

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

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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: THE NETHERLANDS

National Expert: PROF. DR. S.J. (STEF) VAN GOMPEL (Vrije Universiteit (VU) Amsterdam)

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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.

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.

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

Yes. Article 15 CDSMD has been transposed into Dutch law by Act of 16 December 2020 amending the Copyright Act, the Neighbouring Rights Act, the Databases Act and the Act on Supervision and Dispute Resolution of Collective Management Organisations for Copyright and Neighbouring Rights in connection with the implementation of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and neighbouring rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, *Staatsblad* (Bulletin of Acts and Decrees) 2020, 558.

- Dutch National Implementation Act (DNIA): Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG, *Stb.* 2020, 558, <https://zoek.officielebekendmakingen.nl/stb-2020-558.html>.
- Decree on the date of entry into force of the DNIA: Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt, *Stb.* 2020, 559, <https://zoek.officielebekendmakingen.nl/stb-2020-559.html>
- Dutch Neighbouring Rights Act (DNRA): <https://wetten.overheid.nl/BWBR0005921/2021-06-07>.

- I am not aware of a good (official or unofficial) English language translation of the DNRA.

In the Netherlands, Article 15 CDSMD has been implemented in a new Article 7b DNRA and the definition of Article 2(4) CDSMD in Article 1(r) DNRA. The choice was made to implement this new right in the Neighbouring Rights Act and not in the Copyright Act, because it clearly concerns investment protection and not copyright protection. See the Explanatory Memorandum (*Kamerstukken II 2019/20, 35454, 3, p. 48-49, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>*), which further explains this investment rationale of the press publishers right. The Dutch transposition takes a textual (“ad litteram”) approach.

AC 1: Subject matter

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

The definition of Article 2(4) CDSMD is reproduced in full, and almost ad verbatim, in Article 1(r) DNRA, with the exception that Article 1(r) DNRA speaks of "which can also include other works or achievements [i.e. subject matter] *protected under the Databases Act or this Act*", instead of "which can also include other works or *other subject matter*". The definition thus expressly qualifies "other subject matter" as subject matter (achievements) protected under the Databases Act or the DNRA, which the CDSMD merely implies.

- 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, Article 7b(2)(c) DNRA states that the press publisher’s right does not apply to the use of a few words (*‘enkele woorden’*) or very short extracts of a press publication, without further defining this qualitatively or quantitatively. There are no specific provisions on headlines.

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

No, with reference to recital 57 CDSMD, the Explanatory Memorandum (*Kamerstukken II 2019/20, 35454, 3, p. 49, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>*), explains that the press publisher’s right cannot be invoked to monopolise factual information. However, it also recognizes that an overly broad interpretation of this exclusion should not render the protection granted illusory either. According to the Explanatory Memorandum, it is the Court of Justice of the EU that eventually has to determine where the exact boundaries lie.

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

No, material that has entered the public domain cannot be protected through the back door of the press publisher’s right. Article 7b(2)(d) DNRA stipulates that the press publisher’s right does not apply to the use a work, a recording of a performance or a reproduction thereof, a phonogram or a reproduction thereof, a recording of a (part of a) broadcasted radio or television programme or a reproduction thereof, a film or a reproduction thereof, a press publication or a reproduction thereof, or a database, the protection of which has expired and which is included in a press publication.

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

No, the DNRA does not include any other threshold conditions for protection at the level of the subject matter. However, in accordance with Article 15(4) CDSMD, Article V of the DNIA stipulates that the press publisher’s right does not apply to press publications that were made public before 6 June 2019.

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.

Article 7b(1) DNRA names the publisher of a press publication as the beneficiary of the press publisher's right. The term 'publisher' is not defined, but refers to news publishers or press agencies that publish press publications, as defined in Article 1(r) DNRA (see the Explanatory Memorandum, *Kamerstukken II* 2019/20, 35454, 3, p. 48, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). The LNI does not employ lists of press publications or beneficiaries that would be covered. Whether press agencies that primarily supply news items and images as an intermediate product to media and other professional buyers are among the beneficiaries of the press publisher's right is disputed in Dutch literature (see M.M.M. van Eechoud, 'Artikel 15 DSM-richtlijn: bescherming van perspublicaties met betrekking tot onlinegebruik (persuitgeversrecht)', *AMI* 2019-6, p. 197-202, at 199).

