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

ESTONIA

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

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

Country: ESTONIA

National Experts: KARMEN TURK (Triniti Law Firm)

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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.**

No, not similar to article 15 CDSMD. However, the press publications were protected as works where copyright may subsist, i.e. collection of works. See on this:

> "§ 4 Works in which copyright subsists
>
> (1) Copyright subsists in literary, artistic and scientific works.
> (2) For the purposes of this Act, 'works' means any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation.
> (3) Works in which copyright subsists are: […]
> 22) collections of works and information (including databases)."

Subsection 31 (1) of the Copyright Act foresaw that such collection of work may have been a collective work: "A collective work is a work which consists of contributions of different authors which are united into an integral whole by a natural or a legal person on the initiative and under the management of this person and which is published under the name of this natural or legal person (works of reference, collections of scientific works, newspapers, journals and other periodicals or serials, etc.).".

In addition, if it was not a collective work, a separate paragraph in the Copyright Act prescribed a separate type of copyright of "compilers" (i.e. creators of collections of works) as follows:

> "§ 34 Copyright of compilers
>
> (1) A person who creates a collection as a result of his or her creative activity by selecting or arranging the economic (compiler) shall enjoy copyright in this collection.
> (2) A compiler may independently arrange and transform results of intellectual activity to which this Act does not apply (§ 5).
> (3) A compiler may independently arrange and transform, observing the provisions of § 44 of this Act, works whose term of protection of copyright has expired.
> (4) Works subject to protection by copyright may be arranged and included in collections as originals or in a transformed form only with the consent of the author or his or her legal successor except in the cases prescribed in Chapter IV of this Act. A compiler is required to observe the copyright in works included in the collection.
> (5) The publication of a collection by a person shall not restrict other persons in using the same economic in order to create an independent collection pursuant to the provisions of subsections (1) and (4) of this section.

(6) A collection compiled by a person may be transformed by other persons only if they observe the copyright of the compiler of the original collection.[RT I 1999, 97, 859 – entry into force 06.01.2000]"

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 was transposed into the Copyright Act as paragraph 73^2 titled "Rights of press publishers". The new amendment was enacted on 8 December 2021 and came in force as of 7 January 2022.[1] The transposition is partly ad litteram and partly adapts the Article 15 into the national law via an intentionalist approach. The new paragraph stands (according to an unofficial translation in state gazette, however compared to Estonian there are slight differences that have been highlighted below in this reply):

"§ $73.^2$ Rights of press publishers

(1) Press publishers have the exclusive right to authorise or prohibit:
1) direct or indirect, temporary or permanent online reproduction by any means and in any form, in whole or in part, of their press publications by information society service providers;
2) communication of their press publications to the public by information society service providers in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) For the purposes of this Act, a 'press publication' means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:
1) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine, except periodicals that are published for scientific or academic purposes;
2) has the purpose of providing the general public with information related to news or other topics;
3) is published in any media under the initiative, editorial responsibility and control of a service provider.

(3) The provisions of subsection 1 of this section are not applied to:
1) private or non-commercial uses of press publications by individual users;
2) hyperlinking;
3) use of individual words or very short extracts of a press publication.

(4) The provisions of subsection 1 of this section leave intact and do not in any way affect the rights provided in this Act concerning the works and objects of related rights published in press publications.

(5) The authors of works incorporated in a press publication have the right to receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers."

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.

Estonian: Autoriõiguse seadus, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (jõustunud 07.01.2022) (AutÕS). Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/akt/128122021003?leiaKehtiv (last visited: 13.04.2022)

Unofficial English translation: *Copyright Act*, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (entry into force 07.01.2022). Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/en/eli/513012022002/consolide (last visited: 13.04.2022)

[1] Copyright Act, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (entry into force 7 January 2022). Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/akt/128122021003?leiaKehtiv (last visited: 13.04.2022).

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.

There are some slight differences that are partly a result of choice and partly the result of an invalid understanding of the text of CDSMD:

1. The choice to "create" this new right not as an author's right (as had been argued in Estonia, given that the rights in collections of works, collective works and compilations of works (referred to in the answer to question 1 above) are author's rights), but as a separate new neighbouring right or related right (such as the performers' rights).

2. The paragraph sets forth an equivalent provision to Article 2 (4) c CDSMD. Article 2 (4) c CDSMD reads:

   "is published in any media under the initiative, editorial responsibility and control of a service provider".

   The English translation of the Estonian provision in § 73.2 subparagraph 2(3) reads the same:

   *"*is published in any media under the initiative, editorial responsibility and control of a service provider."

   However, in Estonian, it reads:

   "is published in any media under the initiative of a service provider, under the responsibility and control of an editors' office.*"*

   The difference is slight, however there is room for misinterpretation as there could be service providers under whose initiative the press publication is published that are not media organizations and in addition there must be a control by editors. Editorial responsibility as a legal term is defined in the Media Services Act as a characteristic for media organizations. In addition, the "control by editors" is not the same as the term "editorial responsibility" (in Estonian: "toimetuse vastutus" versus "toimetuslik vastutus"). The Explanatory Memorandum[2] to the Copyright Act refers to the correct idea under CDSMD. Hereinafter, the Explanatory Memorandum will be referred without the footnote.

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.

Yes, the protection is *ad litteram* transposition of CDSMD. There are no differences.

[2] Explanatory Memorandum to the Copyright Directive, 2021. Available, https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine)%20(368%20SE%20I)%20ettevalmistamine%20teiseks%20lugemiseks/ (last visited 13.04.2022)

However, the Explanatory Memorandum (that is not binding) does include an explanation that "for example, an information society service provider could be able to use article headlines, a few sentences or short video clips, for images it could probably be possible (if at all) to use low-resolution 'thumbnail images', etc. The interpretation of this point can also be based on the explanations given in recital 58 of the DSM Directive". The Explanatory Memorandum also sets forth in a footnote according to which, "[f]or example, Google has proposed that the criterion of 'single words and very short extracts' should be met by a limit of 200 characters. Wikimedia Estonia also proposed in 2019, for example, that a preview could be 280 characters and a thumbnail".

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

No, these are not literally excluded. However, the subsection 4 reads:

> "(4) The provisions of subsection 1 of this section leave intact and do not in any way affect the rights provided in this Act concerning the works and objects of related rights published in press publications."

As right of press publishers do not affect the rights in the Copyright Act, § 5 of the Copyright Act is of importance and it states that:

> "§ 5 Results of intellectual activities to which this Act does not apply
> This Act does not apply to: […]
> 6) news of the day;
> 7) facts and data;"

Thus, the Copyright Act does not apply to the news of the day and facts and data and, as such, cannot be embodied by any regulation in the law, including the press publishers' right.

However, the press publishers right does not only extend to the compiled "works", but the directive as well as the Copyright Act state that the press publishers right also extends to "collections which can also include other subject matter". Thus, following only this paragraph, data, facts and the news of the day would not be excluded from the application of rights of press publishers.

Still, the Explanatory Memorandum may be helpful for practitioners, as it states that (even though it seems incorrect in the light of the conclusion made above): "It is also important to note that protection does not extend to content that is not protected at all (Art. 5 of the Copyright Act), the most important in this context being facts and data (see also recital 57) and news of the day. In the case of daily news, it should be noted that this should be interpreted as meaning that daily news in a volume corresponding to the need to reflect a specific event of the day are not protected. An event of the day is an event as such occurring at a particular time and no monopoly on its coverage can be granted to any one undertaking, all those who wish may cover events of the day. This means that an event of the day, as information of the nature of a press release, does not meet the criteria of a work and is not protectable. However, articles which analyse and report on the event of the day are clearly protectable."

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

There is no explicit mention.

