCA – quotation, criticism and review; Art. 203 of the CCA – incidental use; Art. 204 of the CCA – the right of panorama; Art. 212 of the CCA – free use for public safety.

For offline uses the following exceptions and limitations apply: Art. 182 of the CCA – temporary acts of reproduction; Art. 182 of the CCA – private use; Art. 188 of the CCA – text and data mining for other purposes; Art. 194 of the CCA – limitation for the benefit of persons with disabilities; Art. 195 of the CCA – limitation for

the benefit of persons who are blind, visually impaired or otherwise print-disabled; Art. 197 of the CCA – collections intended for teaching and scientific research; Art. 199 of the CCA – use of the works in digital and cross-border teaching activities; Art. 200 of the CCA – use of the works for judicial, administrative or other official proceedings; Art. 201 of the CCA – use of the works to inform the public; Art. 202 of the CCA – quotation, criticism and review; Art. 203 of the CCA – incidental use; Art. 204 of the CCA – the right of panorama; Art. 206 of the CCA – parody and caricature; Art. 212 of the CCA – free use for public safety.

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.**

Press publications and photographs as original works, have been voluntarily collectively managed by the DZNAP since 2007/2008. This has been to some extent codified in Art. 217(1)(2) of the CCA that essentially provides for the old voluntary collective licensing scheme that the DZNAP has for online and offline use of original press publications. However, original photographs are outside of the legal provision.

Nevertheless, the CCA in Art. 167 introduces mandatory collective licensing for the same category of objects of protection (original press publications and original photographs) when they are used as a part of a press publication in online use. For both online and offline use, the CCA in Art. 168 introduces the rule that if a press publisher commissions a work or an object of a neighbouring right or this is made during an employment contract, the press publisher retains the right of use. If works created in such circumstances are collectively licensed, the fee is shared between the author and the press publisher. Art. 169 of the CCA provides for the right of the press publisher to retain all rights of use in works or objects of a neighbouring right – in the scope of press publishing activity without any spatial or time constraints. This is only the case if such objects of protection are provided to a press publisher without a commission and employment agreement by persons who are not professional journalists and photographers. Moreover, all fees that are collected in this specific situation are retained by press publishers in their entirety. However, in this instance, it is the press publisher that has the discretionary power to remunerate such works.

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.

In addition to the above explained situations of revenue sharing, there is one problematic area of the CCA that has the potential of excluding certain authors from a share of the revenue.⁹ As stated above, Art. 167 of the CCA introduces mandatory collective licensing for original press publications and original photographs when they are used as a part of a press publication in online use. These licensing schemes only cover professional journalists and photographers, and audio-visual content is presumably covered by an indirect reference to a provision on mandatory collective licensing of Art. 217(3)(2) of the CCA. Moreover, this rule allows press publishers to choose whether authors that are not professional journalists or photographers have a share in the revenue. Under Art. 169(1) of the CCA if a person is not a professional journalist or photographer covered by some sort of an employment or commission agreement and their work or subject matter of a related right is delivered to a press publisher, there is a presumption that a press publisher has acquired non-exclusive economic rights with no territorial or time limits of exploitation of such content to the extent necessary for the realisation of the activity the press publisher performs. Art. 169(4) of the CCA states that all fees that are collected through mandatory collective licensing and stem from this legislative constellation belong to the press publisher in its entirety.

⁹ Marušić (n 1) 746-747.

Nevertheless, the press publisher has an obligation under Art. 169(3) of the CCA to publish on its website the general conditions of use of the delivered content, in which it needs, inter alia, to determine whether, in which cases and in what amount, persons who deliver content to the publisher of press publications have the right to remuneration for use. This means effectively that it is a press publishers' choice to determine the share of the revenue and who has access to this share.

AC 8: Term of protection

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

The term of protection of press publications is regulated under Art. 171 of the CCA. For press publications used offline it is ten years from the date of the first lawful publication of a press publication, concerning that press publication. For press publication used online, the term of protection is two years from the date of the first lawful publication of a press publication, concerning that press publication. Art. 172 of the CCA provides for a general rule on applicability of other provisions of the CCA to the press publishers right. More specifically, Art. 172 of the CCA includes the application of Art. 126 of the CCA that implements the CDSMD's 1 January rule.

