

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

FINLAND

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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>

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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.**

Press publications have been regulated by the Finnish Copyright Act with three specific sections – section 23, section 25 g and section 50 – but the protection has not been similar to the protection of press publications under Art 15 CDSMD. Because of the overlaps of subject-matter, section 50 was repealed and replaced with a new provision, intended to implement Article 15 CDSMD. Section 23 remained intact. The same applies to section 25 g.

Section 50 of the Finnish Copyright Act with the title “*Press reports*” provided that:

“A press report which is supplied by a foreign press agency or by a correspondent abroad by virtue of a contract may not be made available to the public by the medium of a newspaper or radio without the consent of its recipient, until twelve hours have elapsed from its making public in Finland.”

In other words, such press reports received from a foreign press agency or a correspondent abroad by virtue of a contract were given a short 12 hours’ protection from newspapers and radio in Finland. This provision has now been repealed and replaced with a new one, implementing Article 15 CDSMD.

Section 23 of the Finnish Copyright Act with the title “An article on a current topic” provides that:

“(1) Articles in newspapers and periodicals on current religious, political, or economic topics may be included in other newspapers and periodicals, unless reproduction is expressly prohibited.

(2) The author's name and the source must always be indicated.”

The provision is based on Art 10 *bis* (1) of the Berne Convention (BC). Whether the section should be repealed was discussed during the implementation process of the CDSMD, as the Government's Bill HE 43/2022 vp, (henceforth "Government's Bill", at p. 25) erroneously states that this limitation is not included in the exhaustive list of permitted exceptions and limitations in the ISD. However, as can be read from Article 5(3)(c) ISD, one permitted exception or limitation is for:

"reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible".

In the end, section 23 of the Act was preserved and also *made applicable to the press publisher's right*. The Government's Bill says that the established nature of the limitation and the fact that the representatives of media businesses do not object it, speaks in favour of preserving it in the Copyright Act. Section 23 will be discussed in more detail under Question 13 (exceptions and limitations to press publisher's right).

Section 25 g, titled "A reuse of a television programme or a newspaper or periodical stored in archives", which is applicable to newspapers or periodicals, states that:

"A publisher may make a copy of the work by virtue of extended collective licence, as provided in section 26, and communicate it to the public, if the work is included in a newspaper or a periodical published by the publisher before 1 January 1999."

Section 25 g(3) adds that:

"The provisions of subsections 1 and 2 shall not apply to a work whose author has prohibited the use."

The provision does not define publishers. It is applicable when copyright owners have not transmitted through individual licensing or other transfer the rights needed for online republication to the publisher of a newspaper or periodical, as concerns works published before 1 January 1999. It is presumed that after this date, online republication has been arranged directly through contract. When republication of such journalistic content would not be otherwise possible, section 25 g(2) enables republication through a collective license, under section 26 of the Act. Section 25 g does *not* apply to the press publisher's right.

In addition to these specific provisions pertaining to press publications, press publications could have received protection as *compilation works* under the general provisions and doctrines of copyright, provided the general criteria for copyright protection (above all the threshold of originality) were fulfilled. Such rights to the compilation – if any – emerge originally with the employee or other natural person compiling such a work. The rights may transfer to the employer, such as a press publisher, because of the employment relationship or employment contract, or because of other specific contractual obligations to that effect between the employee and the employer. The Finnish Copyright Act does not specify under which conditions copyright transfers from the employee to the employer. Such a compilation is protected – if the general criteria for protection are fulfilled – like any other copyright-protected work, implying also protection for reproduction in part under the relevant conditions. The same applies to individual news articles. They are subject to copyright law like any other literary works and the rights can be transferred from the employee to the employer (such as a press publisher) under the same provisions. The applicable general provisions of the Finnish Copyright Act pertaining to copyright in compilation works or individual press publications such as news stories were not repealed or modified in the course of transposing CDSMD in Finland.

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

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

Article 15 CDSMD was transposed into national law in Finland through an amendment to the Copyright Act (8.7.1961/404, in Finnish “*Tekijänoikeuslaki*”). The amendment has the date and identification number 3.3.2023/263 and the name in Finnish “*Laki tekijänoikeuslain muuttamisesta*”, “*Law about amendments to the Copyright Act* (my translation, henceforth “*Amending Act*”).

The up-to-date Copyright Act is here <https://www.finlex.fi/fi/laki/ajantasa/1961/19610404> (in Finnish) and here <https://www.finlex.fi/sv/laki/ajantasa/1961/19610404> (in Swedish). A translation into English has been prepared by the responsible Ministry of Education and Culture, but it has not been updated since amendment 608/2015. It is here https://www.finlex.fi/fi/laki/kaannokset/1961/en19610404_20150608.pdf.

The transposition takes for the most part a textual or “*ad litteram*” minimalist approach, but also seeks to preserve a limitation of press publishers’ right under section 23 of the Copyright Act, which was cited above. It also adapts the press publisher’s right to existing exceptions of the Finnish Copyright Act and utilizes the Finnish collective licensing mechanism for the purposes of mass licensing as one alternative.

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

AC 1: Subject matter

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

Section 50(3) of the Finnish Copyright Act provides the same definition as Art 2(4) of the CDSMD without any meaningful changes or modifications. It modifies the order by excluding scientific or academic publications in the first paragraph. Sub-sections (1)-(3) of Section 50(3) are in practice identical with the language of Art 2(4) (a)-(c) CDSMD.

The Government’s Bill specifies in its reasons (at p. 108) that internet news sites are covered by the definition but other internet sites such as blogs in general not, if they post blogs as part of their other activity and not due to the initiative, editorial responsibility and control of a service provider such as a news publisher. The Government’s Bill refers here to recitals 55 and 56 of CDSMD. The Government’s Bill also explains that the press publisher’s right does not require independence or originality from the press publication or its part, which are the general conditions of copyright protection. Furthermore, the Government’s Bill states that both printed and online / digital press publications qualify for protection, but the exclusive right only protects from online uses by information society service providers (in line with CDSMD). However, the limitation to online uses / information society service providers is not clearly expressed in section 50. This aspect of LNI will be discussed in more detail under Question 11 (Targeted users).

Government’s bills in Finland typically strongly affect courts’ subsequent interpretation of the enacted provisions provided the provisions have not been modified in the course of the legislative process and the reasons given in the Government’s Bill clarify the meaning. This is the situation in the present context.

- 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.**

Individual words or very short extracts are excluded from protection under Section 50(2), numbered subparagraph 3).

The provision copies the text of Art 15(1) for the relevant parts but does not define what it means. There are no specific provisions on non-literary content or headlines, but the Government's Bill notes that the CDSMD does not provide specific protection for headlines (at p. 46). However, later the Government's Bill (at p. 108) notes that the purpose of the Act is not to categorically exclude protection from headlines even if they are very short. It continues that headlines constitute press publication's essential and commercially significant elements. This statement in the Government's Bill may affect subsequent interpretations by Finnish courts so that they may grant protection for very short headlines more easily. Otherwise, the Government's Bill leaves the subsequent definition of what constitutes individual words or very short extracts to the courts.

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

The LNI does not seem to extend to mere facts reported under the protected subject matter. However, there is no specific exclusion to this effect either, although the Government's Bill (at p. 108) notes that recital 57 excludes mere facts reported from the protected subject matter.