The Explanatory Memorandum does state the following: "Also, Article 15(2) of the DSM Directive contains a condition that the publication must not, by relying on new related rights, prevent the use of works or other subject matter for which protection has expired. The Copyright Act contains terms of protection for both works (Chapter VI of the Copyright Act) and subject-matter of related rights (Art. 74 of the Copyright Act) and they are already applicable, it has not been considered necessary in the drafting of the proposal to over-emphasise this principle separately in the regulation on the protection of press publications."

In the opinion of the author of this reply, this reasoning does not really transpose into the non-application of the publisher's right to the public domain, as the paragraphs mentioned in the Explanatory Memorandum do not regulate public domain issues, but the term of rights regards works, however the definition of "press publisher's right" extends not only to the works but to "collections which can also include other subject matter" (i.e. public domain material).

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.

There is no list of beneficiaries – the right applies as the definition allows.

The Explanatory Memorandum defines press publications as follows: a collection of written works of a primarily journalistic nature (see Art. 4(1) and (2) of the Copyright Act), which may also include other works (e.g., photographs, videos) and materials (e.g., subject matter of rights related to copyright such as performances, phonograms, etc.). There are three additional cumulative criteria for a publisher to qualify for protection. The Memorandum sets forth that press publications such as dailies, weeklies and monthlies of general or special interest, including subscription magazines, and news websites should be covered.

Regarding territory, the Explanatory Memorandum states that recital 55 of the directive adds that legal protection should benefit publishers established in a particular Member State and having their registered office, central administration or principal place of business in the Union.

According to recital 56 of the DSM Directive, it is necessary to define the concept of a press publication to cover only press publications published in any media, including the paper media, in the context of an economic activity which constitutes the provision of services under EU law.[3] As explained above, the slight difference in the definition of cumulative criteria may have importance, as it may widen the application to include services that are not intended to be covered by the directive.

AC 3: Restricted acts

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

The Copyright Act (referring to the Article 2 and Article 3(2) of Directive 2001/29/EC) states that:

> "(1) Press publishers have the exclusive right to authorise or prohibit:
> 1) direct or indirect, temporary or permanent online reproduction by any means and in any form, in whole or in part, of their press publications by information society service providers;
> 2) communication of their press publications to the public by information society service providers in such a way that members of the public may access them from a place and at a time individually chosen by them."

From the 2nd section, the words "by wire or wireless means" as set forth in Article 3(2) of Directive 2001/29/EC are left out. This has little significance in the opinion of the author as it is made clear that the new right only pertains to online uses and other uses such as those relating to physical copies, would maintain the current protection mechanism (based, inter alia, on § 31 of the Copyright Act).

[3] see Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Article 57.

However, the unofficial English translation mistranslates, as the term "communication to the public" (Article 3(1) of Directive 2001/29/EC) instead of "making available to the public" (Article 3(2) of Directive 2001/29/EC) is used. In the Estonian version, the correct term is used.

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

Yes, the LNI includes hyperlinking exception:

> "(3) The provisions of subsection 1 of this section are not applied to:
> 2) hyperlinking;"

Hyperlinking as such is not defined in the Copyright Act. However, the Explanatory Memorandum refers to recital 57 of the directive and adds that, since the right of making available to the public is one of the property rights guaranteed to the press,[4] the Directive, by excluding hyperlinks from the scope of this right, seems to follow to a large extent the case law of the Court of Justice in its interpretation of Article 3 of the Information Society Directive.[5]

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. As stated in an answer to Question 9, the law explicitly states that both new exclusive rights in the Copyright Act (referring to the Article 2 and Article 3(2) of Directive 2001/29/EC) foresee a specific kind of user: information society service providers.

Information society service is defined in section 2 of Information Society Services Act

> "1) "Information society services" are services provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location, and such services involve the processing, storage or transmission of information by electronic means intended for the digital processing and storage of data. Information society services must be entirely transmitted, conveyed and received by electronic means of communication. Services provided by means of fax or telephone call and television or radio services are not information society services."

By definition OCSSPs are included as a platform provider is a provider of an information society service, the main or one of the main purposes of which is to store and make accessible to the public a large number of objects of rights uploaded by users of the service, which the provider organises and promotes for the purpose of generating direct or indirect revenue.

The law explicitly excludes non-commercial uses:

> "(3) The provisions of subsection 1 of this section are not applied to:
> 1) private or non-commercial uses of press publications by individual users;"

[4] The right for authors set out in Article 3 of the Information Society Directive in paragraph 1 (general right of communication to the public, which includes the right of making available) and for holders of related rights in paragraph 2 (right of making available).

[5] See, for example, the judgments of the Court of Justice in cases C-466/12, C-348/13, C-160/15. However, contrary to the case law, the operative text of the Directive and the recitals exclude hyperlinks from its scope, irrespective of whether or not they fall within the scope of the act of communication to the public.

Thus, first of all, individual users do not need to ask the publication for authorisation if they use the publication for private and non-commercial purposes, including as set forth in the Explanatory Memorandum, when these users (e.g., bloggers) share press releases online (see also recital 55 of the DSM Directive).

Secondly, the Explanatory Memorandum states that, according to recital 54 of the DSM Directive, the widespread availability of press publications online has led to the emergence of new online services, such as news aggregators or media monitoring services, for which the re-use of press publications is an essential part of the business model and an important source of revenue. Some examples of "targeted" users are provided: "mainly covers" "news aggregators" that collect information from a wide variety of sources, systematise it and update it regularly (e.g., Drudge Report, Huffington Post, Fark, Zero Hedge, Newslookup, Newsvine, World News (WN) Network, Google News).

However, the Explanatory Memorandum further stipulates that such users also include search engines and social networking platforms, as according to surveys, nearly half of users (47%) find the information they are looking for in the sources provided by these channels, and do not visit the website of the media outlet.[6]

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.

The Copyright Act does not transpose Article 15(2) in its entirety (namely the following part is not transposed expressly:

> "The rights provided for in paragraph 1 shall not be invoked against those authors and other right-holders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.
>
> When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired."

The Act but only states in a minimalist way, in subsection 4 of §73^2 of the Copyright Act, that:

> "(4) The provisions of subsection 1 of this section leave intact and do not in any way affect the rights provided in this Act concerning the works and objects of related rights published in press publications."

In the Explanatory Memorandum, it is explained that the objective of the Directive is already served by the existing Copyright Act.

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.

Beyond the *explicit verbis* exceptions (private use, hyperlinks, short extracts) no other exception is set forth in the law separately for press publishers.

[6] See on this the Commission's 2016 Impact Assessment 1/3, p 157. See also Annex 13A, p. 185: "Eurobarometer data on consumer's habits when accessing news online". No such survey has been carried out in Estonia, but information on the importance of different information channels can be found in the document "Study on the situation and trends in media policy" (by Ragne Kõuts-Klemm, Halliki Harro-Loit, Indrek Ibrus et al.), p. 62. For example, English-language social media channels are used by around a third of people for current affairs information, while Estonian-language news portals are used by around 70% of people. Available at: https://www.yti.ut.ee/sites/default/files/aki/aruanne-24-03-2019-7.pdf.

However, in the Explanatory Memorandum it is stated that: "with regard to § 73^2(3) of the Copyright Act, which has been added to the draft Copyright Act, it must certainly be made clear that all other cases of free use (Chapter IV of the Copyright Act, to which § 75(1)(6) of the Copyright Act refers with regard to rights related to copyright) also apply to the rights of publishers of press publications, i.e. quotation, use for educational purposes, etc. are still possible. Article 15(3) of the DSM Directive makes this unambiguously clear. Recital 57 specifies that the rights granted to publishers of press publications should be subject to the same provisions on exceptions and limitations as those applicable to the rights established by Directive 2001/29/EC, including the exception for quotation in criticism or review provided for in Article 5(3)(d) of that Directive."