AC 9: Waiver

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

Art. 170 of the CCA stipulates that the press publisher can freely dispose with its rights. This implies that the press publisher has a right of waiver or a royalty-free grant.

AC 10: Entry into effect

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

The CCA was adopted on 1 October 2021, made public in the Official Gazette on 14 October 2021, and entered into force on 22 October 2021. The implementation deadline of 7 June 2021 was not respected. Art. 305(2) of the CCA implements CDSMD's 6 June 2019 rule.

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.

The CCA caters to press publishers – or to be more precise the printed press, in two more instances. The first one is in Art. 14(2) of the CCA with the addition of works made by the press in the exemplary list of works made by authors,¹⁰ and the second one is the creation of a related right for news of the day¹¹ found in Art. 18(4) and (5) of the CCA. These provisions were introduced for the first time with the new enactment of the CCA that was adopted on 1 October 2021, made public in the Official Gazette on 14 October 2021, and entered into force on 22 October 2021. Regarding the first, the addition of works made by the press seems a bit redundant, since newspaper articles are already considered literary works. Regarding the second, Art. 18(4) and (5) of the CCA provide a moral right of attribution to the first source of 'news of the day'. Here, the subject matter – news of the day – is protected by an enforceable moral right. The enforceability of this right lies with the press publisher, broadcaster, and journalist, as right-holders, and is protected as a misdemeanour by fine. This could be construed as a gold-plating in relation to Art. 2(8) of the Berne Convention for the Protection of Literary and Artistic Works,¹² which excludes news of the day and press information from copyright protection. Ricketson and Ginsburg¹³ suggest that the most

¹⁰ Branka Marušić, 'The New Croatian Copyright Act – A Mixed Bag of Novelties and Quandaries' (2022) 71(11) GRUR Int 1056, 1057.

¹¹ Branka Marušić, 'Saving the printed press – the Croatian implementation of Article 15 of the DSM Directive' (Kluwer Copyright Blog, 19 December 2022) < <https://copyrightblog.kluweriplaw.com/2022/12/19/saving-the-printed-press-the-croatian-implementation-of-article-15-of-the-dsm-directive/> > accessed 19 May 2023.

¹² Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, completed May 1896, revised 13 November 1908, completed 20 March 1914, revised 2 June 1928, revised 26 June 1948, revised 14 July 1967, revised 24 July 1971, amended 28 September 1979) WIPO TRT/BERNE/001 (1984) ('BC').

¹³ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* (3rd edn, OUP 2022) 502,503.

convincing idea behind the introduction of this mandatory exclusion of ‘news of the day’ lies on the grounds of public policy and freedom of information. This is even more convincing given the rapid aggregation of news – evidenced by the Covid-19 pandemic and the ongoing war in Ukraine. Therefore, this introduction might cause a problem from the side of freedom of information, since it provides a tool to press publishers to initiate misdemeanour proceedings and deter other outlets (both online and offline) from bringing the news of the day to users.

PART II: Article 17 CDSMD

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

Background information

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

Article 17 CDSMD has been transposed in the CCA in Title 3.2 on Economic Rights of the Author, specifically in the range of articles from Art. 50 – Art. 53 of the CCA. The CCA was adopted on 1 October 2021, made public in the Official Gazette on 14 October 2021, and entered into force on 22 October 2021. The transposition takes a textual approach – the vast majority of provisions have been transposed in an almost literal manner.

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 link for the official version of the CCA in Croatian can be found here: https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1941.html

The link for the unofficial English translation of the CCA can be found here: https://www.dziv.hr/files/file/zastita/zakon_autor_2021_ENG.pdf (it seems that some provisions have been google translated so parts of the provisions are missing – nevertheless it is a useful translation).

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 (object) of protection is works under Art. 50(1) of the CCA; performances under Art. 139 of the CCA in connection with Art. 136(1) of the CCA; phonograms under Art. 145 of the CCA in connection with Art. 142(1)(5) of the CCA; fixations of audiovisual works under Art. 155 of the CCA in connection with Art. 150 of the CCA; broadcasting program signals under Art. 162 of the CCA in connection with Art. 158(1) of the CCA; and ephemeral recordings under Art. 190 of the CCA.