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

Section 50(3) of the Copyright Act states that the rights of the press publisher as defined under Section 50(1) cannot be invoked to prohibit content whose copyright protection has expired. There are no other exclusions or specific provisions pertaining to public domain content.

- 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.**

Section 50(1) of the Copyright Act merely states that the publisher of a press publication gets the right, without defining the concept of a publisher. The types of press publications covered under the definition of a press publication is discussed above. The Government's Bill refers (at p. 107) to recital 55 of the CDSMD and explains that the concept covers service providers such as news publishers and news agencies. The referred recital of CDSMD also states that to benefit from protection, the press publisher must be established in a Member State and have its registered office, central administration or principal place of business within the Union. This is given effect in Section 64 of the Copyright Act. This provides that section 50 of the Act (discussed above) applies to press publications of a publisher established in a Member State of the European Economic Area (EEA). The provision does not specifically require that the press publisher must have its registered office, central administration or principal place of business within the Union. The Copyright Act does not list any specific press publications or beneficiaries of protection.

AC 3: Restricted acts

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

Section 50(1) of the Copyright Act provides the holder of a press publication right with (my translation):

“--an exclusive right to control the publication by reproducing it and by communicating it to the public for the purpose of gain so as to enable members of the public to access the work from a place and at a time individually chosen by them.”

It should be noted that the Finnish Copyright Act uses the term *communication to the public* also for the *making available to the public* right of Art 3(2) of the Information Society Copyright Directive (ISD). Under the Finnish Copyright Act, making available to the public is a broader category comprising multiple rights, including communication to the public; public performance; offering for sale, rental or lending; and public display.

Reproduction is a generic term of copyright, defined in section 2(2) of the Copyright Act. According to this:

“The reproduction of a work shall comprise making copies of the work in whole or in part, directly or indirectly, temporarily or permanently and by any means or in any form whatsoever. The reproduction of a work shall also comprise the transfer of the work on to another device, by which it can be reproduced or communicated.”

Communication to the public is defined in section 2(3), numbered sub-section 1). According to this, a

“work is communicated to the public by wire or wireless means, including communication in a way which enables members of the public to access the work from a place and at a time individually chosen by them”.

Section 2(4) of the Copyright Act further defines that:

“A performance and communication to the public shall also comprise performance and communication to a comparatively large closed circle for purposes of gain.”

However, it is not clear whether *reproduction* and *communication to the public* under section 50(1) are interpreted in the same way as with copyright in general. The Government’s Bill merely says (at p. 107) that the press publisher’s right does not require independence or originality from its protected subject matter, which are the conditions of protection under copyright. Considering the different subject matters of protection and copyright’s originality threshold lacking with press publisher’s right, different interpretations are thus likely. For example, communicating to the public of a press publication in modified or altered form should not fall under the exclusive rights of a press publisher. Furthermore, hyperlinking is excluded from the press publisher’s right, signifying a difference to the communication to the public right under copyright in general.

The text of section 50(1) does not clearly limit the exclusive right to services offered *on-line* via computer networks as required by Art 15 CDSMD. The words of section 50(1) “*so as to enable members of the public to access the work from a place and at a time individually chosen by them*” suggests on-line use but the definition is explicitly connected to the communication to the public right only. The Government’s Bill (at p. 107 and 108) says that it is the intention of section 50 of the Act to protect from online uses only. It refers to recital 55 of CDSMD, which expresses the intention to limit the right to on-line uses by information society service providers. Courts in Finland will likely follow this clarification to the extent possible, provided they first pay attention to the reasons given in the Government’s Bill and the intention of the CDSMD.

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

Section 50(2), numbered subparagraph 2) of the Copyright Act excludes hyperlinks from the exclusive rights of the holder of press publisher's right by stating that section 50(1) shall not be applied to hyperlinks. Hyperlinks are not defined in the Act.

Government's Bill explains (at p. 107) that this means that communicating a newspaper or periodical to the public through hyperlinking is not part of the exclusive rights. Instead, the exclusive rights are said to apply to search services that index and reproduce newspaper pages found online. It further notes that such search services can be specialised in media monitoring and news aggregation. It specifies that to the extent general purpose search services produce similar results, they are also covered by the exclusive right.

AC 4: Targeted users

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

The text of section 50(1) of the Act does not limit the exclusive right to services offered by *information society service providers*, as required by Art 15 CDSMD. However, the Government's Bill (at p. 107 and 108) says that this is the intention of section 50 of the Act. The Government Bill refers to recital 55 CDSMD, which expresses the intention to limit the right to on-line uses by information society service providers. Courts in Finland will likely follow this, provided they read the Government's Bill and the CDSMD.

The Government's Bill does not specify what type of information society service providers are covered – for example whether social media services like Twitter and Facebook are covered or not. This is a contested question in the implementations of Art 15 CDSMD (see e.g. Furgal, Ula, “The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings”, GRUR International 2023, 1–15). The question is also connected to the exclusion from the scope of exclusive rights of *private or non-commercial uses by individual users*, and will be discussed in more detail in the following.

Section 50(1) of the Act limits the exclusive rights of reproduction and communication to the public *for the purpose of gain*. This could constitute an attempt to transpose the requirement of the second subparagraph of Art 15(1) CDSMD that the “*rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users*”. However, section 50(2)1) of the Finnish Copyright Act transposes the said requirement clearly and explicitly by stating that section 50(1) shall not be applied to *private or non-commercial uses of press publications by individual users*.

Section 50(1) of the Act thus excludes reproduction and communication to the public not made for the purpose of gain from the scope of the exclusive right by *using different terminology* than that used in section 50(2)1), which reproduces the wording of the second sentence of Art 15 CDSMD. There is no justification or explanation for this legislative solution in the Government's Bill. The Government's Bill explains (at p. 107) in its reasons that when applying the exclusion of *private or non-commercial uses of press publications by individual users*, it does not make a difference what types of web pages or services are used for communication to the public. It mentions as examples of permitted uses private individuals' Twitter or Facebook posts for the exercise of their freedom of expression, as well as other network uses *without the purpose of gain*. In other words, the Government's Bill does not seem to distinguish the concepts but possibly treats them as synonyms. However, this is hardly a logical conclusion.

The limitation of the exclusive rights of the press publisher *for the purpose of gain* in section 50(1) does not limit the exclusion to *individual users*, like section 50(2)1) and the second sentence of Art 15 CDSMD do, suggesting that the limitation *for the purpose of gain* excludes some situations from the scope of the exclusive rights not excluded by section 50(2)1), which is based on the second sentence of Art 15 CDSMD.

The exclusion of acts not made for the purpose of gain could contradict Art 15 CDSMD, as uses of press publications by *non-individual users* would fall outside the exclusive right whenever they are not for the purpose of gain. When uses are for the purpose of gain, section 50(2)1) would prevent the application of section 50(1) when there is private *or* non-commercial use by individual users. Section 50(2)1) and the second sentence of Art 15 CDSMD use *three distinct concepts*, 1) *private or* 2) *non-commercial* uses and the additional criterion of 3) *individual users*. 1) and 2) being alternatives means that some private uses must fall outside the concept of non-commercial uses and the other way around. Otherwise, only one concept would have sufficed. In addition, the use must be done by an *individual user* to be excluded. It is not clear whether the term *individual user* is restricted to natural persons (private individuals) in their personal capacity or whether the concept also covers online postings of press publications by individual representatives of diverse organizations, such as non-profit organizations and even commercial enterprises.