The exceptions to neighbouring rights are set forth section 75 of the Copyright Act:

> "§ 75 Limitation of related rights
>
> (1) Without the authorisation of the holder of related rights specified in this Chapter, and without payment of remuneration, it is permitted to use the performance, phonogram, radio or television broadcast or recordings thereof, film, unpublished work, literary criticism or scientific publication, or press publication, including by reproduction:
>
> 1) for private use by natural persons, taking account of the provisions of §§ 26 and 27 of this Act and on condition that such reproduction is not carried out for commercial purposes;
> 2) for the purpose of illustration for teaching or scientific research to the extent justified by the purpose and on condition that such use is not carried out for commercial purposes and on condition that the source is indicated, if possible;
> 3) if short excerpts are used in connection with the reporting of current events to the extent justified by the informational purposes to be achieved and on condition that the source is indicated, if possible;
> 4) if short excerpts (quotations) from an object of related rights which is lawfully published are used for informational purposes and to the extent justified by the informational purposes to be achieved and the obligation to convey the meaning of the whole performance, phonogram, radio or TV broadcast or film accurately is observed and on condition that the source is indicated, if possible;
> 5) for an ephemeral recording of the performance, broadcast or phonogram by a broadcasting service provider and for reproduction thereof by means of its own facilities and for the purpose of its own broadcasts, provided that the broadcasting service provider has received an authorisation to broadcast the performance, broadcast or phonogram from the right-holder beforehand or the transmission or retransmission of the performance, broadcast or phonogram by the broadcasting service provider is lawful on another basis. Such recordings and reproduction thereof (copies) shall be destroyed after thirty days from their making, except for one copy which may be preserved as an archive copy under the conditions set out in subsection 23 (3) of this Act;
> 6) in other cases where the rights of authors of works are limited pursuant to Chapter IV and § 57.4 of this Act.
>
> (2) The free use prescribed in this section is permitted only on the condition that that this does not conflict with normal use and does not unreasonably harm the legitimate interests of holders of related rights."

For clarification, the reference in Copyright Act § 75 (1)6, i.e. "other cases where the rights of authors of works are limited pursuant to Chapter IV and § 57.4 of this Act", refers to the whole chapter setting forth free use cases, including free use of works for scientific, educational, informational and judicial purposes; free use of work in scientific research for the purpose of text and data mining as well as for purposes other than scientific research; use of orphan works and free use of out-of-commerce objects of rights.

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.**

No, the Copyright Act does not mention any separate regime for licensing of uses.

In the Explanatory Memorandum, the freedom of contract is emphasised. As the possible negative effect of the new right, it is stated that: "There is some risk of adverse effects. Although new property rights have been guaranteed to the media, negotiating with certain information society service providers to exercise these rights can prove difficult and time-consuming. France was one of the first countries to transpose the Directive's provisions on the protection of the press (already in 2019). The first to react was Google, which wished to retain only the title and a link to the source, without a short summary, as a search result for press releases on all its services in France. This will only be displayed if the publication itself has requested it and without paying a fee. The French competition authority has now decided that the negotiations should still go ahead and that a fee should be paid for the use of press publications.[7]"

For press publishers, the law does not exclude the possibility for collective licensing as the subsection 76 (1) of the Copyright Act states:

> "(1) Authors, performers, producers of phonograms, broadcasting service providers and other holders of copyright and related rights have the right to establish collective management organisations."

As regards extended collective licensing, an EU-wide possibility for extended collective licensing agreements by collecting societies (also referred to as collecting societies) will be created in Estonia, facilitating the use of works of copyright and the subject matter of related rights in cases where obtaining a mandate from each individual right-holder is unduly burdensome and impractical and makes the necessary licensing transaction unlikely. The paragraph is based on Article 12 of the DSM Directive. This is not mandatory provisions for transposition by Member States, but the drafters in Estonia have considered it necessary to have such a possibility in Estonian law. Thus, it is allowed.

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.

No details are set forth in the law. The law states as the Directive:

> "(5) The authors of works incorporated in a press publication have the right to receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers."

In the Explanatory Memorandum it is stated that "paragraph 5 of the new norm sets out additional guarantees for authors, according to which they are entitled to receive an appropriate share of the revenues that the publisher of a press release receives from information society service providers for the use of their press release. This provision is based on Article 15(5) of the DSM Directive. For journalists, this provision does not replace but complements the general principle of fair and proportionate remuneration contained in Article 18 of the DSM Directive (see comments above). Under Article 18, the media publisher, for example, if it concludes a contract of employment with a journalist or photographer or other author, must also be guided by the principle of fair and proportionate remuneration from the outset. If, in addition, the publication also receives revenue from information society service providers for the exploitation of new rights, it is necessary to charge the author an

[7] See Decision No 20-MC-01 of 09.04.2020, available at: https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de (last visited: 13.04.2022).

"appropriate share" of the remuneration received. It is important to note here that the obligation under this paragraph is incumbent on the publisher of a press publication where that publication has in turn received such remuneration from a user."

AC 8: Term of protection

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

Like the Directive, the Estonian law states, in subsection 74 (1.1) of the Copyright Act, that:

> "The rights of press publishers expire two years after the press publication is published."

Subsection 74 (2) of the Copyright Act states that:

> "The term of protection commences from the first of January of the year following the year when the acts specified in subsections 1 and 1.1 of this section are performed."

Subsection 88.1 (3.4) of the Copyright Act states that:

> "The rights deriving from subsection 2 of § 73.2 of this Act are not applied to press publications which were first published before 6 June 2019."

AC 9: Waiver

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

As the general rule the Copyright Act subsection 14 (1) provides that:

> "An author has the right to obtain appropriate and proportional remuneration (author's remuneration) for the use of the author's work by other persons except in the cases prescribed by this Act."

As the right for the press publishers is an "exclusive right to authorise or prohibit" and there is no mention of any requirement of remuneration, I would argue that right-holders can waive their right to payment or license fees. However, there remains an exclusive right to "authorize":

> "subsection 62 (5) of Copyright Act:
>
> […] a press publisher may transfer (assign) the economic rights provided in this Chapter or grant an authorisation (licence) for the use of the object of related rights. The use of the objects of related rights is governed by the provisions of Chapter VII of this Act, unless otherwise deriving from this Chapter."

Chapter VII includes section 49.2 of the Copyright Act, which covers the regulation on amendments to author's contracts:

> "The author and the performer or their representative have the right to request amendment of the contract from the person with whom they have entered into the contract for exercising these rights or to whom they have transferred the rights, or from a legal successor of such person, in order to receive additional, relevant and fair remuneration, if the initially agreed remuneration turns out to be unproportionally small while compared to the direct or indirect total revenue deriving from the use of the work or performance."

As this provision cannot be waived, any contractual clauses which waive the obligations arising from it are null and void. Thus, if the right-holder waives the right to renegotiate receiving a fee, that could be addressed under this clause.

AC 10: Entry into effect

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

As of 7 January 2022.

Additional information

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

No.

PART II: Article 17 CDSMD

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

Background information

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

The Article 17 was transposed into the Copyright Act as a new section of 4 in Chapter VII of the Copyright and Related Rights Act titled "Communication to the public and making available to the public of a work and subject matter of related rights by a platform provider". The new amendment was enacted on 8 December 2021 and came in force as of 7 January 2022.[8]

The transposition is partly *ad litteram* and partly adapts the article 15 into the national law via intentionalist approach.

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

Estonian:

Autoriõiguse seadus, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (jõustunud 07.01.2022).

Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/akt/128122021003?leiaKehtiv (last visited: 13.04.2022)

Unofficial English translation:

Copyright Act, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (entry into force 07.01.2022).

Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/en/eli/513012022002/consolide (last visited: 13.04.2022)

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

[8] Copyright Act, RT I 1992, 49, 615, RT I, 28.12.2021, 1 (entry into force 07.01.2022). Available in official gazette Riigi Teataja: https://www.riigiteataja.ee/akt/128122021003?leiaKehtiv (last visited: 13.04.2022).

AC 1: Subject matter

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

The Copyright law transposes the definition ad litteram in section 57.8 of the Copyright Act:

> "§ 57.8 Online content-sharing service provider
>
> (1) 'Online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of objects of rights uploaded by its users, which it organises and promotes for purposes of making direct or indirect profit."

The Explanatory Memorandum[9] to the Copyright Act (that is not binding, nor mandatory) states that a platform provider is a platform provider if the following cumulative criteria are met:

> "1. It is an information society service provider.
>
> 2. the main or one of the main purposes of the service provider is to store and make publicly accessible a large number of rights objects uploaded by users of the service
>
> 3. the service provider organises and promotes the rights objects made accessible for the purpose of generating revenue."

The same paragraph in separate sections sets forth the subject matter of protection in subsection 57.8 (2) of Copyright Act:

> "For the purposes of this Subchapter, an 'object of rights' means a work and an object of related rights."

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.

Section 57.8(2) of the Copyright Act sets forth*:*

> "(2) For the purposes of this Subchapter, an 'object of rights' means a work and an object of related rights."

This means the beneficiaries are holders of rights to the works protected by copyright and subject matter protected by rights related to copyright (i.e. performers; phonogram producers; television and radio broadcasting service providers; producers of the first fixations of films; persons who, after the expiry of the term of copyright, first lawfully publishes or communicates to the public previously unpublished works; persons who publish a literary critical or scholarly edition of a non-copyright work; and press publishers). Thus all rightsholders are included as in the Directive.

[9] Explanatory Memorandum to the Copyright Directive, 2021. Available, https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine)%20(368%20SE%20I)%20ettevalmistamine%20teiseks%20lugemiseks/ (last visited 13.04.2022).

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")?

Subsection 579(1) of the Copyright Act does not change the content (scope) of the exclusive right of communication to the public or making available to the public, but extends the regime of liability associated with it. Pursuant to the Explanatory Memorandum:

> "when a user makes a communication or making available to the public, the platform provider also commits such an act, provided that the communication or making available to the public by the user is made through the platform provider's website. By analogy, a platform provider commits a communication to the public or making available to the public of an object of a right where its user has committed a communication to the public or making available to the public of an object of a right through the platform."

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 carve-out in the Copyright Act 57 is the same as in Article 2(6) CDSMD[8]:

> "(3) Providers of services that offer not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communications services as defined in clause 6 of § 2 of the Electronic Communications Act, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, and the principal activity of which is not providing the public access to objects of rights are not deemed 'online content-sharing service providers' specified in subsection 1 of this section."

However, some examples are provided in the Explanatory Memorandum:

> "Platform providers do not include service providers that offer non-profit online encyclopaedias (e.g., Wikipedia), non-profit educational and scientific repositories (e.g., Europeana), open source software development and sharing platforms (e.g., GitHub), electronic communications services (see next sentence), online trading venues (e.g., osta.ee), business-to-business cloud services (e.g., Amazon's server services) and cloud services where users can upload content for their own use and where the main activity is not to provide the public with access to rights objects (e.g., DropBox). An electronic communications service is, according to Section 2(6) of the Electronic Communications Act, a service consisting wholly or mainly in the transmission or routing of signals over an electronic communications network under agreed conditions. This includes both network service providers (e.g., Telia) and providers of interpersonal communication services (e.g., Gmail and WhatsApp).
>
> The fact that a service provider offers a service described in the above list does not preclude such a service provider from being considered a platform provider if the other services offered by the service provider qualify as platform services within the meaning of Section 578(1) of the draft."

To note, at the time of drafting, there are estimated to be fewer than 5 service providers registered in Estonia that meet the definition of a platform provider. On behalf of the Ministry of Justice, there was an analysis to assess which Estonian service providers qualify as platform providers under Article 17 of the DSM Directive. According to the assessment, the Estonian companies Lolsol OÜ (www.annaabi.ee), Upload OÜ

(www.upload.ee), Abi24 OÜ (www.iha.ee) and Sportfoto OÜ (www.sportfoto.com) could meet the definition of a platform provider if they are found to provide access to a "large amount" of protected content.[10]

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.

The E-Commerce Directive 2000/31/EC limited liability regime had been transposed into Estonian Information Society Law Act and the general liability derived from there. This liability regime in essence was designed as a secondary liability regime.

However, Estonia is infamous also for reducing the limited liability regime through the *Delfi v Estonia* case before the European Court of Human Rights, where primary liability was affirmed for seriously unlawful content (of speech).

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, in general for areas other than intellectual property and in the field of intellectual property, for platforms not subject to the CDMSD and LNI (e.g., size). Thus, in theory, liability would not follow for such a platform that enables users to make content available to the public as long as that platform operator did not have knowledge nor should have had knowledge that the content infringed the rights of others. After gaining such knowledge, the obligation of the platform operator was to delete or makes such content unavailable pursuant to information society law act (transposing E-Commerce Directive).

However, there are some noteworthy exceptions also in the mentioned cases – see above the reply to the question 6.

LNI states directly in 57[9] in paras 6 and 7 that the ECD does not apply (as the referred Information Society Services Act § 10 transposes Article 14 of ECD and § 11 transposes to non-monitoring obligation):

> "(6) Where an online content-sharing service provider commits an act of unauthorised communication to the public or making available to the public of objects of rights in the manner described in subsection 1 of this section, the limitation of liability provided in subsection 1 of § 10 of the Information Society Services Act is not applied to such acts.
>
> (7) Upon complying with the requirements specified in subsection 3 of this section, the provisions of subsection 1 of § 11 of the Information Society Services Act are not applied to the online content-sharing service provider, taking also into account that while complying with the requirements specified in subsection 3 of this section, the online content-sharing service provider has no general obligation to monitor.[RT I, 28.12.2021, 1 – entry into force 07.01.2022]"

[10] „Analüüs Euroopa Parlamendi ja nõukogu direktiivi (EL) 2019/790 art 17 kohaldamise kohta Eesti ettevõtjatele", 16.12.2019, Law Firm KPMG Law ja KPMG Baltics, available: https://www.just.ee/sites/www.just.ee/files/analuus-dsm-direktiivi-kohaldamise-kohta-eesti-ettevotjatele_ab-kpmg-law-ja-kpmg-baltics_16.12.2019.pdf. (last visited 01.04.2022).

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.

The obligations are as there are set forth in the Directive, i.e.:

1. First requirement: a commitment to make the best effort to obtain an authorisation.
2. Second requirement: preventing the making available of infringing content. This is in the form of "all reasonable efforts: made all reasonable efforts, in accordance with the strictest standards of care in commercial or professional matters, to ensure that the particular subject matter of the rights in respect of which it has obtained relevant and necessary information from right-holders is not made available to the public through its websites; and
3. Third requirement: removal of infringing content. This means that a service provider acted promptly upon receipt of a duly substantiated notification from the right-holder to ensure that the subject matter of the right notified was not made available to the public through its websites or was removed therefrom, and used its best endeavours, in accordance with paragraph (2), to prevent the subject matter of the right notified from being uploaded in the future.