Press publications are additional subject matter under Art. 163 of the CCA in connection with Art. 172 of the CCA.

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.

The beneficiaries of the protection are authors under Art. 50(1) of the CCA; performers under Art. 139 of the CCA in connection with Art. 136(1) of the CCA; phonogram producers under Art. 145 of the CCA in connection with Art. 142(1)(5) of the CCA; audiovisual producers under Art. 155 of the CCA in connection with Art. 150 of the CCA; and broadcasting organisations under Art. 162 of the CCA in connection with Art. 158(1) of the CCA (broadcasting program signals) and under Art. 190 of the CCA (ephemeral recordings).

Press publishers are additional beneficiaries under Art. 163 of the CCA in connection with Art. 172 of the CCA.

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”)?

Art. 50(1) of the CCA almost literally transposes Art. 17(1) of the CDSMD. Art. 50(1) of the CCA protects right-holders against acts of communication to the public as defined in Art. 36 of the CCA and acts of making available to the public as defined in Art. 46 of the CCA.

AC 4: Targeted providers

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

Art. 50(2) and (3) of the CCA contain the definition of the OCSSPs. The definition in the CCA incorporates certain elements that can be found in recital 62 of the CDSMD. For illustrative purposes the provision of Art. 50(2) and (3) can be seen in the text below. The parts that were taken from recital 62 and inserted in the text of the articles are marked in bold. Additionally, the term ‘profit-making purposes’ from Art. 2(6) of the CDSMD has been refined to reflect the national formula taken from the Croatian Obligations Act. This difference is also marked in bold in the text below. Since Art. 50 *mutatis mutandis* applies to performers, phonogram producers, audiovisual producers, broadcasting organisations, and press publishers, the reference to ‘an author’ should not be understood as to exclude these beneficiaries from the scope of Art. 50.

Article 50

“(2) The online content-sharing service provider is a provider of an information society service within the meaning of the law regulating e-commerce, of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works uploaded by its users, which it organises and promotes for the purpose of obtaining **direct or indirect material or commercial benefit**.

(3) Information society service providers within the meaning of the law regulating e-commerce, whose services do not have as their main purpose enabling users to download and share large amounts of copyright-protected work for material or commercial benefit from such activities, such as non-profit online encyclopaedias and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services within the meaning of the law regulating electronic communications, online marketplaces **whose main activity is retail and which do not provide access to copyright-protected work (recital 62, 5th sentence)**, business-to-business cloud services and cloud services that allow users to

download content for their own use, **such as online storage services (cyberlockers) (recital 62, 5th sentence)**, are not considered online content-sharing service providers in terms of this Act.”

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 implementation of Art. 17 of the CDSMD into the CCA there existed no specific national provision that was targeting the online service providers. However, in general, a primary liability regime would have applied to online service providers. The primary liability regime under the CCA would entail a direct (primary) infringement of copyright or a related right by a natural or legal person. This infringement gives recourse to the injured party by way of civil procedures (for damages), misdemeanour procedure for breach of the CCA, and injunctive relief. If the infringer gains a “considerable material gain” – which is defined in Art. 87 (29) of the Croatian Criminal Code¹⁴ as a material gain that surpasses the amount of EUR 7963,37 – there is a criminal sanction of up to three years imprisonment prescribed under Art. 285 of the CCC. The criminal proceeding is initiated by the injured party. This option is seldom used since the injured parties are reluctant to undergo two separate proceedings due to cost issues. Regarding the secondary liability, the CEA since 2003 contains Art. 18 hosting safe harbour provision. Although Croatia entered the European Union (EU) in 2013, the CEA literally transposes Art. 14 of the ECD into Art. 18 of the CEA. Furthermore, the CEA contains in Art. 19 a linking safe harbour provision. This provision mirrors the hosting safe harbour – in the conditions of application – however, it is only for linking. For informative purposes, the translation of the provision is listed below.

Article 19

“The service provider who opens access to third-party data through electronic referral is not responsible for this information:

- if it has no knowledge and could not have known about the illegal activity of the user or the content of the data in this information,
- if it removes or disables access to the data as soon as it finds out that it is an illegal activity or data.”