Section 50(1) seems to establish a fourth category by excluding from the press publisher's rights uses made without '*the purpose of gain*.' It would be illogical to transpose the same limitation twice by resorting to different terminology. Moreover, it would be rational to presume that different terminology, especially when used in the same section, is intended to produce different effects. Only when the use of a press publication is *for the purpose of gain*, does the question of whether section 50(2)1) applies materialise. Section 50(2)1) would not have any function, should the effects of the two expressions be the same. It is thus reasonable to think that they have at least partly different meanings and effects, although especially the concepts *without the purpose of gain* and *non-commercial uses* may be closely related. The criterion *private or non-commercial uses of press publications by individual users* under section 50(2)1) thus excludes at least some additional situations from the scope of the exclusive rights as defined under section 50(1) and the concept *for the purpose of gain*. Otherwise, section 50(2)1) could be never applied.

The Finnish Copyright Act uses the term *for the purpose of gain* also when defining the communication to the public right in section 2(3) 4), by stating that a performance and communication to the public shall also comprise performance and communication to a comparatively large closed circle for purposes of gain. However, it is not clear whether the intended meaning of the term in section 50(1) is intended to be the same.

Section 50 of the Copyright Act and the Government's Bill do not thus directly answer whether social media services like Twitter and Facebook are covered by the exclusive rights of press publishers when they provide their platforms and offer their services for individual users to post privately or non-commercially press publications. However, private or non-commercial uses of press publications by individual users through such social media platforms would be in practice excluded, should such social media platforms need permission from press publishers for posts of press publications through social media services. Compared to news aggregators or search services providing snippets of news publications, their role is also more passive. Many news publishers actively offer the possibility of posting their news for example to Twitter, Facebook and other social media. This suggests that the exclusion of private or non-commercial uses by individual users also excludes the related social media platform and service from the coverage of the exclusive rights.

Press publisher's rights are not within the chapter concerning the liability of online platforms (OCSSPs). Section 55 I provides the list of related rights that are covered by the regime implementing Art 17 CDSMD. Section 50 is not covered. This exclusion is also noted in the Government's Bill (at p. 27). This indicates that OCSSPs do not have to acquire licenses and they do not become liable when users upload press publications.

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.

Section 50(4) of the Copyright Act provides that "when a [copyright-protected] work is included in a press publication on the basis of a non-exclusive license, section 50(1) cannot be invoked against the holder of such a license to prohibit the license holder's use" (my translation).

Section 50(6) further specifies that "section 50 does not affect the rights of the author under this Act to the work included in a press publication" (my translation).

However, there is no provision reproducing the wording of Art 15(2) second sentence, according to which:

“The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders 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.”

It is thus clear that under section 50(4) press publisher’s right cannot be invoked against the holder of a non-exclusive license to prohibit such license holder’s use.

It is less clear what section 50(6) means in practice and why Art 15(2) second sentence has not been implemented specifically. I interpret section 50(6) of the Act so that when a right owner has granted the press publisher a *sole* or a *non-exclusive license*, the right owner’s situation is analogous to the holder of a non-exclusive license. In other words, the owner’s use cannot be prohibited by the press publisher under such circumstances. When the right owner has granted the press publisher an exclusive license, which also excludes the right owner’s own use, press publisher’s right can possibly be invoked against the owner’s use.

However, as there is no explicit transposition of Art 15(2) second sentence, it is uncertain whether the rights provided for in Art 50(1) can be invoked against authors and owners of related rights under some circumstances, for example when such authors or right owners exploit their works or other subject matter non-independently from the press publication in which they are incorporated.

AC 5: Exceptions and limitations

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

The last para of Section 50 Copyright Act makes a reference to certain existing exceptions and limitations to copyright and states that press publisher’s right shall be correspondingly governed by the provisions of sections 11, 11 a, 13 b, 16, 16 f–16 j, 17 a–17 d, 22, 23, 23 a and 25 c. The provisions are listed and reproduced below. The most important sections from the perspective of the subject matter of the press publisher’s right (section 22 and 23) will be discussed in more detail.

According to **section 11**, titled “General provisions”:

“(1) The provisions of this Chapter do not limit the rights conferred to the author by section 3 to a larger degree than as provided in section 25 e.

(2) If a work is reproduced or made available to the public under the provisions of this Chapter, the author's name and the source must be indicated to the extent and in a manner required by proper usage. The work may not be altered without the author's consent more than necessitated by the permitted use.

(3) A copy of a work made by virtue of a limitation on copyright as provided in this Chapter may be, for the purpose determined in the limitation, distributed to the public and used in a public performance.

(4) The provisions of subsection 3 shall correspondingly apply to use by virtue of extended collective licence.

(5) A limitation on copyright as provided in this Chapter does not permit the reproduction of a copy of a work which has been made or made available to the public contrary to section 2 or whose technological measures have been circumvented in violation of section 50a(1). The provisions of this subsection shall not, however, pertain to the use of works under sections 11a, 16, 16a–16c or 22 or under section 25d(2) or (5).”

According to **section 11a**, titled “Temporary reproduction”:

“(1) The provisions of section 2 in regard to the right to make copies of a work shall not apply to temporary reproduction:

- 1) which is transient or incidental;
- 2) which is an integral and essential part of a technological process;
- 3) the sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of a work; and
- 4) which has no independent economic significance.

(2) The provisions of subsection 1 shall not apply to a computer program or to a database.”

According to **section 13 b**, titled “Reproduction of works for text and data mining”, the said exception also covers the press publisher’s right. There is no translation into English available yet.

According to **section 16**, titled “Reproduction in archives, libraries and museums”:

“An archive, and a library or a museum open to the public, to be determined in a government decree, may, unless the purpose is to produce direct or indirect financial gain, make copies of a work in its own collections:

- 1) for the purpose of preserving material and safeguarding its preservation; 2) for the purpose of technically restoring and repairing material;
- 3) for the purpose of administering and organising collections and for other internal purposes required by the maintenance of the collection;
- 4) for the purpose of supplementing a deficient item or completing a work published in several parts if the necessary complement is not available through commercial distribution or communication.”

Section 16 f, titled “Use of orphan works”, the Orphan Works Act (764/2013) lays down provisions on the reproduction and communication to the public of orphan works:

“1) in public libraries, museums and educational organisations; 2) in archives and film and audio archives; and 3) in public television and radio companies.”

Sections 16 g-j concern exceptions related to out-of-commerce works introduced by Amending Act (3.3.2023/263) apply to the press publisher’s right. There is no translation into English available yet.

Sections 17 a–17 d concern exceptions for the benefit of persons who are blind, visually impaired or otherwise print-disabled. There is no translation into English available yet.

Section 22, titled “Quotation”, states the following:

“A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose.”

The right to cite (or quote as in the translation) is technology neutral, meaning that both the cited work and the citation can be in any technological form. Section 22 requires that: 1) a cited work has been made public; 2) it is cited in accordance with proper usage; and 3) to the extent necessary for the purpose.

The requirement of proper usage connotes, among others, that author's name and the source must be indicated to the extent and in a manner required by proper usage, as also required by section 11. In addition to this, the quotation must be justified by its connection to the cited work – there must be a reason to cite the work. The extent of permitted citation varies depending on the context, the nature of the cited work and the reason for the citation. Even citation of the whole work may be justified under certain circumstances, for example in case of pictures or short texts.