The Copyright Law Act sets this forth in 57^9 (3) the following:

> "An online content-sharing service provider is not liable for communication to the public or making available to the public of objects of rights in the manner specified in subsection 1 of this section without an authorisation, if the online content-sharing service provider proves that they:
>
> 1) made best efforts to obtain an authorisation;
>
> 2) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability to the public, through its websites, of specific objects of rights for which the right-holders have provided the online content-sharing service provider with the relevant and necessary information; and
>
> 3) acted expeditiously, after receiving a substantiated notice from the right-holders, to disable access to, or to remove from their websites, the notified objects of rights, and made best efforts to prevent their future uploads in accordance with clause 2 of this subsection."

As can be seen, the removal obligations are towards current as well as future infringing content following receipt of a duly reasoned notification from the right-holder:

> (1) as regards current infringing content: the OCSSP must act expeditiously to ensure that the subject matter of the right notified is not made available to the public through its websites or is removed therefrom; and
>
> (2) as regards future infringing content: the OCSSP must use its best endeavours to prevent future uploading of the subject-matter of the right which he has notified, taking into account the requirements of paragraph (2) of 57(3).

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 subsection 57.9 (3) of Copyright Act states:

> "An online content-sharing service provider is not liable for communication to the public or making available to the public of objects of rights in the manner specified in subsection 1 of this section without an authorisation, if the online content-sharing service provider proves that they:
>
> 1) made best efforts to obtain an authorisation;
>
> 2) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability to the public, through its websites, of specific objects of rights for which the rightholders have provided the online content-sharing service provider with the relevant and necessary information; and
>
> 3) acted expeditiously, after receiving a substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified objects of rights, and made best efforts to prevent their future uploads in accordance with clause 2 of this subsection.

Thus the law follows the wording of the Directive regards "best efforts" and "high industry standards". However, in the official language, the exact translation regards to "high industry standards" language of "high standards of due diligence in economic and professional activities" is used.

The Memorandum explains that "best efforts" obligation to acquire authorization does not have any prescribed substance but that it will, to a large extent, be shaped by the standard that will emerge in the platform services market after the regulation enters into force, which in turn will be guided by European Commission guidelines and case law.

However, some considerations are set forth in the Memorandum that reflect recitals 66 and 70 of the DSM Directive:

> "Firstly, it is obvious that in order to achieve best effort, the platform provider itself must make a proactive effort to obtain licences from right-holders in relation to the types of works that are typically uploaded on its platform. In any event, such an effort must involve entering into negotiations with right-holders who are easily identifiable (for example, rightholders represented by collecting societies). The platform provider must also be prepared to negotiate in good faith for a licence agreement with right-holders who themselves offer to grant such a licence.
>
> On the other hand, in view of the large amount of content protected by rights, a platform provider cannot be required to acquire all licences. In this context, it should be borne in mind that the platform provider must not be subject to a general monitoring obligation. This means, inter alia, that in a situation where the platform provider has not been provided with the information necessary to identify the content (e.g., access to the digital file containing the subject matter of the rights, together with the necessary data), the platform provider cannot be obliged to identify such content independently and, consequently, to negotiate the acquisition of a licence in respect of that content.
>
> Furthermore, it should be noted that, in accordance with the principle of freedom of contract, the platform provider cannot be obliged to acquire the licence in any event. The platform provider will have made its best effort if it shows a willingness to acquire the licence on reasonable terms, but the right-holder or its agent does not enter into negotiations with the platform provider or refuses to grant the licence. It should be borne in mind that the draft does not create an obligation for right-holders to grant authorisation."

As regards the "high industry standards of professional diligence", the Memorandum states:

> "In particular, this can be done by comparing the uploaded content with the information provided by the rights holder, using content discovery algorithms or by detecting whether the content uploaded by the user contains a watermark or metadata marking that the content is protected by a third party right. However, the provision is drafted in a technology-neutral way to allow the platform provider to adopt other effective technological or non-technological solutions."

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

Yes, subsection 57.9 (4) of the Copyright Act states:

> "In determining whether the online content-sharing service provider has complied the requirements deriving from subsection 3 of this section, the principle of proportionality must be adhered to, taking into account also the type, the audience and the size of the service and the type of contents uploaded by the users of the service, as well as the availability of suitable and effective means and their cost for online content-sharing service providers."

The Memorandum states that the use of the term "best effort" in 57^{9} (3) in is not intended to derogate from the standard laid down in Article 17(4)(a) of the DSM Directive. It must be the best effort, taking into account the proportionality criterion. In the light of the proportionality criterion, the content of the scope of the effort must be determined taking into account the type, volume and target audience of the service, the type of content uploaded by users of the service, and the cost and availability to the platform provider of suitable and effective means.

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.

In addition to the "proportionality criteria" (see answer to the question 10 above), Section 57^{10} provides for exemptions from liability for new platform providers. The regulation is based on Article 17(6) of the DSM Directive. In order to safeguard innovation, it is important to ensure that new service providers who qualify as platform providers do not immediately have to comply with the strict economic or professional due diligence requirements laid down in Art. 57^{9}(3)(2), which would create an unreasonably high barrier to market entry for such service providers.

> "§ $57.^{10}$ Special rules for liability of online content-sharing service providers
>
> (1) An online content-sharing service provider the services of which have been available to in the European Union for less than three years and which have an annual turnover below 10 million euros, is not liable for unauthorised communication to the public or making available to the public of objects of rights in the manner specified in subsection 1 of § 57.9 of this Act, if they:
>
> 1) made best efforts to obtain an authorisation; and
>
> 2) acted expeditiously, after receiving a sufficiently substantiated notice regarding the infringement from the right-holder, to disable access to the notified objects of rights or to remove those objects of rights from their websites."

The burden of proving the size of the turnover and the length of the period of activity rests on the platform provider wishing to rely on the limitation of liability set out in the AutÕS § 57^{10} meaning that a priori no such assumptions regards to liability limitations are made.

Thus, a service provider who fulfils the requirements referred to in paragraph 1 shall not be required to put in place a solution to prevent, on a continuous basis, the uploading of subject matter for which it does not have authorisation to transmit or make available to the public. According to the Memorandum, changing the name or the scope of the

service or transferring the service to another legal entity shall not renew the derogation and agreements or other actions to renew the derogation shall be prohibited.

However, paragraph 2 provides for an additional obligation compared to the above for new platforms that have gained a certain popularity in a short period of time. A platform provider whose websites have been visited by more than five million unique visitors per month on average in the preceding calendar year shall not be liable for the unauthorised communication to the public or making available to the public of a subject-matter of a right through its websites if, in addition to the requirements of Art. 5710(1) of the Copyright Act, it proves that it made best efforts to prevent the future uploading of such a subject-matter of a right in respect of which it had received relevant and necessary information from right-holders. Thus, in a situation where the average number of visitors to a platform provider exceeds 5 million per month, a service provider fulfilling the conditions set out in paragraph 1 of that provision must, like a service provider fulfilling the conditions set out in Paragraph 579(2) of the AutÕS, take measures to identify and remove rights subject matter in respect of which right-holders have provided relevant and necessary information.

The law states an additional due diligence obligation for such service providers whose size is still noteworthy:

> "(2) An online content-sharing service provider which meets the conditions specified in subsection 1 of this section, where the average number of monthly unique visitors of the website of such service provider exceeds five million, calculated on the basis of the previous calendar year, is not liable for unauthorised communication to the public or making available to the public of objects of rights via its websites, if they prove, in addition to the requirements provided in subsection 1, that they have made best efforts to prevent further uploads of the notified objects of rights for which the right-holders have provided relevant and necessary information to the service provider."