Article 32(9) DNRA provides, in line with Article 15(1) CDSMD, that the protection of the press publisher's right is reserved to publishers of press publications who are nationals of or legal entities established under the law of one of the EU or EEA Member States or who have their registered office or usual residence in the Netherlands.

AC 3: Restricted acts

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

Article 7b(1) DNRA stipulates that the publisher of a press publication has the exclusive right to grant permission for the reproduction and the making available to the public of his press publication for online use by a provider of an information society service. Article 1(f) DNRA defines 'reproduction' as the direct or indirect, temporary or permanent reproduction of a recording or a reproduction thereof, in whole or in part by any means and in any form; reproduction does not include temporary reproductions which are transient or incidental, forming an integral and essential part of a technological process carried out for the sole purpose of enabling transmission in a network between third parties by an intermediary or a lawful use and having no independent economic significance. Article 1(m) DNRA defines 'making available to the public' as the making available to members of the public of material protected under this Act by wire or wireless means in such a way that they can access it from a place and at a time individually chosen by them. The press publisher's right can only be invoked against providers of an 'information society service', which as explained in the Explanatory Memorandum (*Kamerstukken II* 2019/20, 35454, 3, p. 48, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>) is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535, and only insofar as these providers use the press publications online.

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

Article 7b(2)(b) DNRA stipulates that the press publisher's right does not apply to the hyperlinking to a press publication, without further defining the concept of hyperlinking.

AC 4: Targeted users

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

The press publisher's right can only be invoked against providers of an 'information society service', which as explained in the Explanatory Memorandum is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535, and only insofar as these providers use the press publications online. The Explanatory Memorandum explains that the press publisher's right is mainly targeted at media monitoring services and services that aggregate news (*Kamerstukken II* 2019/20, 35454, 3, p. 48, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). Article 7b(2)(a) DNRA expressly stipulates that the press publisher's right does not apply to private or non-commercial use of a press publication by individual users.

- 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.**

No. Article 7b(3) DNRA provides that the press publisher's right cannot be invoked against a creator whose work is incorporated in a press publication or against a performer, phonogram producer, broadcaster, film producer and database producer whose achievement is incorporated in a press publication. These right-holders can therefore continue to exploit their own works and materials protected by neighbouring rights or database rights, without the publisher being able to invoke the press publishing right against them. The Explanatory Memorandum gives the example of a freelance journalist with a professional website containing his own articles (*Kamerstukken II* 2019/20, 35454, 3, p. 49, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). Article 7b(4) DNRA stipulates that when a press publication incorporates a work or other protected achievement on the basis of a non-exclusive licence, the press publisher's right may not be invoked against a provider of an information society service who has obtained permission from the rights owner concerned for the use of that work or achievement.

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.**

Yes. The LNI has ensured that the full list of exceptions and limitations in Article 10 DNRA, which applies to all achievements protected by neighbouring rights, also applies to the press publisher's right. This includes exceptions and limitations for the copying of material concerning current economic, political, religious or ideological subjects in radio or television programmes (Article 10(a) DNRA); quotation (Article 10(b) DNRA); the making available through dedicated terminals on the premises of libraries, museums and publicly accessible archives (Article 10(c) DNRA); the copying of fragments in reports on current events (Article 10(d) DNRA); illustrations for teaching (Article 10(e) DNRA); preservation (Article 10(f) DNRA); ephemeral recording (Article 10(g) DNRA); incidental inclusion (Article 10(h) DNRA); people with a disability (Article 10(i) DNRA); caricature, parody or pastiche (Article 10(j) DNRA); purposes of detecting criminal offences, public safety or administrative, parliamentary or judicial proceedings (Article 10(k) DNRA); orphan works (Article 10(l) DNRA); visually impaired persons (Article 10(m), (n) and (o) DNRA); text-and-data mining (Article 10(p) and (q) DNRA); and out-of-commerce works (Article 10(r) DNRA). This includes the Dutch implementation of Articles 3(1), 4(1), 5(1), 6(1) and 8(2) CSDMD, as well as the Orphan Works and Marrakech Treaty Directives. These exceptions and limitations thus also apply to the press publisher's right. Article 10(d) DNRA clarifies that the exception permitting the copying of short fragments in a report on current events also applies to *photo* reports. This ensures that this exception, which previously only applied to film, radio or television reports, becomes more relevant to the press publisher's right (see *Kamerstukken II* 2019/20, 35454, 3, p. 51, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

Article 9c DNRA stipulates that a press publication, or a reproduction thereof, that is brought into circulation or made public by or on behalf of the public authority and of which the public authority is the right owner, may be freely reused, unless the public authority has explicitly reserved the press publisher's right.