In accordance with section 11, citation is permitted even when the cited copy of a work has been made or made available to the public contrary to section 2 of the Copyright Act or whose technological measures have been circumvented in violation of section 50a(1) of the Copyright Act.

Section 22 enables citations of press publications. Citations can be longer than individual words or very short extracts of a press publications, which do not fall within the exclusive press publisher's right in the first place. Citations can also be done *for the purpose of gain* and for *non-private or commercial uses by non-individual users*, provided the general conditions for citation are fulfilled. In other words, the inherent limitations of the press publisher's exclusive right still leave ample room for the applicability of section 22.

Section 23, titled “An article on a current topic” states the following:

“(1) Articles in newspapers and periodicals on current religious, political, or economic topics may be included in other newspapers and periodicals, unless reproduction is expressly prohibited.

(2) The author's name and the source must always be indicated. (821/2005)”

As indicated under Question 1, the section is based on Art 10 *bis* (1) of BC. Government's Bill discussed (at p. 25) whether the section should be repealed. The Government's Bill erroneously said that the limitation is not included in the exhaustive list of permitted exceptions and limitations in the ISD. As noted earlier, it is included in Article 5(3)(c) of ISD. The section was preserved possibly because of the established nature of the limitation and the fact that the representatives of media businesses did not object it. It was also made applicable to the press publisher's right. There is no discussion of whether this could interfere with Art 15 CDSMD as the exception is relatively broad. Section 23 is not applied to other related rights.

Section 23 is intended to secure freedom of the press and to enable discussion of current topics by the press. It enables the publishing of the whole article, if in line with the informational purpose. The exception enables republication not only in printed, but also in digital form. It has been suggested in a copyright textbook that the principle of narrow interpretation of exceptions to copyright prevents republication in a news service that merely consist of aggregated news or articles from other newspapers (K Harenko, V Niiranen and P Tarkela, *Tekijänoikeus* [“Copyright law”] 2nd edn, Alma Talent Oy 2016, 209). This statement is no more fully in line with what the CJEU has stated in its case law about the interpretation of exceptions and limitations to copyright.

Section 23 a provides the new parody exception (the exception also covers caricature and pastiche). The provision simply states that a published work can be used in parody, caricature and pastiche. There is no translation into English available yet.

Section 25 c, titled “Use of public statements”, states the following:

“Oral or written statements made in a public representational body, before an authority or at a public consultation on a matter of public interest may be reproduced and communicated without the author's consent. However, a statement and a written or similar work presented as evidence in a case or in a matter may be reproduced and communicated only in the reporting of the case or matter and only to the extent necessary for the purposes of such reporting. The author shall have the exclusive right to publish a compilation of his statements.”

AC 6: Licensing

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

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

Section 50(8) of the Act states that “what is said in section 25 n about [extended] collective license, applies to the press publisher’s right under section 50(1)” (my translation).

Section 25 n(1), titled “The use of a work included in a press publication” (my translation), states that: “A [copyright-protected] work included in a press publication can be used in ways regulated by section 50(1) in accordance with a collective license as stated in section 26” (my translation).

Section 25 n(2) states that: “What is said in section 25 n(1) does not apply to a work whose author has prohibited its reproduction or communication to the public” (my translation).

Section 26 of the Act regulates [extended] collective licenses.

The Government’s Bill states (at p. 109) that the right owners are free to use collective licensing as the mechanism to grant licenses. When granting such licenses, the applicable fees for diverse uses could be agreed upon. The Government’s Bill also notes (at p. 95) that the press publisher has a similar right to refuse collective licensing as authors have under section 25 n(2). According to section 26 of the Act, the collective rights organisation also has the right to represent copyright owners who have not given their consent for collective licensing (extended collective license). However, the right owner is entitled to compensation, which the right owner must apply. The Ministry of Education and Culture supervises the collective licensing organisations approved for the purpose.

There are no other provisions in the Copyright Act on licensing of press publications.

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.

Section 50(7) provides that “the author of a work included in a press publication has the right to an appropriate share of the revenues the press publisher has earned through the exercise of the right based on section 50(1)” (my translation). There are no other provisions on revenue sharing.

The Government’s Bill states (at p. 96) that it is the intention that there are no specific provisions on revenue sharing between press publishers and other right owners and that the issue will be left for freedom of contract. It further states that if organising for [extended] collective licensing to manage their right, press publishers, authors and owners of related rights could also agree on their respective revenue shares.

AC 8: Term of protection

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

The term of protection is 2 years from the end of the year when the press publication was published.

AC 9: Waiver

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

There are no provisions in the Copyright Act to this effect. The Government's Bill does not provide additional information in its reasons. There is no apparent reason why right-holders could not waive their rights or give their authorisation for free.

AC 10: Entry into effect

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

Section 73 of the Copyright Act provides that the changes brought about by the Amending Act *shall enter into force 3 April 2023*. However, section 73(2) provides specifically about press publications that:

“What is provided for in section 50, shall not apply to a press publication that has been published before 6 June 2019.”

Section 73(3) further states, without limiting its wording to press publications, that:

“Provisions in force at the time this [Amending] Act enters into force shall apply to any acts done, rights acquired and agreements concluded before this Act enters into force” (my translation).

In other words, the press publisher's rights seem to emerge *retroactively* as concerns press publications published between 6 June 2019 (the date at which the CDSMD was to be transposed into domestic law) and 2 April 2023 (the day preceding the entry into effect of the Act). The Government's Bill states (at p. 126) that section 73(2) is based on Art 15(4), third sentence, which states that:

“Paragraph 1 [Art 50(1)] shall not apply to press publications first published before 6 June 2019.”

The Government's Bill further states that section 73(3) is based on Art 26(2) of CDSMD, according to which:

“This Directive shall apply without prejudice to any acts concluded and rights acquired before 7 June 2021.”

Because of the delay in the Finnish implementation, the situation is more complicated. It is not certain from a constitutional law perspective whether retroactive protection is possible or whether EU law would require it in case of late transposition, as such protection might also affect the rights and obligations of others retroactively.

However, retroactive application is partly prevented by section 73(3), which excludes from such retroactive effect acts done, rights acquired and agreements concluded before 3 April 2023. Yet it is not certain how, for example, an ongoing communication of the press publication to the public would be interpreted from this perspective, when the original communication act of the user predates 3 April 2023 but continues after that date by remaining visible after the entry into force of the Act on 3 April 2023. It is suggested that such actions originally concluded before 3 April 2023 should not fall under the exclusive rights even after the entry into force of the Act.

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).**

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

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

Article 17 CDSMD has been transposed into national law in Finland through an amendment to the Copyright Act (8.7.1961/404, in Finnish “*Tekijänoikeuslaki*”). The amendment has the date and identification number 3.3.2023/263 and the name in Finnish “*Laki tekijänoikeuslain muuttamisesta*” (“Law about amendments to the Copyright Act” (my translation, henceforth “*Amending Act*”). Most provisions concerning OCSSPs are in the new Chapter 6 a of the Copyright Act. The relevant provisions are sections 55 a – 55 m and section 23 a.

The up-to-date Copyright Act is here: <https://www.finlex.fi/fi/laki/ajantasa/1961/19610404> (in Finnish) and here <https://www.finlex.fi/sv/laki/ajantasa/1961/19610404> (in Swedish). A translation into English has been prepared by the responsible Ministry of Education and Culture, but it has not been updated since amendment 608/2015. It is here: https://www.finlex.fi/fi/laki/kaannokset/1961/en19610404_20150608.pdf.