To date, there is no case law that tested the primary or secondary liability of online service providers. Additionally, it should be noted that since 2014 YouTube has concluded a licensing agreement with the largest collecting society in Croatia.¹⁵

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?

Croatia transposed the ECD in 2003 in a specific legal act, the CEA. The CEA contains in Art. 18 the hosting safe harbour provision which is a literal transposition of Art. 14 of the ECD. In addition, Art. 19 of the CEA includes the linking safe harbour provision, which was explained above. The linking safe harbour provision is still applicable to the OCSSPs, whereas Art. 50(9) of the CCA excludes the applicability of the hosting safe harbour provision. More specifically, Art. 50(9) of the CCA makes a clear reference to the applicability of Art. 18 of the CEA (or lack thereof) as an implementing provision of Art. 17(3) of the CDSMD.

¹⁴ Kazneni zakon NN 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22 (‘CCC’).

¹⁵ Branka Marušić, ‘Derogating Regulatory and Enforcement Powers in Copyright Protection in the Digital Market: A Trojan Horse for the EU?’ (2017) 13 CYELP 169, 172.

- 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.**

Art. 51(1) and (2) of the CCA are a literal transposition of Art. 17(4) and (5) of the CDSMD (English version). There is no deviation, addition or difference in the text.

- 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.**

Art. 51(1) and (2) of the CCA are a literal transposition of Art. 17(4) of the CDSMD (English version). There is no deviation, addition or difference in the text. By contrast, the Croatian version of Art. 17(4) of the CDSMD does not use Croatian standard legal language nor Croatian legal terminology. For example, the term ‘best effort’ in the Croatian version of the CDSMD is ‘poduzeli sve u svojoj moći’ which means to do everything in one’s power. This is a vernacular usually used in literature, but never in legal text or journalistic text. Additionally, the Croatian version of the CDSMD does not use the Croatian language correctly, for example in the translation of ‘high industry standards of professional diligence’ the translation of the CDSMD uses the term ‘visokim sektorskim standardima profesionalne pažnje’ which makes no sense in Croatian – grammatically or logically.

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

Art. 51(1) and (2) of the CCA are a literal transposition of Art. 17(4) and (5) of the CDSMD (English version). There is no deviation, addition or difference in the text. Therefore, the CCA does contain a reference to proportionality. However, it should be noted that Art. 51(7) of the CCA implements recital 62, last sentence on the exclusion of the immunity for online service providers whose main purpose is to participate in or enable unauthorised use of copyright works or piracy.

- 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.**

Art. 51(3), (4), (5) of the CCA are a literal transposition of Art. 17(6) of the CDSMD (English version). There is no deviation, addition or difference in the text. Furthermore, Art. 51(6) of the CCA implements recital 67, last sentence on the prohibition of special immunity under Art. 17(6) for newly created services or for services provided under a new name but which pursue the activity of an already existing OCSSP which could not benefit or no longer benefits from that regime.

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.**

Art. 50(4) of the CCA requires that an OCSSP acquires authorisation from a right-holder. In the light of this, Art. 50(5) of the CCA implements recital 61, 7th sentence, by defining authorisation as a licensing agreement which must be made between an OCSSP and the author. Furthermore, Art. 50(5) implements recital 61, the last sentence, by stating that licensing agreement must emanate fairness and reasonable equality of parties, and authors should be entitled to appropriate remuneration. Under Art. 50(6) of the CCA authors are not required to give authorisation. Nevertheless, under Art. 50(7) of the CCA the author is required to duly justify why he or she is not giving the authorisation to the OCSSP and why he or she wants his or her work or subject matter of a related right to be removed from an OCSSP. This is an implementation of Art. 17(9), second paragraph, first sentence of

the CDSMD. Furthermore, this is the wrong implementation of this part of the Art. 17 of the CDSMD since in the provision of the CDSMD this part forms the procedure of ex post safeguards for removal of content, and not authorisation schemes. In practical terms, no distinction is made between “relevant and necessary information” and a “sufficiently substantiated notice” as in the Directive (although the CCA incorporates both terms) – a sufficiently substantiated notice is understood to be a form of notice which would contain relevant and necessary information (as content of a notice).

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.

The CCA is silent in this regard.

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.