The press publisher's right is not so broad that it also covers reproductions made for personal use, study or use by natural persons without a direct or indirect commercial intent. Therefore, the private copying exception of Article 11 DNRA and the equitable remuneration associated with it do not apply to publishers of press publications (see *Kamerstukken II* 2019/20, 35454, 3, p. 53, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

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.**

The LNI does not include provisions on the licensing of uses of press publications. Nonetheless, according to the Explanatory Memorandum, the law does not prevent the (voluntary) collective exercise of the rights of publishers of press publications, including e.g., an arrangement for journalists who are entitled to an appropriate share of the revenues (*Kamerstukken II* 2019/20, 35454, 3, p. 49, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

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.

Yes. Article 7b(5) DNRA provides that authors of works incorporated in a press publication receive an appropriate share of the revenue received by a publisher for the use of the press publication by a provider of an information society service. Any disputes about the amount of the appropriate share of revenues can be submitted to the Dutch Copyright Contract Disputes Committee (*geschillencommissie auteurscontractenrecht*). For this purpose, Article 25g of the Dutch Copyright Act, which regulates the operation of the Copyright Contract Disputes Committee, applies *mutatis mutandis*. The LNI does not provide details on the size of the share or modes of collection and distribution or transparency obligations on press publishers. However, as the Explanatory Memorandum explains, the Dutch legislator assumes that press publishers, when exercising the obligation of transparency of Article 19 CDSMD (which is implemented in Article 25ca of the Dutch Copyright Act), will also disclose the income that is generated with the press publisher's right and the appropriate share to which the authors are entitled. According to the legislator, freelance journalists and photographers are entitled to this information, which, if necessary, can be enforced in court by invoking civil procedural law (Article 843a Code of Civil Procedure; *Kamerstukken II* 2019/20, 35454, 3, p. 50, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

AC 8: Term of protection

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

Article 12(7) DNRA stipulates, in accordance with Article 15(4) CDSMD, that the rights of publishers of press publications lapse two years after the year in which the press publication was published.

AC 9: Waiver

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

The LNI is silent about the possibility to waive the press publisher's right. In Dutch literature, it has been argued that copyright cannot be waived (see J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, 4th ed. (Recht en Praktijk, IE2), Deventer: Wolters Kluwer 2019, p. 715-718), so perhaps the same arguments apply to the press publisher's right. On the other hand, it can be assumed that authorisation can be given for free: owners of the press publisher's right could, for example, grant a provider of an information society service a royalty-free license (unless this would result from an abuse of a dominant position by the information society service provider, which would be prohibited by competition law).

AC 10: Entry into effect

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

The press publisher's right came into effect in the Netherlands on 7 June 2021.

Additional information

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

The LNI contains a number of provisions that brings the protection of the press publisher's right more in line with that of the other neighbouring rights. First, the rebuttable presumption of proof to be holder of neighbouring rights will also apply to publishers of press publications: the person indicated as the publisher on or in a press publication or announced as such upon publication or release to the public, will be regarded as the holder of the press publisher's right, unless there is proof to the contrary (Article 1a DNRA). Second, it has been provided that the exclusive right of press publishers may be licensed in whole or in part, as is the case with other neighbouring rights (Article 9(1) DNRA). Third, holders of the press publisher's right will also be able to bring claims that are relevant for the exercise and enforcement of the press publisher's right, including the claims of Article 15e DNRA (cessation of infringing services by intermediaries), Article 15f DNRA (provision of security in the event of temporary continuation of an infringement), Article 16 DNRA (payment of profits in addition to damages), Article 17 DNRA (claiming, removal from circulation, destruction of infringing items, attachment and provision of information) and Article 18a DNRA (publication of a decision).

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.

Yes. Article 17 CDSMD has been transposed into Dutch law by Act of 16 December 2020 amending the Copyright Act, the Neighbouring Rights Act, the Databases Act and the Act on Supervision and Dispute Resolution of Collective Management Organisations for Copyright and Neighbouring Rights in connection with the implementation of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and neighbouring rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, *Staatsblad* (Bulletin of Acts and Decrees) 2020, 558.