The transposition takes for the most part a textual or “*ad litteram*” minimalist approach, but also seeks to adapt Art 17 to domestic circumstances, decides not to transpose all parts of it explicitly, and so forth.

AC 1: Subject matter

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

It is difficult to clearly pinpoint the subject matter (object) of protection under the Copyright Act, or even fully understand what is meant by the question in this context. Subject matter of protection is not defined in a single section of the Copyright Act, but emerges from combined effect of multiple sections and the objects of protection related to copyright and related rights. The subject matter of protection is based on copyright and specified rights related to copyright. The following sections of Chapter 6 a of the Act are likely relevant for answering the question.

According to section 55 b (1), “where [copyright-protected] works are saved to the [online content-sharing] service provider’s [OCSSP] service, the [OCSSP] communicates them to the public in a way which enables members of the public to access the work from a place and at a time individually chosen by them” (my translation).

According to section 55 b (2) “the [OCSSP] must obtain an authorisation from the authors for the use meant in section 55 b (1). If such authorisation has not been obtained or granted, section 55 c (1) applies” (my translation). Section 55 c (1) defines the OCSSP’s obligations in the absence of a license.

It should be noted that section 55 b (1) departs from Art 17 CDSMD in that the LNI uses the term “where works are saved to the service” in distinction to “when it gives the public access to copyright-protected works”. This

constitutes a significant departure from Art 17 CDSMD, as the LNI indicates that even where the public cannot access the copyright-protected works, the OCSSP must obtain an authorisation from the authors, provided the work is saved to its service. The Government's Bill does not inform why the LNI departs from Art 17 CDSMD in this respect. It seems to erroneously suggest (at p. 113) that such a reading follows from Art 17(1) 1) CDSMD. As will be discussed in more detail under Question 3 below, section 55 l extends the effect of the provisions to specified related rights.

Another provision likely relevant for the subject matter (object) of protection is section 55 a of the Act, as the Government's Bill limits the notion of a "user" to private individuals only. Section 55 a will be discussed under Question 5 below, as it concerns more the types of OCSSPs covered.

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.

According to section 55 l "what is stated under this chapter about a [copyright-protected] work, shall also apply to related rights under sections 45, 46, 46 a and 48, 49 (1) 2) and 49 a" (my translation).

Section 45 concerns the rights of a performing artist; section 46 those of the producer of a sound recording; section 46 the producer of a video recording; section 48 the rights of radio and television organisations; section 49 (1) 2) the rights of sui generis database producers; and section 49 a the related rights of a photographer.

It should be noted that section 55 l departs from Art 17 CDSMD in that sui generis database rights and the related rights of photographers are covered, in distinction to Art 17(1) 2) CDSMD, which refers to right holders listed under Art 3 1) and 2) of the ISD. Related rights of photographers or the rights of sui generis database holders are not listed there. Therefore, the LNI constitutes a significant departure from Art 17 CDSMD in that it broadens the permitted right-holders to cover *sui generis* database rights and related rights of photographers. The Government's Bill tries to justify (at p. 27) the inclusion of related right of photographers by mistakenly saying that CDSMD is, like other copyright directives, a minimum directive. This would allegedly permit the inclusion of this right within the regime based on Art 17 CDSMD. There is no attempt to justify the inclusion of databases within the regime.

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")?

According to section 55 b (1), "where [copyright-protected] works are saved to the [online content-sharing] service provider's [OCSSP] service, the [OCSSP] communicates them to the public in a way which enables members of the public to access the work from a place and at a time individually chosen by them" (my translation).

As stated under Question 2 above, section 55 b (1) departs from Art 17 CDSMD (and communication to the public right in general) in that the LNI uses the term "where works are saved to the service" in distinction to "when it gives the public access to copyright-protected works". This constitutes a departure from Art 17, as the OCSSP must obtain an authorisation from the authors, provided the work is merely saved to its service, without enabling members of the public access to it.

For the right holders of related rights (discussed under Question 3 above), the same approach applies through the reference to specified related rights holder under section 55 l, discussed under Question 3 above. In other words, the holders of covered related rights enjoy the same protection as authors in this respect.

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”).**

According to section 55 a, the covered service provider [OCSSP] under chapter 6 a of the Act “means a service provider [OCSSP] which provides an information society service of which the main or one of the main purposes is to store a large amount of [copyright-]protected works saved by its users, which the service provider organises and which it markets for profit-making purposes and gives the public access to” (my translation).

The Government’s Bill explains (at p. 112) that the conditions are cumulative. They further state (at p. 113) that the OCSSP does not actively beforehand select the content provided in the service, but the selection of content to be offered and saved in the service takes place through the user of the service. The Government’s Bill also states (at p. 113) that the provisions of Chapter 6 a will not be applied to service providers, the main purpose of which is to practice copyright piracy or facilitate it.

The definition lacks the word “promotes” of Art 17(2) CDSMD and replaces it with the word “markets”. The definition also lacks the words “or other protected subject matter” of Art 17(2) CDSMD. However, I do not consider this as significant, as the word “markets” can be interpreted like the word “promotes” and “other protected subject matter” is included by reference to specific related rights in section 55 l, as discussed under Question 3 below.

What is more problematic is that the Government’s Bill (at p. 113) states that only *private individuals* are classified as “users” under section 55 a. The term user is used throughout chapter 6 a. The definition thus affects the whole chapter. The limitation of users to private individuals contradicts Art 17(2) of CDSMD, read in the light of recital 69. In the light of these provisions, it is reasonable to suggest that also representatives of associations, enterprises and public authorities are defined as “users” when their copyright relevant acts are not done on a commercial basis, such as sharing their content without any direct profit-making purpose, or where their copyright relevant acts do not generate significant revenues in relation to the copyright relevant acts of the users covered by such authorisations. This reading is also in line with scholarly work (Eleonora Rosati, *Copyright in the digital single market: article-by-article commentary to the provisions of directive 2019/790*, OUP 2021, 334-5). It is also in line with freedom of expression as guaranteed on national and European levels, as freedom of expression also protects institutional expression, for example by public authorities and representatives of the media. It is uncertain whether Finnish courts would interpret “user” in the light of Art 17(2) and recital 69 of CDSMD and freedom of expression as a fundamental right, or whether they would be affected more by the said statement of the Government’s Bill.

Limiting the notion of a user in the LNI to private individuals could mean that the representatives of the said institutions would not benefit from any guarantees of freedom of expression and user rights as secured in Art 17 CDSMD. They would not benefit from a license obtained by the OCSSP either, as discussed under Question 18.

- 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.**

Finnish Copyright law does not recognise secondary liability. Primary liability has been reconstructed through the criminal law notion of “partners in crime” in individual instances involving copyright infringing peer-to-peer services (piracy), as will be explained below. Notably, Finnish courts have *not* constructed their liability through the notion of “communication to the public” right, like the CJEU did in its *Stichting Brein* (Pirate Bay) judgment (C-610/15, ECLI:EU:C:2017:456) or aiding and abetting, like in Sweden’s *Pirate Bay* judgments (Stockholm District Court, 17 April 2009, case no B 13301-06; Svea hovrätt (appellate court), case no B 4041-09).