Art. 52(1) of the CCA is a literal transposition of Art. 17(7) first paragraph of the CDSMD (English version). There is no deviation, addition or difference in the text. Furthermore, Art. 52(2) of the CCA is a literal transposition of Art. 17(8) first paragraph of the CDSMD (English version). There is no deviation, addition or difference in the text.

The CCA is silent on specificities of how a general monitoring should be defined.

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.

The CCA is silent in this regard.

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.

The old version of the CCA included an exception of quotation in Art. 90, and the exception of parody and caricature in Art. 94.

- The conditions for the application of Art. 90 were: (a) that a quotation from a copyright is made, (b) that this work has already been lawfully made available to the public for purposes of scientific research, teaching, criticism, polemics, revision, and review. The use could have been made of this exception (a) to the extent justified by the purpose to be achieved and in accordance with fair practice and (b) provided that the source and the name of the author are indicated.
- The conditions for the application of Art. 94 were that: (a) this use concerns the right of adaptation of a work, (b) that the work is adapted into a parody or caricature, (c) to the extent necessary for the purpose thereof, and (d) by indicating which work has been adapted and its author.

The new CCA broadens these provisions. Art. 202 of the CCA includes an exception or limitation to copyright for uses for the purpose of quotation, criticism and review and Art. 206 of the CCA includes an exception to the right of adaption for parody, caricature and pastiche.

- The conditions for the application of Art. 202 are that: (a) a literal quotation of excerpts from a copyright-protected work or subject matter of related rights is made, (b) that this work or subject matter of a related right has already been lawfully made available to the public for purposes of scientific research, teaching,

criticism, polemics, revision, review and the like. The use can be made of this exception (a) to the extent justified by the purpose to be achieved and in accordance with fair practice and (b) provided that the source and the name of the author are indicated, if possible considering the manner of use.

- The conditions for the application of Art. 206 are that (a) this concerns the right of adaptation of a work, (b) that the work is adapted into a parody, caricature or pastiche, (c) to the extent necessary for the purpose thereof (humour, critique of the work that is subject matter of parody, caricature or pastiche, critique of social events and phenomena and the like), in accordance with good customs.

Art. 52(5) of the CCA explicitly states the following:

“(5) Copyright works created by users of online content-sharing services, when uploading and making these works available to the public, shall be subject to the content limitations referred to in Articles 202 and 206 of this Act.”

This means that the two exceptions contained in Article 202 and 206 of the CCA – as explained above, only apply to copyright-protected works created by users of OCSSPs. Additionally, they are triggered in two different situations: (a) when a user-generated work is uploaded and (b) when a user-generated work is made available to the public. This is problematic for three reasons. The first reason is that these exceptions only apply to user-generated copyright-protected works and not content – which is a broader term and encompasses the subject matter of related rights, and is in line with Art. 17(7) paragraph 2 of the CDSMD. Secondly, the parody, caricature or pastiche exception only applies to two specific types of uses by users of OCSSPs (uploading and making available), other uses on different online service providers are not covered. Thirdly, and consequently, Art. 52(5) of the CCA creates two different regimes for the exception of parody, caricature or pastiche – one linked with OCSSPs and the right of making available to the public, and the other linked with the right of adaptation.

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

The CCA is silent in this regard.

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.**

The CCA includes provisions of mandatory collective rights management for certain uses. Art. 217(1)(1)(g) introduces mandatory collective management of works – specifically non-dramatic musical works with or without words and literary works used in the context of Art. 50 of the CCA, i.e., Art. 17 of the CDSMD. This also applies to performers in line with Art. 218(1)(d) of the CCA and phonogram producers in line with Art. 218(2)(b) of the CCA. Press publishers have an option under Art.218(3)(4)(b) to manage their rights collectively when press publications are used in the context of Art. 50 of the CCA, i.e., Art. 17 of the CDSMD.