- Dutch National Implementation Act (DNIA): Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG, *Stb.* 2020, 558, <https://zoek.officielebekendmakingen.nl/stb-2020-558.html>.
- Decree on the date of entry into force of the DNIA: Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt, *Stb.* 2020, 559, <https://zoek.officielebekendmakingen.nl/stb-2020-559.html>.
- Dutch Copyright Act (DCA): <https://wetten.overheid.nl/BWBR0001886/2021-06-07/>.
- Dutch Neighbouring Rights Act (DNRA): <https://wetten.overheid.nl/BWBR0005921/2021-06-07/>.
- An unofficial English language translation of the DCA is published as a booklet by deLex publishers: *Auteurswet / The Dutch Copyright Act 2021*, Amsterdam, deLex 2021 (ISBN code: 978-90-86920-77-8): <https://www.delex.nl/shop/boeken/auteurswet-the-dutch-copyright-act-2021>.
- I am not aware of a good (official or unofficial) English language translation of the DNRA.

In the Netherlands, Article 17 CDSMD has been implemented in Articles 29c-29e of the DCA. Pursuant to Article 19b DNRA, these provisions apply *mutatis mutandis* in the context of neighbouring rights. The Dutch transposition takes a textual (“ad litteram”) approach. The text of Articles 29c-29e of the DCA reads as follows (source: *Auteurswet / The Dutch Copyright Act 2021*, Amsterdam, deLex 2021):

“Section 29c

1. An online content-sharing service provider discloses the literary, scientific or artistic works provided by the users of its service to the public when it gives the public access to them. Where the online content-sharing service provider has obtained authorisation to do so from the authors or their legal successors, that authorisation will also apply to the disclosure to the public by the users of that service, unless they are acting on a commercial basis or the revenue generated by their activity is significant. At the request of the authors or their legal successors, the online content-sharing service provider will provide them with adequate information on the authorised use of the works.

2. Where no authorisation has been granted to the online content-sharing service provider, it is liable for the infringement of the right to disclose to the public, unless it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. it has made its best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of certain works, for which the authors or their legal successors have provided it with the relevant and necessary information; and in any event

3°. after receiving a sufficiently substantiated notice from authors or their legal successors, it has expeditiously removed the notified works from its website or disabled access to them and it has made its best efforts, in accordance with subsection 2 sub 2°, to prevent future uploads of the notified works.

3. In determining whether the online content-sharing service provider has complied with its obligations under the second subsection and in light of the principle of proportionality, the following elements, among others, must be taken into account:

1°. the type, the audience and the size of the service and the type of works provided by the users of the online content-sharing service; and

2°. the availability of suitable and effective means to comply with subsection 2 sub 2° and their cost for the online content-sharing service provider.

4. At the request of the authors or their legal successors, the online content-sharing service provider provides them with adequate information on the measures taken and the manner in which they were implemented in order to comply with subsection 2 sub 2° and 3°.

5. The online content-sharing provider informs the users of its service of the exceptions or limitations to copyright in its general terms and conditions. The cooperation between the online content-sharing provider and the authors or their legal successors may not result in the prevention of the availability of works uploaded by users, which do not infringe copyright, including where such works are covered by an exception or limitation.

6. The application of this section may not lead to any general monitoring obligation.

7. The online content-sharing service provider will introduce a complaints procedure through which users can file complaints against the implementation of subsection 2 sub 2° and 3°. Having heard the author or his legal successor of the work concerned, the online content-sharing service provider will issue an effective decision without undue delay and subject to human review. The online content-sharing service provider will also ensure that authors or their legal successors, and users can lodge an appeal with an impartial dispute resolution committee which will issue an effective decision without undue delay and subject to human review.

8. By order in council, further regulations may be issued on the application of this section.

9. For the purposes of this section, an 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 copyright-protected literary, scientific or artistic works provided by its users, which it organises and promotes for profit-making purposes. Providers of services, such as not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing-and-sharing platforms, providers of electronic communications services, online marketplaces and business-to-business cloud services and cloud services that allow users to upload information for their own use, are not online content-sharing service providers.

Section 29d

1. In derogation from Section 29c (2), an online content-sharing service provider that has provided its service in the European Union or the European Economic Area for less than three years and has an annual turnover below EUR 10 million is not liable for the infringement of the right to disclose to the public where it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. after receiving a sufficiently substantiated notice from the author or his legal successors, it has expeditiously removed the notified works from its website or disabled access to them.