The Finnish courts have not accepted in copyright peer-to-peer file sharing network-cases that the safe harbour exemption under Art 14 ECD (as implemented nationally) would apply to the operators of peer-to-peer copyright infringing services. Typically, the awareness of operators over the illegal nature of content available in the service has been presumed easily. In cases, where liability is not exempted under the said provision, the normal rules of civil and criminal liability apply (Government's Bill HE 194/2001). Consequently, in these situations, the hosting service's own liability has depended on rules of primary copyright liability and criminal law liability.

In the Supreme Court decision *Finreactor* (KKO:2010:47), operators of torrent peer-to-peer services faced primary copyright criminal liability by merely providing the facility and being aware of the infringing activities. The Supreme Court argued that the protection of copyright owners should not depend on the technical implementation of illegal distribution. Enabling the use of torrent files through the service was regarded as essential for the subsequent searches and reproductions of the protected files. This, together with detailed planning and division of the operators' labour in the implementation and operation of the service, meant that the service had to be evaluated as a whole. The operators' intent and awareness of infringements was also necessary for criminal liability. Their immediate participation in individual distributions and reproductions of works was hence not required for criminal liability.

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?

Section 184 of the Act on Electronic Communications Services, titled "Exemption from liability in hosting services" provides the following:

"When an information society service consists of the storage of information provided by a recipient (content provider) of the service upon his request, the service provider is not liable for the content of the information stored or transmitted if it acts expeditiously to disable access to the information stored upon: 1) obtaining knowledge of a court order concerning it or if it concerns violation of copyright or neighbouring right upon obtaining the notification referred to in section 191; 2) by otherwise obtaining actual knowledge of the fact that the stored information is apparently contrary to chapter 11, section 10 or 10a or chapter 17, section 18 or 18a of the Criminal Code.

The provisions in subsection 1 shall not apply if the content provider is acting under the authority or the control of the service provider."

The provision in question implements Article 14 of the Directive on electronic commerce, referred to above. Finland also utilised the opportunity under Article 14, section 3, to implement more detailed measures for removal of and blocking access to information. According to the preparatory materials, the measures provided are considered not to infringe freedom of expression (Government bill HE (C-324/09), where the Court established the standard of a diligent economic operator used to determine when illegality should have become apparent for the hosting service. Moreover, case C-324/09 and joined cases C-236/08-C-238/08 (Google) define that the exemptions are available only when the service provider has not played an active role of a kind to give it knowledge of or control over the information stored. The cases of the CJEU have been referred to in the relevant Government's Bill (HE 221/2013). This seeks to ensure that interpretations of the CJEU are followed in Finland.

Section 184 of the Act on Electronic Communications Services remains in force, but in the implementation of the CDSMD a new section was enacted to the Act on Electronic Communications Services to take account of Art 17 CDSMD implementation. According to section 184 a of the Act on Electronic Communications Services, titled, "Exemption from liability in certain hosting services", "the liability of an OCSSP meant in section 55 a of the Copyright Act for copyright infringing content is regulated in the said Act's sections 55 a—55 m" (my translation).

This apparently means that the general hosting services exemption of section 184 of the Act on Electronic Communications Services no longer applies to the situations covered by Chapter 6 a of the Copyright Act and the specific liability regime there concerning OCSSPs. Chapter 6 a constitutes *lex specialis* in this respect.

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.

As the immunity for targeted service providers and its conditions, including standard of care, are regulated in a single section of the Act, the answer will be provided under Question 9 below.

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

According to section 55 c (1), “if the [OCSSP] does not have an authorisation from the author to the use of a work, it is liable for the communication to the public of the protected work. The [OCSSP] shall be liberated from this liability provided it shows that it has:

- 1) made best efforts to obtain an authorisation;
- 2) made, in accordance with high industry standards of professional diligence in the relevant sector, best efforts to ensure that works the author has notified it with relevant and necessary information, are not available; and
- 3) upon receiving a sufficiently substantiated notice from an author, disabled access to the notified work or removed it from its website expeditiously, and made best efforts in accordance with the 2) point to prevent their future saving to its service” (my translation).

For the most part, the section constitutes a literal transposition of Art 17(4) CDSMD. In the numbered point (3) the LNI uses the term “saving” instead of “uploading” of Art 17(4). The term saving could be interpreted to mean that even when the work saved by the user to the service is not available, the OCSSP would be liable. This problem with the LNI also follows from section 55 b, discussed above under Question 2. Section 55 b uses similarly the term “save” instead of Art 17 terms “upload” and “when it gives the public access to copyright-protected works” in the definition of what constitutes communication to the public in this context. In other words, in the absence of relevant authorisation, the OCSSP may become liable for the mere saving of the works by users even if they are not visible in the OCSSP’s website.

The Government’s Bill (at p. 141) also problematically treats “disabling of access to the notified work” and “removing it from website” as synonyms. In reality, they constitute two distinct concepts and they also appear as separate concepts in the text of section 55 c (1) 3). After removing the work it is not possible for the OCSSP to restore it. Removal of the work should be limited to situations where it is undisputed that the work is infringing.

The rest of section 55 c, which relates to proportionality, will be explored under Question 10 below.

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

According to section 55 c (2), “in determining whether the service provider has complied with its obligations under section 55 c (1), at least the following shall be considered in accordance with the principle of proportionality:

- 1) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
- 2) the availability of suitable and effective means and their cost for service providers” (my translation).

For this part, section 55 c (2) follows a literal approach to transposing Art 17 CDSMD.

According to section 55 c (3), “if the OCSSP in accordance with section 55 c (1) 3) prevents access to the work or removes the work in accordance with section 55 c (1) 3), the OCSSP has to notify the user expeditiously” (my translation). For unknown reasons, there is no obligation to notify users when the OCSSP has disabled access to their work. Only removal requires notification. This is not possible according to Art 17 of CDDSM and from the perspective of freedom of expression as a fundamental right protected nationally and at the European level. Furthermore, the section does not require any explanation as to why access to the work has been prevented or it has been removed. For example, it is not clear whether the notification should include information about the allegedly infringed work, the right owner requiring prevention of access or removal. This type of information would be necessary for the subsequent review mechanisms through which the user can dispute the removal or prevention of access.

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.

According to section 55 d, what is stated in section 55 c (1) 2) and 3) about the obligations of service provider’s obligations concerning subsequent saving of works does not apply to services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million. If the average number of monthly unique visitors of such service providers exceeds 5 million, what is stated in section 55 c (1) 2) and 3) shall however apply.

It appears that for this part the LNI transposes Art 17 CDSMD correctly.

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.

No, there is no such requirement under the LNI, except the right-holder’s duty to notify the OCSSP with relevant and necessary information under section 55 c (2), concerning requests for ex ante blocking of copyright infringing content, or a sufficiently substantiated notice under section 55 c (3), concerning requests to remove copyright infringing content that already is available on the platform, discussed under Question 9 above. According to the Government’s Bill (at p. 115), the “sufficiently substantiated notice”, similarly to “relevant and necessary information”, must contain the information needed for the identification of the work or works constituting the object of the removal request. According to the Government’s Bill, such information means information that enables the blocking, like identification material, also known as a reference file, meaning the work as such in a digital form. It further adds that metadata through which the work can be identified is also sufficient for these purposes. It is questionable whether mere metadata could play such a role in practice, as it does not enable distinguishing legitimate from infringing uses.

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.

No, there is no such possibility under the LNI.