Furthermore, the CCA – through the system of mandatory collective rights management through an organisation for collecting management – widens the scope of implementation of Art. 17 of the CDSMD. More specifically, Art. 217(3) of the CCA includes a mandatory collective rights management through an organisation for the collective management for the right of adaptation (Art. 217(3)(f) of the CCA) and the right of reproduction (Art. 217(3)(g) of the CCA) of non-dramatic musical works with or without words and of literary works. The right of adaptation relates to incorporating musical works with or without words into other types of copyright-protected works, such as audiovisual works, the subject matter of related rights and into other kinds of content uploaded by users of OCSSPs; provided that an OCSSPs has authorisation for reproduction and communication to the public,

including an act of making available to the public, when providing the public with access to the works uploaded by users of OCSPPs. The right of reproduction implies audio recording, including the creation of phonograms, as well as incorporating non-stage musical parts with or without words into an audiovisual work, including the creation of a videogram. Here the CCA requires that OCSPPs have an authorisation for the right of adaptation and the right of reproduction – rights which are not encompassed by Art. 17(1) of the CDSMD or its implementing provision of Art. 50(1) of CCA. This broadens the scope of implementing provisions of Art. 17 of the CDSMD, and is a gold-plating provision.

Broadcasters are excluded from collective management of rights under Art. 219 of the CCA.

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.

Art. 50(4) of the CCA is a literal transposition of Art. 17(2) of the CDSMD (English version) in regard to the authorisation covering users and the CCA is silent regarding the opposite situation. However, Art. 50(4) of the CCA requires that these licences cover not only the right of communication to the public stipulated in Art. 36 of the CCA and the right of making the work available to the public stipulated in Art. 46 of the CCA, but also the right of reproduction stipulated in Art. 33 of the CCA. This broadens the scope of implementing provisions of Art. 17 of the CDSMD, and is a gold-plating provision.

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?

Art. 52(3) of the CCA is a literal transposition of Art. 17(9), third paragraph of the CDSMD (English version). The CCA is silent regarding the treatment 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?

The CCA is silent in this regard.

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.

The CCA is silent in this regard.

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.

Art. 53(1) of the CCA is a literal transposition of Art. 17(9), first paragraph of the CDSMD (English version). Art. 53(2) of the CCA is a literal transposition of Art. 17(9), second paragraph, second sentence of the CDSMD (English version). The CCA is silent on the details.

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.

Art. 53(1) of the CCA provides the possibility for users of OCSSPs to initiate proceedings of mediation before the Council of Experts for Remunerations in the Field of Copyright and Related Rights ('Council of Experts'), especially to examine the application of exceptions and limitations. Art. 239 of the CCA provides the procedural steps for mediation. The procedure can be initiated by right-holders and rightsholders associations on an individual request of one or more right-holders. All parties are required to enter, conduct and finish the mediation negotiations in good faith. All parties are liable for any abuse of mediation negotiations or negotiating positions, or their rights (stemming from civil obligations). Once the mediation is initiated the Council of Experts will, as a mediator, assist the parties to achieve an agreement. The Council of Experts is authorised to submit proposals to the parties concerning the settlement of their claims. These proposals are submitted in person, or by registered mail. If none of the parties expresses its opposition by registered post within three months as from the receipt of the proposal, it is considered that both parties accept such proposal. The proposals need to be included in the final agreement. Art. 53(1) of the CCA also provides a possibility for arbitration and other out-of-court and court proceedings.

AC 12: Sanctions

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

The CCA is silent in this regard.

AC 13: Information obligations

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

Art. 50(8) and Art. 51(8) of the CCA are a literal transposition of Art. 17(8) second paragraph of the CDSMD (English version). There is no deviation, addition or difference in the text. Art. 52(4) of the CCA is a literal transposition of Art. 17(9) fourth paragraph of the CDSMD (English version). There is no deviation, addition or difference in the text. The CCA is silent on the details.

AC 14: Waiver

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

The CCA is silent concerning waivers. However, there is nothing in the CCA that would run counter to the concept of waivers. Art. 50(5) of the CCA stipulates that the right-holders in the agreements concluded between them and OCSSPs should receive appropriate remuneration for the use of their works and subject matter. From the wording of the provision and the use of the word should, coupled with the mandatory collective licensing of certain uses, it could be inferred that royalty-free licences are not an option under the CCA.

AC 15: Entry into effect

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

The CCA was adopted on 1 October 2021, made public in the Official Gazette on 14 October 2021, and entered into force on 22 October 2021. The implementation deadline of 7 June 2021 was not respected.

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)?

N/A.

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.

N/A.