Paragraph 3 specifies that, in fulfilling the obligations referred to in paragraphs 1 and 2 of this Article, account must also be taken of paragraphs 4, 5 and 7 of Section 579 of the AutÕS, i.e. the content of the obligations must be based on the principle of proportionality, must take account of the obligations to protect the fundamental right to freedom of expression of users, and the scope of the obligations described must not be interpreted in such a way as to impose a general obligation of supervision on the platform provider.

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. First and foremost, for the platform operator to adhere to its own immunity requirements, the Memorandum states that the right-holders must make available the relevant information:

> "rights holders also have an important role to play in fulfilling these obligations - in order for the platform provider to know which content to restrict uploads of, rights holders must provide relevant and necessary information (including, for example, a file containing the rights object) to service providers. The platform provider cannot be in breach of this obligation to the extent that it has not been provided with the information necessary to identify the content. However, the platform provider must ensure an effective means of providing right-holders with the relevant information."

As regards the removal of content by the platform operators, the laws states that in 57^9 (3) that the notification for removal must be *sufficiently substantiated notice*. The Memorandum explains:

> "In order to allow right-holders to submit a notification for the removal of protected content from a website, the platform provider must provide the possibility to submit such notifications and put in place a procedure to respond appropriately to such notifications. The possibility to submit a notification for the removal of infringing content must be available to all right-holders, inter alia, irrespective of whether they have given permission to access the content to a certain extent or have previously provided the information referred to in paragraph 2.

> The right-holder's notification for the removal of the subject-matter of the rights must be reasoned. Such justification must be sufficiently detailed to enable the platform provider to conclude that the right-holder's rights have been infringed by the uploading."

As regards the complaint procedure (section 57.11 of the Copyright Act) that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, the contents uploaded by the users on the website of the online content-sharing service provider, a right-holder requesting that access of the public to their object of rights would remain disabled or be removed after the submission of a complaint specified in subsection 1 of this section must substantiate this request.

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.

Not *expressis verbis*. However, if no authorization is given, platform provider must endeavour, subject to strict commercial or professional due diligence, to ensure that the particular work or object of a related right for which it has received relevant and necessary information from the right-holder is made available on or is removed from its platform. The Memorandum states that:

> "In particular, this can be done by comparing the uploaded content with the information provided by the rights holder, using content discovery algorithms or by detecting whether the content uploaded by the user contains a watermark or metadata marking that the content is protected by a third party right. However, the provision is drafted in a technology-neutral way to allow the platform provider to adopt other effective technological or non-technological solutions."

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.

No. Subsection 57^9 (7) of the Copyright Act states:

> "Upon complying with the requirements specified in subsection 3 of this section, the provisions of subsection 1 of § 11 of the Information Society Services Act are not applied to the online content-sharing service provider, taking also into account that while complying with the requirements specified in subsection 3 of this section, the online content-sharing service provider has no general obligation to monitor.[RT I, 28.12.2021, 1 – entry into force 07.01.2022]"

The Memorandum states that,

> "according to Article 11(1) of the InfoTS, the information storage service provider does not have an obligation to monitor information which it merely transmits or provides access to, which it temporarily caches for the purpose of transmission or which it stores for the user of the services, nor does it have an obligation to search for facts and circumstances indicating illegal activity. A grammatical reading of this clause suggests that providers of information storage services are not subject to any obligation to monitor (i.e. both a general obligation to monitor and a limited obligation to monitor applicable in specific cases). For the sake of legal clarity, the provision in question provides that, to the extent that Article 11(1) of the InfoTS also excludes a limited obligation of supervision, such exclusion does not apply to platform providers in the performance of their obligations under Article 579(3) of the AutÕS."

At the same time, paragraph 7 sets out the principle that the obligations of platform providers described in Art. 57^9(3) of the AutÕS must not be so extensive as to constitute a general obligation of supervision. In substance, this principle presumably corresponds to the prohibition of a general obligation of supervision laid down in Article 15(1) of the e-commerce Directive, the content of which has been clarified in several previous judgments of the Court of Justice. According to the drafters, as set forth in Explanatory Memorandum, this means in particular that

platform providers cannot be obliged under Art. 57^{9}(3) AutÕS to proactively identify and remove content for which they have not been provided with relevant information in advance.

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

No, the Memorandum only declares the obvious:

> "Compliance with the obligations described in § 579(3)(2) and (3) of the AutÕS, which is added by the draft, may generally mean that the platform provider implements automated content identification and blocking technologies to remove infringing content. It is obvious that the technological solutions put in place are in many cases not sufficiently capable at the time of the adoption of the amendment in question to adequately detect uploads that qualify, for example, as cases of free use. This makes it easier for a platform provider to take down content than to put in place a solution to detect whether copyright or related rights have been infringed. This may also result in the blocking of content that the user actually had the right to upload. Such over-blocking would be particularly problematic given the central role of internet platforms in enabling the global distribution of digital content."

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.

Subsection 57.9 (5) of the Copyright Act states that:

> "Upon complying with the requirements specified in clauses 2 and 3 of subsection 3 of this section, the online content-sharing service providers must take measures to enable users to lawfully communicate to the public or make available to the public the objects of rights, including on the basis of the cases of free use provided in Chapter IV of this Act, considering, among other things, and the industry standards of professional diligence."

Subsection 579 (5) of the Authors' Rights Act means that the platform provider must (when complying with the requirements set out in subsections 572 (3) (2) and (3) of the Authors' Rights Act) allow users to upload and make available information that has been uploaded to the platform, taking into account, *inter alia*, the cases of free use set out in Chapter IV of the Authors' Rights Act. According to the spirit of the Directive, in addition to the exceptions, thus citation, caricature, pastiche etc., users may also rely on the other cases of fair use set out in Chapter IV of the AutÕS, insofar as the conditions for their application are fulfilled. These free use cases such as caricature, pastiche, citation, etc. have been part of Authors' Rights Act since its adoption in 1992.

According to paragraph 2 of 57^{12} of the Copyright Act, the platform provider must inform users in the terms of service that they may use works and other material in accordance with the cases of free use laid down in the Copyright Act. This will raise awareness among users of their rights to rely on the exceptions provided for in the Copyright Directive when transmitting and making available content. The provision has been added on the basis of the last sentence of Article 17(9) of the DSM Directive.

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

See answer to the question 27.

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.**

As stated above, the Memorandum states that Copyright Act 57^{9} (3)(1) means that there are some important considerations that can be taken as a starting point for making the best possible effort.

> "Firstly, it is obvious that in order to achieve a best effort, the platform provider must itself make a proactive effort to obtain licences from right-holders for the types of works that are typically uploaded on its platform.
>
> In any event, such an effort must involve entering into negotiations with right-holders who are easily identifiable (for example, right-holders represented by collecting societies).
>
> The platform provider must also be prepared to negotiate in good faith for a licence agreement with right-holders who themselves offer to grant such a licence.
>
> On the other hand, in view of the large amount of content protected by rights, a platform provider cannot be required to acquire all licences. In this context, it should be borne in mind that the platform provider must not be subject to a general monitoring obligation. This means, inter alia, that in a situation where the platform provider has not been provided with the information necessary to identify the content (e.g., access to the digital file containing the subject matter of the rights, together with the necessary data), the platform provider cannot be obliged to identify such content independently and, consequently, to negotiate the acquisition of a licence in respect of that content.
>
> Furthermore, it should be noted that, in accordance with the principle of freedom of contract, the platform provider cannot be obliged to acquire the licence in any event. The platform provider will have made its best effort if it shows a willingness to acquire the licence on reasonable terms, but the right-holder or its agent does not enter into negotiations with the platform provider or refuses to grant the licence.
>
> It should be borne in mind that the draft does not create an obligation for right-holders to grant authorisation."