2. The online content-sharing service provider referred to in the first subsection, whose average number of monthly unique visitors exceeds 5 million, calculated on the basis of the previous calendar year, is not liable for the infringement of the right to disclose to the public where it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. after receiving a sufficiently substantiated notice from the author or its legal successors, it has expeditiously removed the notified works from its website or disabled access to them and it has made its best efforts to prevent future provision of the notified works.

3. In determining whether the online content-sharing service provider has complied with its obligations under the first and second subsections, and in light of the principle of proportionality, the following elements, among others, will be taken into account:

1°. the type, the audience and the size of the service and the type of works provided by the users of the online content-sharing service; and

2°. the availability of suitable and effective means to comply with subsection 2 sub 2° and their cost for the online content-sharing service provider.

Section 29e

Article 196c (4) of Book 6 of the Dutch Civil Code does not apply insofar as an online content-sharing service provider discloses the literary, scientific or artistic works provided by the users of its service to the public under the conditions established by Sections 29c and 29d.”

AC 1: Subject matter

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

The protection of Articles 29c-29e DCA relates to literary, scientific or artistic works protected by copyright, and to recordings of performances, phonograms, first fixations of films, recordings of broadcasts, or reproductions thereof, as protected by neighbouring rights (Article 19b DNRA).

AC 2: Right-holders

3. Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.

The beneficiaries of the protection provided by Articles 29c-29e DCA are authors or their legal successors whose literary, scientific or artistic works are disclosed to the public through online content-sharing service providers, as well as the performers, phonogram producers, film producers and broadcasters or their legal successors whose recordings of performances, phonograms, first fixations of films, recordings of broadcasts, or reproductions thereof are disclosed to the public through online content-sharing service providers (Article 19b DNRA).

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”)?

Pursuant to Article 29c(1) DCA and Article 19b DNRA, an online content-sharing service provider discloses the works or other protected subject matter provided by the users of its service to the public when it gives the public access to them. The right of “disclosure to the public” (*openbaarmaking*) is a broad right encompassing both the right of communication to the public and the right of making available to the public.

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”).

Article 29c(9) DCA and Article 1(s) DNRA contain the definition of “an online content-sharing service provider”. This definition is almost a verbatim copy of the definition contained in Article 2(6) CDSMD, including the carve-outs of providers which do not qualify as an online content-sharing service provider. Article 29c(9) DCA reads: “For the purposes of this section, an 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 copyright-protected literary, scientific or artistic works provided by its users, which it organises and promotes for profit-making purposes. Providers of services, such as not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing-and-sharing platforms, providers of electronic communications services, online marketplaces and business-to-business cloud services and cloud services that allow users to upload information for their own use, are not online content-sharing service providers.”

With reference to recital 62 CDSMD, the Explanatory Memorandum (*Kamerstukken II 2019/20, 35454, 3, p. 35-36, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>*), recalls that this definition is meant to exclusively target online services which compete with other online services for the same audiences.

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.

No (save for the uncertainties around the broad scope of the right of communication to the public and its application to online service providers, but this is not an issue specific to Dutch law but an issue resulting from the CJEU case law).

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, they benefited from the hosting safe harbour under Article 196c (4) of Book 6 of the Dutch Civil Code, which is the national implementation of Article 14 of the ECD (Directive 2000/31/EC). As such, this provision continues to apply, but pursuant to Article 29e DCA, it does not apply insofar as an online content-sharing service provider discloses the literary, scientific or artistic works provided by the users of its service to the public under the conditions established by Sections 29c and 29d DCA.

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

Yes. Pursuant to Article 29c(2) DCA, where no authorisation has been granted to the online content-sharing service provider, it is liable for the infringement of the right to disclose to the public, unless it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. it has made its best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of certain works, for which the authors or their legal successors have provided it with the relevant and necessary information; and in any event

3°. after receiving a sufficiently substantiated notice from authors or their legal successors, it has expeditiously removed the notified works from its website or disabled access to them and it has made its best efforts, in accordance with subsection 2 sub 2°, to prevent future uploads of the notified works.