AC 7: General monitoring

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

Section 55 f (2) simply states that the norms of this chapter [chapter 6 a] shall not lead to general monitoring of website contents.

According to the Government’s Bill (at p. 118), this does not exclude specific monitoring obligations.

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.

Section 55 f was modified during the legislative process because of the Finnish Parliament’s Constitutional Law Committee statement (PeVL 58/2022 vp), which considered the original proposal concerning automated blocking as unconstitutional from the perspective of freedom of expression. The solution of the Government was to abolish the norm on automated blocking (original section 55 f) and replace it with more generic language on general monitoring. The new Government’s Bill (HE 313/2022 vp, henceforth Amended Government’s Bill) does not discuss the issue of general monitoring further. Section 55 f will be further discussed under Question 20 below.

AC 8: Exceptions and limitations

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

Section 22 of the Copyright Act, titled “Quotation”, states the following:

“A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose.”

The right to cite (or quote as in the translation) is technology neutral, meaning that both the cited work and the citation can be in any technological form. Section 22 requires that a cited work: 1) has been made public; 2) is cited in accordance with proper usage; and 3) is only used to the extent necessary for the purpose.

As stated in the context of the press publisher’s right, the requirement of proper usage connotes, among others, that the author’s name and the source must be indicated to the extent and in a manner required by proper usage, as also required by section 11 of the Act. In addition to this, the quotation must be justified by its connection to the cited work – there must be a reason to cite the work. The extent of permitted citation varies depending on the context, the nature of the cited work and the reason for the citation. Even citation of the whole work may be justified under certain circumstances, for example in case of pictures or short texts.

In accordance with section 11 of the Copyright Act, citation is permitted even when the cited copy of a work has been made available to the public contrary to section 2 of the Copyright Act or whose technological measures have been circumvented in violation of section 50a(1) of the Copyright Act.

Section 22 of the Act enables citations for the purposes of criticism and review, among others. Citations can also be done for the purpose of gain and for by non-individual users, such as media enterprises, provided the general conditions for citation are fulfilled.

The Copyright Act did not include specific exceptions concerning caricature, parody or pastiche. Parodies have been permitted in case law provided there is transformative use and a new copyright-protected work is created in the process.

Section 23 a of the Copyright Act provides the new parody exception (the exception also covers caricature and pastiche). The provision simply states that a published work can be used in parody, caricature and pastiche. The requirement of “proper usage” was dropped from the wording of the section during the legislative procedure, as this is not based on the CDSMD. According to statement of the Education and Culture Committee of the Parliament (SivM 22/2022 vp.), the requirement to comply with the prohibition of discrimination, which is for example protected in the EU Charter of Fundamental Rights, does not depend on whether the criterion of proper usage is included in the section.

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

According to section 55 e (1), “the co-operation between the [OCSSP] and author referred to in section 55 c (1) shall not lead to the disabling of access of protected works saved by the user, when the use does not infringe copyright. Such protected works can be used under any exception to copyright under this Act” (my translation).

In other words, any uses under copyright exceptions are permitted. The OCSSP is not allowed to disable access to works benefitting from any exceptions. Formerly, the section referred specifically to the quotation and parody exceptions as examples (sections 22 and 23 a). However, this was removed during the legislative process after the Parliament’s Constitutional Committee Statement (PeVL 58/2022 vp). The Amended Government’s Bill (at p. 11) notes that the reference was “unnecessary”. The Amended Government’s Bill further notes that after the removal of the said reference, all [copyright-protected] works used under any exceptions to copyright are covered by the notion of legitimate use. This is said to be a legislative solution in accordance with the CDSMD.

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.**

Chapter 6 a of the Copyright Act does not regulate licensing of content for the purposes of OCSSP services. However, my presumption is that the general sections of the Copyright Act concerning licensing (including extended collective licensing) apply to OCSSP services, meaning that they can be utilised for the purpose of licensing the use of copyright-protected works and related rights covered by chapter 6 a in OCSSP services.

There are two sections in chapter 6 a pertaining to licencing. According to section 55 g, the OCSSP shall, at the request of an author, give the author sufficient information about its practices under section 55 c (1) and their functioning. When license agreements have been concluded between an OCSSP and author, the OCSSP must grant the author, at the author’s request, information about the uses covered by such agreements.

According to section 55 k, what is stated in this chapter above [6 a] about the rights of authors and users of services or the duties of OCSSPs, cannot be departed from through contract. A contract term, according to which the user of the service renounces her right to invoke an exception provided for in this Act, shall not bind the user.

According to the Government’s Bill, section 55 k implements the Art 17(9) requirement that the Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law. However, section 55 k goes in its wording considerably further, also regulating the rights of authors and the duties of OCSSPs more generally, preventing contractual derogations from such rights and obligations. As such, section 55 k could produce unpredictable and undesired outcomes.

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

According to section 55 b (3), “if the service provider [OCSSP] has been granted an authorisation by authors, such authorisation also covers the actions of users, when they save works for their communication to the public. However, this does not apply when the user of the service operates for the purpose of gain or the user’s actions produce the user significant revenues” (my translation).

In other words, the users benefit from platform’s licenses under certain conditions.

What was said under Question 2 above about the concept of “user” being limited to “private individuals” in the Government’s Bill (at p. 113) could also function as a limitation here, meaning that only private individuals would benefit from such a license in distinction to associations, enterprises and public authorities when their copyright relevant acts are not done on a commercial basis (such as sharing their content without any direct profit-making purpose) or where their copyright relevant acts do not generate significant revenues in relation to the copyright relevant acts of the users covered by such authorisations. If interpreted in the light of Art 17(2) CDSMD, recital 69 and freedom of expression as a fundamental right, also non-individual users should be included.

There are no provisions in the Act addressing the reverse situation, that is, whether licenses obtained by users cover the platform. The question is not discussed in the reasons of the Government’s Bill either. However, the Education and Culture Committee of the Parliament said in its statement (SivM 22/2022 vp.) that under section 55 c (2), which concerns the conditions under which the OCSSP is liable, the user must be able to invoke not only any exceptions to copyright but also the absence of copyright protection or that the user has obtained an authorisation from the author for the use of the work, including open licenses like Creative Commons licenses. This is also in line with recital 66 of the CDSMD, according to which:

“The steps taken by online content-sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including works or other protected subject matter the use of which is covered by a licensing agreement.”

According to the Committee statement and recital 66 of CDSMD, it can thus be argued that such licenses would also cover the OCSSP. However, it is uncertain whether courts in Finland will notice what the Education and Culture Committee of the Parliament said in its statement, or what is stated in a recital to the CDSMD. If they do notice, it is still uncertain how they will interpret it. In addition to the said statements, it would constitute an unjustified restriction of freedom of expression were users not able to upload works licensed to them either directly or through open licenses (like Creative Commons) because of OCSSP liability. Therefore, it would also be in line with fundamental rights conform interpretation, and in particular freedom of expression, to interpret the Act so that the licenses obtained by users would also cover the related acts of the OCSSP.

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?

According to section 55 e (1), “the co-operation between the [OCSSP] and author referred to in section 55 c (1) shall not lead to the disabling of access to protected works saved by the user, when the use does not infringe copyright. Such protected works can be used under any exception to copyright under this Act” (my translation).