Platform providers must act <u>transparently towards</u> right-holders in § 57^{12} of the Copyright Act. Memorandum states that:

> "Where there is a licence agreement between a platform provider and a right-holder for the transmission or making available of content, the platform provider must provide the right-holder, upon request, with sufficient information on the use of the content covered by the agreements, including the volume of such use. The information on compliance with the requirements set out in Art. 579(3) and (5) of the Copyright Administration Act must be sufficiently relevant, comprehensive and accurate to ensure that right-holders have sufficient information to draw adequate conclusions as to the fulfilment of the platform provider's obligations. In this respect, right-holders are entitled, in the case of measures imposed under Art. 579(5) of the Copyright Act, to receive information to enable them to assess under which conditions the subject matter of the rights is not blocked (including to establish that the platform provider is not abusing the measure under Art. 5 to make available content that is clearly infringing exclusive rights).

> The obligation imposed by this provision does not require the platform provider to be able to provide information on the due diligence measures taken in respect of each specific work or subject matter of the rights related to copyright. Nor does such an obligation to provide information imply that the platform provider is under an obligation to disclose business secrets within the meaning of Article 5(2) of the Act on the Prevention of Unfair Competition and Protection of Business Secrets. The platform provider and the right-holders or their representatives may also agree on the precise terms and conditions regarding the information that the platform provider shares with the right-holders."

The Explanatory Memorandum further states that the regulation could have an impact on the information society, as extended licensing agreements can also be concluded, for example, to carry out various digitisation projects, to make works and objects of copyright available on various platforms, etc.

Section 57.13 of the Copyright Act foresees state supervision:

> "State supervision over performance of the obligations of an online content-sharing service provider provided in subsection 5 of § 579, subsections 1 and 2 of § 57.11 and subsection 2 of § 57.12 of this Act is exercised by the Consumer Protection and Technical Regulatory Authority."

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.

Yes, the license obtained by the platform covers users' right under subsection 57.9 (2) of the Copyright Act:

> "Where an online content-sharing service provider obtains an authorisation for communication to the public or making available to the public of objects of rights, that authorisation provides the user of the service also with the right to communicate to the public or make available to the public the objects of rights via the website of the online content-sharing service provider, to the extent covered by the authorisation, provided that they are not acting on a commercial basis or their activity does not generate significant revenues."

To note, in official English translation the ending reads: "[…] provided that they are not acting on a commercial basis and their activity does not generate significant revenues."

Arguably, if the user has a license to use the works, it is a "license" also for the platform. This is contradicted by the new, widened notion of "communicating to the public", where all actors in the link participate. However, the Explanatory Memorandum also suggests this approach of "extended license": the communication to the public or making available to the public of the subject matter of the rights is lawful if:

1. the activity of the user is covered by one of the cases of fair use provided for in Chapter IV of the Copyright Act;
2. The user has permission (licence) to upload the content;
3. The uploaded content is not protected by third party rights because:
    a. the user himself has created the content,
    b. the content is not the subject of a work or of rights related to copyright; or
    c. the rights have expired in respect of content created by a third party.

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?

"Legitimate uses" are tied to "lawful communication" in subsection 57.9 (5) of the Copyright Act (see also above regards free uses (answer to question 16) and freedom of expression (answer to question 27):

> "Upon complying with the requirements specified in clauses 2 and 3 of subsection 3 of this section, the online content-sharing service providers must take measures to enable users to lawfully communicate to the public or make available to the public the objects of rights, including on the basis of the cases of free use provided in Chapter IV of this Act, considering, among other things, and the industry standards of professional diligence."

The Memorandum explains:

> "Protecting freedom of expression requires, among other things, that content that does not infringe copyright and related rights does not become inaccessible on digital platforms. The communication or making available to the public of the subject matter of rights is lawful if:
>
> the user's activity is covered by one of the cases of free use set out in Chapter IV of the Copyright Act;
>
> The user has permission (licence) to upload the content;
>
> The uploaded content is not protected by third party rights because:
>
> - the user himself has created the content,
> - the content is not the subject of a work or of rights related to copyright, or
> - the rights have expired in respect of content created by a third party."

This provision does not mean that the platform provider must be able to identify and ensure the availability of legitimately uploaded content in each individual case. The purpose of the provision is to direct the platform provider to take measures to minimise the number of cases where legitimately uploaded content is blocked. The platform provider remains free to decide what measures it will take to achieve this. The effectiveness of the measures taken by the platform provider will depend on the market standard. The Memorandum explains:

> "In essence, such a solution means that (i) the platform provider must take appropriate steps to minimise the blocking of legitimately uploaded content already at the stage of uploading the content and (ii) the solution adopted by the platform provider must not be highly inefficient if a significantly more efficient standard for detecting the legitimacy of similar content and making it available has evolved in the market of competing service providers, and it would not be disproportionate for the platform provider to comply with such a standard in light of AutÕS § 579(4).
>
> The provision is based on the fact that the European Commission's guidelines to be issued for the application of Article 17 of the DSM Directive will also develop a state-of-the-art standard to reduce false positives, i.e. situations where legitimately uploaded content is blocked."

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

No, not in affirmative manner.

However, the Explanatory Memorandum uses the term "manifestly infringing content" in one place. Namely regards paragraph 5712(1) that regulates the exchange of information, based on Article 17(8) of the DSM Directive. It states:

> "Platform providers must act transparently towards right-holders. Where a licence agreement between a platform provider and a right-holder for the transmission or making available of content has been concluded,

the platform provider must provide the right-holder, upon request, with sufficient information on the use of the content covered by the agreements, including the volume of such use. The information on compliance with the requirements set out in Art. 579(3) and (5) of the Copyright Administration Act must be sufficiently relevant, comprehensive and accurate to ensure that right-holders have sufficient information to draw adequate conclusions as to the fulfilment of the platform provider's obligations. In this respect, right-holders are entitled, in the case of measures imposed under Art. 579(5) of the Copyright Act, to receive information to enable them to assess under which conditions the subject matter of the rights is not blocked (including to establish that the platform provider is not abusing the measure in Art. 5 to make available content that is manifestly infringing exclusive rights)."

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.

See answers to questions 17, 18, 27.

Additional comment: in the draft it was considered that in order to protect users' freedom of expression, a measure should be introduced whereby the platform provider would have to allow the user to confirm that the uploading of the rights object is legitimate, as it is a case of free use. Upon such confirmation, the platform provider would not make the uploaded right object unavailable, unless the illegality was obvious (the use of the right object clearly exceeds the motivated volume). The negative impact on right-holders of users asserting (maliciously or unknowingly) the legitimacy of content, even in situations where making the content available would infringe the exclusive rights of the right-holder, was to be further mitigated by an obligation on the platform provider to limit the right to assert the legitimacy of users who repeatedly abuse this right. A similar solution, based on user assurance, has been proposed by European academics and several interest groups. From other Member States, a similar solution was proposed in the initial draft transposition of the German DSM Directive. However, this was dropped and the reasoning is in Memorandum:

> "Although such a safeguard would provide some legal clarity compared to the solution proposed in the draft, it would not be flexible enough to take account of possible more efficient solutions that may emerge in the online platform market. Secondly, such a solution would not be in line with the European Commission's proposal to safeguard freedom of expression, and would therefore lead to fragmentation of the EU market, thereby creating a significant additional administrative burden for platform providers."

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.

There are a few such safeguards :

1. In court procedures.

   Application for injunction. Under the Estonian Civil Procedure Code, the judge has to make a decision on grant or non-grant within 24 hours. However, it is difficult to change the status quo (e.g., reinstatement would change the status quo *vis-à-vis* removed content).