These immunities emanate from Article 17(4) CDSMD. In line with Article 17(6) CDSMD, a somewhat lighter regime has been laid down in Article 29d DCA for small and starting service providers (see Q11 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.**

Yes, in conformity with the CDSMD, Article 29c(2) DCA refers to “best efforts” and to “high industry standards of professional diligence”. Although the Dutch text version of Article 17(4) CDSMD speaks of “*alles in het werk hebben gesteld*” (i.e. “having made every effort”), the Dutch legislator has opted to stay closer the term “best efforts” in the English text version of Article 17(4) CDSMD (in Dutch: “*naar beste vermogen*”, literally “to the best of its ability”), in order to indicate that obtaining permission for specific types of works can be quite difficult and that the contractual freedom of the parties remains paramount (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

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

Yes. Article 29c(3) DCA provides that, in determining whether the online content-sharing service provider has complied with its obligations under Article 29c(2) DCA and in light of the principle of proportionality, the following elements, among others, must be taken into account:

1°. the type, the audience and the size of the service and the type of works provided by the users of the online content-sharing service; and

2°. the availability of suitable and effective means to comply with subsection 2 sub 2° and their cost for the online content-sharing service provider.

The same is provided for in Article 29d(3) DCA with respect to the immunities for small and starting service providers.

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.

Yes, in line with Article 17(6) CDSMD, a somewhat lighter regime has been laid down in Article 29d DCA for small and starting service providers.

Pursuant to Article 29d(1) DCA, an online content-sharing service provider that has provided its service in the EU or the EEA for less than three years and has an annual turnover below EUR 10 million is not liable for the infringement of the right to disclose to the public where it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. after receiving a sufficiently substantiated notice from the author or his legal successors, it has expeditiously removed the notified works from its website or disabled access to them.

Pursuant to Article 29d(2) DCA, the online content-sharing service provider referred to in Article 29d(1) DCA, whose average number of monthly unique visitors exceeds 5 million, calculated on the basis of the previous calendar year, is not liable for the infringement of the right to disclose to the public where it demonstrates that:

1°. it has made its best efforts to obtain authorisation; and

2°. after receiving a sufficiently substantiated notice from the author or its legal successors, it has expeditiously removed the notified works from its website or disabled access to them and it has made its best efforts to prevent future provision of the notified works.

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, right-holders must provide the online content-sharing service provider with the relevant and necessary information to ensure the unavailability of certain works under Article 29c(2) sub 2° DCA. In addition, they must give a sufficiently substantiated notice to trigger the online content-sharing service provider to expeditiously remove the notified content from its website or disabled access to it and to prevent future uploads of the notified content under Article 29c(2) sub 3° DCA. Article 29c(5) DCA explicitly provides that the cooperation between online content-sharing providers and right-holders may not result in the prevention of the availability of works

uploaded by users, which do not infringe copyright, including where such works are covered by an exception or limitation.

13. Does the LNI allow right-holders to “earmark” content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.

The LNI does not include provisions on the “earmarking” of content the unauthorised online availability of which could cause right-holders significant economic harm.

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. Article 29c(6) DCA explicitly provides that the application of Article 29c DCA may not lead to any general monitoring obligation, without further defining the concept of general monitoring. The Explanatory Memorandum states that the immunities of Article 29c(2) DCA could be satisfied by filtering the content that users of its service want to upload to *specific* works for which right-holders have provided the online content-sharing service provider with the relevant and necessary information, but that this does not introduce a general monitoring obligation and that the application of the provision should not lead to such a result (*Kamerstukken II* 2019/20, 35454, 3, p. 37-38, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). The Minister stated that he hoped that the CJEU will shed more light on the relationship between the filtering obligation, on the one hand, and the general monitoring ban, on the other hand, in the case of *Poland v. the European Commission* (see *Kamerstukken II* 2020/21, 35454, 6, p. 23-24, <https://zoek.officielebekendmakingen.nl/kst-35454-6.html>).

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 Explanatory Memorandum states that, in order to comply with Article 29c(2) sub 2° and 3° DCA, online content-sharing service providers must in any case have in place a proper notice-and-takedown procedure and, if possible, a notice-and-staydown procedure. Without specifying a specific kind of technology, it nevertheless infers from Article 17(4) CDSMD that this may involve filtering measures (*Kamerstukken II* 2019/20, 35454, 3, p. 38, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). However, the Minister concludes from the principle of proportionality that filtering is only an option when – given the state of the art – the means to do so are available at acceptable costs, that filtering measures that are too broad and block lawful content are not appropriate in view of the user freedoms expressed in exceptions and limitations, and that automatic filtering ought to be limited to cases of “likely infringement” (see *Kamerstukken II* 2020/21, 35454, 6, p. 6, 9 and 28, <https://zoek.officielebekendmakingen.nl/kst-35454-6.html>, where reference is made to the provisional position of the European Commission of 27 July 2020 on the filtering of “likely infringing” content, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591, p. 15: “automated blocking of content identified by the right-holders should be limited to likely infringing uploads, whereas content, which is likely to be legitimate, should not be subjected to automated blocking and should be available”).