In other words, the OCSSP is not allowed to disable access to works benefitting from any copyright exceptions, the latter uses thus constituting legitimate uses. Formerly, the section referred specifically to the quotation and parody exceptions (Section 22 and 23 a). However, this was removed during the legislative process after the Parliament’s Constitutional Committee Statement (PeVL 58/2022 vp). The Amended Government’s Bill (at p. 11) notes that the reference was “unnecessary”. The Amended Government’s Bill further notes that after the removal of the said reference, all [copyright-protected] works used under any exceptions to copyright are covered by the notion of legitimate use. This is said to be a legislative solution in accordance with the CDSMS.

According to section 55 e (2), the OCSSP “must inform the user in its terms and conditions that the user is allowed to use works in accordance with the exceptions to copyright under this Act” (my translation).

According to section 55 f (1), the OCSSP “must have practices and procedures at place, which ensure that its practices under section 55 e do not prevent legitimate use in accordance with section 55 e” (my translation).

The original Government’s Bill regulated automated blocking mechanisms explicitly and noted that OCSSPs may use them only when it can be presumed with great likelihood that the situation concerns infringement of copyright and the communication to the public right. It further noted that this is the case when the right holders have given the OCSSP relevant and necessary information enabling it to identify and disable access to copyright-protected works. However, the section on automated blocking mechanisms was abolished from the Government’s Bill because of the Parliament’s Constitutional Law Committee statement (PeVL 58/2022 vp). In the final accepted Act there is no provision on automated blocking mechanisms. Instead, the provision on the prohibition of general monitoring was added to section 55 f (2). The Amended Government’s Bill notes (at p. 11) that when determining legitimate use, the OCSSP practices, including technological solutions, should identify legitimate uses for example through metadata concerning the content. However, it is not clear how metadata or other technological solutions could play such a role in the foreseeable future.

The legislative solution does not provide real answers to the critique the Constitutional Law Committee presented in its statement (PeVL 58/2022 vp). Yet the Constitutional Law Committee accepted this solution in its subsequent statement (PevL 85/2022 vp., para 9). However, the Constitutional Law Committee noted (at para 11) that section 55 f must be complemented, provided CDSMS permits this, with a new enactment, which would, for example, explicitly prohibit a filtering mechanism or other practices and procedures of the OCSSP, which do not sufficiently distinguish illegal from legitimate content. In addition to this, the Committee noted that the Bill should be complemented with an enactment guiding the application of the Act, which would limit the restrictions of freedom of expression and information to what is necessary taking account of the meaning of freedom of expression in a democratic society and the need to find a fair balance between different fundamental rights. The Committee considered such enactments as necessary, because private parties apply the Act in the first place. This requires, according to the Committee, more specificity from the Act than what was achieved in the Amended Government’s Bill (leading to the final Act as accepted without further modifications). The Education and Culture Committee of the Parliament similarly emphasised in its statement (SivM 22/2022 vp.) that the OCSSP is not allowed to use filtering mechanisms or other practices or procedures, which do not sufficiently distinguish between legitimate and illegal content. The Education and Culture Committee concluded that this requirement is inherent to sections 55 e (1) and 55 f (1). However, the Education and Culture Committee did not make any changes to the Amended Government’s Bill here.

There are no proposals for such amendments yet. Before giving its statement PevL 85/2022 vp., the Constitutional Law Committee was sitting its last meetings before the Parliamentary elections. The EU Commission had already initiated infringement procedures against Finland for not implementing the CDSMD in time. Only two experts gave their statements before the Committee, in addition to two representatives from the Ministry responsible for preparing the Act. These factors likely affected the Constitutional Law Committee’s statement in that it formally accepted the Amended Government’s Bill despite the noted need to complement section 55 f with new provisions better securing freedom of expression and other fundamental rights. Such a conflicted position of the Constitutional Law Committee is very exceptional.

The Education and Culture Committee of the Parliament noted in its statement (SivM 22/2022 vp.) that when fulfilling the obligations flowing from section 55 c (2), the OCSSP must use technologies or other practices or procedures, which recognise legitimate and illegal uses in the best possible way and that while uploading works to the service, the user must be able to invoke not only copyright exceptions but also absence of copyright protection or that the author has authorised the use of the copyright-protected works, for example through open licenses, such as Creative Commons licenses. This statement importantly broadens legitimate uses beyond copyright exceptions.

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

No, there is no such concept in the Copyright Act.

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

No, there are no other mechanisms for the avoidance of action against legitimate content in the Act.

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.

According to section 55 h (1), the OCSSP “must put in place an effective and expeditious complaint and redress mechanism, that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them” (my translation). This constitutes a literal transposition of Art 17(9) CDSMD.

According to section 55 h (2), “when a user has submitted a complaint under the mechanism provided for in section 55 c (1) 2) about disabling access to a protected work or its removal in under 55 c (1) 3) through the mechanism of section 55 h (1), the author must be reserved an opportunity to be heard and give her reasoned statement to the complaint made by the user. The complaint must be processed without undue delay, and the decision to disable access to or remove a protected work must be subject to human review” (my translation).

According to section 55 h (3), “if the reasons given by the author are not adequate, the protected work must be returned to the service. Decision not to return the work to the service must be subject to human review” (my translation).

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.

The Act establishes an out-of-court mechanism administered by the Ministry of Culture and Education, which is responsible for copyright in Finland. It gives users the right to subject a decision made by the OCSSP to review by an impartial expert appointed by the Ministry. The process is free and voluntary, and the recommendations given are non-binding in nature under section 55 I (1).

Section 55 l regulates the process in its main features. More detailed provisions will be given in a separate Decree. The Decree has not been given yet.

Section 55 j (1) of the Act provides that the author can initiate court proceedings about unauthorised use of a work and obligation to inform the author under section 55 g against the OCSSP. Section 55 j (2) provides the user of the service the right to initiate court proceedings against the author to confirm that the user has the right to use the work in accordance with the exceptions provided for in the Copyright Act or because of an agreement concluded with the author. The user also has the right initiate court proceedings against the OCSSP to obligate it to enable the public to access to the materials saved by the in the service. According to section 55 j (3), the user and the OCSSP have the right to initiate court proceedings against the author for damages resulting from an unjustified request to disable access to or remove a protected work.

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.

According to section 55 j (3), the user and the OCSSP have the right to initiate court proceedings against the author for damages resulting from an unjustified request to disable access to or remove a protected work. However, it appears that this procedural right was left to the Act by legislator's mistake. During the late stages of the legislative process, at the request of the Education and Culture Committee of the Parliament (SivM 22/2022 vp.), the right to damages was abolished. However, apparently the legislature forgot to delete the procedural right.

It is thus likely that section 55 j (3) was not removed because of a mistake. However, now that the section is there, courts could construct such a right nevertheless, as otherwise section 55 j (3) would be rendered meaningless. Another scenario is that the courts will recognise the legislature's clear mistake and ignore section 55 j (3).

AC 13: Information obligations

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

According to section 55 g, the OCSSP shall, at the request of an author, give the author sufficient information about its practices under section 55 c (1) and their functioning. When license agreements have been concluded between OCSSP and author, OCSSP must grant the author, at the author's request, information about the uses covered by such agreements.

AC 14: Waiver

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

There are no specific provisions in the Act to this effect. On the other hand, there seems to be nothing preventing such right-holder waiver or authorisation for free.

AC 15: Entry into effect

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

The Act entered into force on 3 April 2023.

Additional information

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

No, it does not.

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

No.