   General proceedings. Under Estonian Courts good practices, the county court should reach the decision within 100 days. However, in practice, this time may be much longer.

2. Complaint mechanism.

   In the event that the platform provider blocks content which the user considers to be lawful to upload, the platform provider must ensure that the user has the opportunity to lodge a complaint, which, if granted, obliges the service provider to make the incorrectly blocked content available again (§ 57^{11}(1)).

In doing so, the platform provider must ensure that the submission of complaints is convenient and easy for the user and that complaints are handled as efficiently and quickly as possible. Decisions to remove uploaded content or to make it inaccessible to the public must be subject to human review, which is to help to ensure that complaints are resolved in a way that allows a meaningful assessment of the legality of the uploaded content.

No time limit is foreseen in the law.

3. Copyright Commission procedure.

In the event of a dispute, the user must be able to refer the matter to the Copyright Committee. The Copyright Committee at the Patent Office shall settle by conciliation, disputes between a user of a platform service and a platform provider or a right-holder concerning the question whether the transmission or making available of a work or other content via a platform provider's website infringes copyright or rights related to copyright. This will provide users with an additional out-of-court dispute resolution mechanism in relation to disputes as to whether a user's transmission or making available of content through a platform provider's website is lawful.

No time limit is foreseen in the law.

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.

See above, reply to question 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.

For users: no

For right-holders: no

For platforms: the draft provides for national supervision of the fulfilment of certain obligations by the platform provider. The obligations of the platform provider to be supervised are, according to the Act:

"(1) an obligation to establish a complaints and redress mechanism that users (consumers) of their services can use in the event of a dispute between the right-holder and the user of the service over the unavailability or removal of uploaded works or other material,

(2) an obligation to ensure that complaints and disputes are dealt with without undue delay and that decisions to remove or make inaccessible to the public uploaded content are subject to human review,

(3) an obligation to ensure that the mechanism for resolving complaints relating to the removal of content takes into account the economic or professional standard in striking a balance between the protection of right-holders and the fundamental right to freedom of expression,

(4) the obligation to inform users (consumers) of the terms of the service that they may use works and other material in accordance with the exceptions laid down in copyright law.

(5) Transparency obligations and informing obligations towards right-holders."

As regards sanctions, see section 57.15 of the Copyright Act:

> "§ 57.[15] Compliance notice and non-compliance levy
>
> (1) If an online content-sharing service provider does not perform the obligations provided in subsection 5 of § 57.9, subsections 1 and 2 of § 57.11 and subsection 2 of § 57.12 of this Act, the Consumer Protection and Technical Regulatory Authority has the right to issue a compliance notice to the online content-sharing service provider and require performance of the obligation.
>
> (2) Upon non-compliance with the compliance notice specified in subsection 1 of this section, the Consumer Protection and Technical Regulatory Authority may impose a non-compliance levy in accordance with the procedure provided in the Substitutional Performance and Non-Compliance Levies Act.
>
> (3) The upper limit of the non-compliance levy specified in subsection 2 of this section is 50,000 euros."

AC 13: Information obligations

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

Section 57.[12] of the Copyright Act states that:

> "§ 57.12 Notification obligation of online content-sharing service providers
>
> (1) An online content-sharing service provider must give sufficient information to a right-holder at the request of the latter:
>
> 1) regarding the use of the content covered by the licence agreement between the online content-sharing service provider and the right-holder;
>
> 2) regarding compliance with the requirements provided in subsections 3 and 5 of § 57.9 of this Act.
>
> (2) An online content-sharing service provider must inform, in the terms and conditions of their service, the users about the fact that they can use the objects of rights made available to the public on the website of the online content-sharing service provider in the cases of free use provided in this Act.[RT I, 28.12.2021, 1 – entry into force 07.01.2022]"

AC 14: Waiver

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

As the right-holders also include those right-holders for whom the Copyright Act does not allow waiving of rights (e.g., for authors in case of further distribution), there is no definitive answer to this question. However, waiver in this case could come in the form of inactivity from the right-holder.

AC 15: Entry into effect

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

As of 7 January 2022.

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)?

Explicit addressing: not in the law *expressis verbis*. However, in general, yes.

In the draft law there was a norm, an original wording of subsection 579(5):

> "In fulfilling the requirements specified in subsections 579(3)(2) and (3) of this Act, the platform provider shall take measures to protect the fundamental right of freedom of expression of users, based, inter alia, on the standard in the field of economic and professional activities."

In the final law, the subsection 57.9 (5) of the Copyright Act is:

> "Upon complying with the requirements specified in clauses 2 and 3 of subsection 3 of this section, the online content-sharing service providers must take measures to enable users to lawfully communicate to the public or make available to the public the objects of rights, including on the basis of the cases of free use provided in Chapter IV of this Act, considering, among other things, and the industry standards of professional diligence."

As per the explanation during the readings in the Parliament the purpose was that the amendment, the text of § 579(5) would no longer refer to the "protection of the fundamental right to freedom of expression", which the platform provider should take measures to ensure, but to measures to enable (i.e., not block) legitimate uploads. The Ministry of Justice stressed that the adoption of measures to "enable users to make lawful subject matter of rights available to the public" does not imply an obligation on the part of the platform provider to ensure that lawful uploads are always available through the platform, but aims at minimising (as far as possible) the blocking of lawful uploads in situations where the platform provider exercises its obligations under § 579(3)(2) and (3) and § 5710(1)(2).

According to the Ministry of Justice, in addition, subsection 579 (5) of the Authors' Rights Act has been clarified in the proposed amendment to the effect that the platform provider must (when complying with the requirements set out in subsections 572 (3) (2) and (3) of the Authors' Rights Act) allow users to upload and make available information that has been uploaded to the platform, taking into account, *inter alia*, the cases of ALL free use set out in Chapter IV of the Authors' Rights Act. According to the spirit of the Directive, in addition to the exceptions thus as citation, caricature etc., users may also rely on the other cases of fair use set out in Chapter IV of the AutÕS, insofar as the conditions for their application are fulfilled.

Additional safeguards for users (that are to protect fundamental human rights of remedy, rights to express etc.).

The Explanatory Memorandum states that: "To this end, Section 579(5) of the AutÕS, provides that when making a decision to block the transmission or making available of content, the platform provider must take measures to protect users' fundamental right to freedom of expression, based, inter alia, on the standard in the field of economic and professional activities for the protection of users' freedom of expression."

However, in the law in force, as stated, no reference exists to the freedom of expression, but the norm states:

> "to enable users to lawfully communicate or make available to the public the subject-matter of rights."

As the Explanatory Memorandum suggests, in order to minimise negative effects and to protect the fundamental rights of platform users, the draft sets out the following safeguards:

1. Establishing a fast and light complaint handling mechanism. In the event that the platform provider blocks content which the user considers to be lawful to upload, the platform provider must ensure that the user has the opportunity to lodge a complaint, which, if granted, obliges the service provider to make the incorrectly blocked content available again (§ 5711(1) of the AutÕS to be inserted by the draft).

2. In the event of a dispute, the user must be able to refer the matter to the Copyright Committee. The Copyright Committee at the Patent Office shall settle by conciliation, in accordance with the procedure laid down in the Conciliation Act, disputes between a user of a platform service and a platform provider or a right-holder concerning the question whether the transmission or making available of a work or other content via a platform provider's website infringes copyright or rights related to copyright. This will provide users with an additional out-of-court dispute resolution mechanism in relation to disputes as to whether a user's transmission or making available of content through a platform provider's website is lawful.
3. As the Explanatory Memorandum suggests: "Pursuant to Section 57^{9}(5) of the Copyright Act, the platform provider must in essence ensure that additional safeguards are introduced to protect users' freedom of expression when using filtering technology."

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.