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.

Yes, the DCA and DNRA already provided for an exception or limitation to copyright and neighbouring rights for uses for the purpose of quotation, criticism and review (Article 15a DCA; Article 10(b) DNRA) and caricature, parody or pastiche (Article 18b DCA; Article 10(j) DNRA). Therefore, the legislator did not find it necessary to adapt the law to the provision in Article 17(7) CDSMD that users of an online platform must at all times be able to invoke the right to quote and the parody, pastiche and caricature exception, since this already follows from the

law (*Kamerstukken II* 2019/20, 35454, 3, p. 39, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). Article 29c(5) DCA provides that the online content-sharing provider must inform the users of its service of the exceptions or limitations to copyright in its general terms and conditions.

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

Yes, where relevant, any other exceptions or limitations may apply to the protection provided by the LNI. This follows from the general system of the law, according to which right-holders are given exclusive rights, subject to the exceptions laid down by law (see explicitly Article 1 DCA).

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:

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

The LNI does not include provisions on the licensing of uses, save for the requirement for online content-sharing service providers to provide right-holders, at their request, with adequate information on the authorised use of the works (Article 29c(1) DCA). This is an information duty on the part of online content-sharing service providers.

The Explanatory Memorandum underscores that right-holders are not obliged to give their authorisation for use. Copyright is an exclusive right and creators or their successors in title may withhold their consent. Online content-sharing service providers, for their part, are not obliged to accept the licences offered. The contractual freedom of the parties is paramount and is not restricted by the CDSMD or the LNI. It is possible that parties cannot reach agreement even though best efforts have been made to do so. This also follows from the applicable proportionality test (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

The Explanatory Memorandum does mention the *possibility* of obtaining the prior consent of right-holders through collective rights management organisation, in particular when a collective management organisation is sufficiently representative to also grant licences with an extended effect to non-member right-holders. However, the LNI does not prescribe collective rights management, nor does the CDSMD require it (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

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. Pursuant to Article 29c(1) DCA, where the online content-sharing service provider has obtained authorisation from the right-holders, that authorisation will also apply to the disclosure to the public by the users of that service, unless they are acting on a commercial basis or the revenue generated by their activity is significant.

The Explanatory Memorandum explains that the LNI does not preclude online content-sharing service providers from agreeing with right-holders that users who act on a commercial basis or whose activities generate significant income are also covered by the license that the platform obtains (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

With reference to recital 69 CDSMD, the Explanatory Memorandum further explains that an online content-sharing service provider is not required to obtain a licence for the use of a work for which users of its service have already arranged the rights, but that the platform cannot assume that users will always do so (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>).

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?

Yes, but only in rather general terms. Article 29c(5) DCA provides that the online content-sharing provider must inform the users of its service of the exceptions or limitations to copyright in its general terms and conditions and that the cooperation between online content-sharing providers and right-holders may not result in the prevention of the availability of “works uploaded by users, which do not infringe copyright, including where such works are covered by an exception or limitation”.

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, the LNI does not include a concept of “manifestly infringing uploads”. However, as observed above (Q12), with reference to the principle of proportionality, the legislator assumes that filtering measures may not be too broad and may not block lawful content and that automatic filtering ought to be limited to cases of “likely infringement” (*Kamerstukken II 2020/21, 35454, 6, p. 6, 9 and 28, <https://zoek.officielebekendmakingen.nl/kst-35454-6.html>*).

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.

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.

Yes. Article 29c(7) DCA requires online content-sharing service providers to introduce a complaints procedure through which users can file complaints against the implementation of subsection Article 29c(2) sub 2° and 3° DCA. Having heard the right-holder of the work or other subject matter concerned, the online content-sharing service provider will issue an effective decision without undue delay and subject to human review. Essentially, a user who believes that uploaded material has been unfairly blocked may report this, upon which the right-holder will be given the opportunity to respond to such a report. If such a response is not received or not received in time, the content will simply be unblocked. The LNI does not contain any applicable time limits.

The online content-sharing service provider will also ensure that right-holders and users can lodge an appeal with an impartial dispute resolution committee in the event of an unwelcome decision. The impartial dispute resolution committee will issue an effective decision without undue delay and subject to human review (Article 29c(7) DCA). Here again, the LNI does not contain any applicable time limits.

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.

Yes, the Explanatory Memorandum explicitly mentions that there will always remain the possibility of submitting a dispute to the courts, as enshrined in Article 17 of the Dutch Constitution (*Grondwet*), or to an alternative dispute resolution procedure, such as arbitration and mediation (see *Kamerstukken II 2019/20, 35454, 3, p. 23 and 39, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>*).

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.

No, the LNI does not provide for specific sanctions in cases of abuses of the procedures it introduces.

AC 13: Information obligations

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

Yes. First, online content-sharing service providers must provide right-holders, at their request, with adequate information on the authorised use of the works (Article 29c(1) DCA). Second, pursuant to Article 29c(4) DCA, online content-sharing service providers must provide right-holders, at their request, with adequate information on the measures taken and the manner in which they were implemented in order to comply with Article 29c(2) sub 2° and 3° DCA. This latter obligation does not entail the provision of individualised information to right-holders on a work-by-work basis. Also, it does not require online content-sharing service providers to reveal trade secrets (*Kamerstukken II* 2019/20, 35454, 3, p. 38-39, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>). Third, Article 29c(5) DCA requires an online content-sharing providers to inform the users of its service of the exceptions or limitations to copyright in its general terms and conditions.

AC 14: Waiver

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

The LNI is silent about the possibility to waive the rights provided by Articles 29c-29e DCA and Article 19b DNRA. In Dutch literature, it has been argued that copyright cannot be waived (see J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, 4th ed. (Recht en Praktijk, IE2), Deventer: Wolters Kluwer 2019, p. 715-718), so perhaps the same arguments apply here. On the other hand, it can be assumed that authorisation can be given for free: as the Explanatory Memorandum emphasises that the contractual freedom of the parties remains paramount (*Kamerstukken II* 2019/20, 35454, 3, p. 37, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>), it is likely that right-holders may also grant online content-sharing service providers a royalty-free license (unless this would result from an abuse of a dominant position by online platforms, which would be prohibited by competition law).

AC 15: Entry into effect

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

Articles 29c-29e DCA and Article 19b DNRA came into effect in the Netherlands on 7 June 2021.

Additional information

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

The LNI does not explicitly address the relationship with fundamental or human rights. However, during the parliamentary proceedings (in particular, in the advice of the Council of State, (*Kamerstukken II* 2019/20, 35454, 4, p. 2-7, <https://zoek.officielebekendmakingen.nl/kst-35454-4.html>) and in the discussions in the Lower House, *Kamerstukken II* 2019/20, 35454, 5, p. 4, 8-10, 12, <https://zoek.officielebekendmakingen.nl/kst-35454-5.html>), attention was repeatedly drawn to the problem that preventive filtering of infringing content can be at odds with the freedom of information and expression and the prohibition on censorship, as enshrined in international treaties and the Dutch Constitution. According to the legislator, by implementing all safeguards that the CDSMD permits, no available policy space to protect user freedoms have remained unused (*Kamerstukken II* 2020/21, 35454, 6, p.

6, 9-10, <https://zoek.officielebekendmakingen.nl/kst-35454-6.html>). The relationship with fundamental or human rights is therefore addressed – albeit only in implicit form – in the different safeguards in the LNI.

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

As such, there is no noteworthy divergence in the LNI from the standards set out in Article 17 CDSMD. However, it is important to emphasise that the Dutch legislator has ensured that further regulations may be issued on the application of Article 29c DCA by order in council (Article 29c(8) DCA). This enables the lawmaker, if necessary, to quickly put in place additional safeguards to guarantee the freedom of expression of users or to secure any other legitimate interests (see *Kamerstukken II* 2020/21, 35454, 6, p. 10, <https://zoek.officielebekendmakingen.nl/kst-35454-6.html>). It is explicitly not the intention to directly and fully transpose the European Commission guidelines referred to in Article 17(10) CDSMD into an order in council. Since guidelines are not legally binding, there will always have to be independent consideration of further rules to be laid down by order in council (*Kamerstukken II* 2019/20, 35454, 4, p. 7-9, <https://zoek.officielebekendmakingen.nl/kst-35454-4.html>).