Articles 15 & 17 of the Directive on Copyright in the Digital Single Market

Questionnaire – Annex to the Comparative National Implementation Report

SWEDEN

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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.**

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).**

Yes. The LNI was placed in Chapter 5 Copyright Act[1] concerning neighbouring rights, in new sections 48 b – 48 d.

The transposition takes mostly a textual approach but is also adaptive to national circumstances as a matter of legislative drafting to avoid conflicts with other legislation.

In addition to Article 15 DSM Directive, LNI also introduced a new extended collective licensing (ECL) arrangement enabling the use of press publications.

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.

The LNI is available at: https://svenskforfattningssamling.se/sites/default/files/sfs/2022-12/SFS2022-1712.pdf

[1] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.

A good unofficial translation by the national expert follows below. Original formatting (indentation) preserved.

"Producers of press publications
48 b § The producer of a press publication has, subject to exceptions provided for in this Act, an exclusive right to control the online use of their press publication through an information society service by

1. making copies of the press publication, and
2. making the press publication available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

The right pursuant to the first paragraph does not cover

1. use that does not take place for a commercial purpose,
2. hyperlinking measures, or
3. use of individual words or very short excerpts from a press publication.

The right pursuant to the first paragraph applies until the end of the second year after the press publication was published.

The provisions in 2 § second paragraph, 6-9 §§, 11 § second paragraph, 11 a § and 15 a-16 §§, 16 a § third paragraph, 16 e – 17 c, 17 e, 21, 22, 25-26 b, 26 e, and 42 a-42 k §§ shall be applied in relation to press publications envisaged in this section.

48 c § The term press publication in 48 b § means a collection of mainly literary works of a journalistic nature, which have not been produced for scientific or academic purposes, and which

1. constitutes an individual item within a periodical or regularly updated publication under a single title,
2. has the purpose of providing the public information concerning news or other topics, and
3. has been produced on the initiative of a service provider under their editorial responsibility and control.

48 d § Authors whose works are incorporated in a press publication have the right to an appropriate share of the revenue that the producer of the press publication receives from an information society service provider for uses covered by the right in 48 b §.

Only an organisation representing many authors of the relevant type of work used in Sweden is entitled to collect remuneration according to the first paragraph. The organisation shall collect the remuneration and distribute it to the beneficiaries of the remuneration, after making deductions for operative costs. Authors who are not represented by the organisation shall, for the purpose of distribution, be treated as authors who are represented by the organisation.

The producer of a press publication shall at the request of the organisation provide information necessary for the calculation of the remuneration."

Additional provision introduced in connection with LNI

"Extended collective licence for use of works incorporated in a press publication
42 h § An information society service provider may, pursuant to an extended collective licence under 42 a §, communicate works to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them, if the works are incorporated in a press publication pursuant to 48 c § and the use takes place online. The provider may also make such copies of works that are necessary for the communication.

The first paragraph does not apply if the author has prohibited the reproduction or communication by notifying any of the contracting parties, or if it can specifically be assumed for other reasons that the author opposes the use."

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 LNI targets press publications. The term is defined in Section 48c Copyright Act. Although some minor discrepancies appear in the wording compared to Article 2(4) DSM Directive, these are merely a matter of legislative drafting. However, the preparatory works make clear that the right does cover popular scientific publications. The understanding is that these are not published for scientific or academic purposes (Regeringens proposition 2021/22:278, p. 89).

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.

No. The LNI introduces the relevant exclusion but does not define any of the terms. Whilst no conclusive guidance is provided in the preparatory works, the understanding is that the terms should not necessarily be understood to refer to extracts shorter than 11 words (cf. C-5/08 *Infopaq International*) nor, on the other hand, that the exclusion is limited to text as such. The exclusion is intended to include the use of other types of content, such as images and video (such as in the case of snippets or rich links), provided it is an extract. The assessment is left to the courts, which are, however, expected to make case-by-case assessments having regard to the type of content, and ultimately to the CJEU (Regeringens proposition 2021/22:278, pp 94-95).

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

No. Whilst the LNI does not explicitly state this, it is clear from the preparatory works (Regeringens proposition 2021/22:278, p. 92). No definitions are provided.

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

Whilst the LNI does not explicitly state this, the preparatory works make clear that the right cannot be used to prevent use of subject matter to which protection has lapsed (Regeringens proposition 2021/22:278, p. 92). Whilst there seems to be some room to discuss protection relative to subject matter that cannot be protected as such (e.g., non-original creations), systemically it seems impertinent to exclude works to which protection has expired while letting the protection conferred by LNI cover creations which would never have been protected by copyright, except facts which are also explicitly excluded.

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

No.

AC 2: Right-holders

8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.

The LNI covers producers of press publications (sv. *framställare av presspublikationer*). As a matter of legislative drafting, the legislator opted for the term *producer* rather than *publisher* to avoid interpretative conflicts with other parts of the Copyright Act or other legislation, such as freedom of expression legislation. The term is intended to cover a service provider that takes the initiative to publish the publication and that is generally responsible for and exerts control over the operation of the service (Regeringens proposition 2021/22:278, p. 90).

The right applies to producers of press publications established in Sweden and remaining regions of the EEA. In case of the latter this follows from Section 30a International Copyright Regulation.

AC 3: Restricted acts

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

The LNI protects against the reproduction and the making available to the public, as envisaged in Article 2 and 3(2) InfoSoc Directive respectively, of press publications (Regeringens proposition 2021/22:278, p. 96).

Moreover, in accordance with Article 15(3) DSM Directive, the LNI also protects against circumvention and removal of RMI-information as envisaged by Chapter 6a Copyright Act, implementing Articles 6 and 7 InfoSoc Directive (Regeringens proposition 2021/22:278, p. 96).

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

No. The default understanding is that the Directive is not intended to change the CJEU's case law on linking, which in turn establishes that linking to content that has lawfully been made available does not involve an act of making available to the public (Regeringens proposition 2021/22:278, p. 93, reference being made to C-466/12 *Svensson*). Despite this, the LNI includes the exclusion concerning linking as envisaged by Article 15(1) third paragraph DSM Directive. The provision is, however, not understood to confirm the CJEU's case law but to address the issue where the link itself constitutes a reproduction or making available, such as where the link text itself reproduces protected content. Viewed in this way, the legislator understands the interpretation of the exclusion to also be dependent on the interpretation of the other exclusion concerning individual words and very short extracts. Additionally, the legislator does not distinguish between different types of links, recognising that visual elements may also be displayed, similarly as the other exclusion (Regeringens proposition 2021/22:278, p. 94). Although not stated in the preparatory works, letting the exclusion cover different types of linking is likely the reason why the LNI conspicuously refers in Section 48b paragraph 2 Copyright Act to 'hyperlinking measures' (sv. *hyperlänkningsåtgärder*), as opposed to hypertext linking. In any other case (i.e., that does not involve incorporating into the link protected content by reproducing it), it seems the permissibility of linking measures is governed by the CJEU's case law, such as C-466/12 *Svensson* and C-160/15 *GS Media*. Admittedly, as the legislator envisages that the linking exclusion also covers different types of links, in case of the making available right, since it is not dependent on a reproduction as such, an assessment of the permissibility of the link might have to be made in case of reference to unlawfully uploaded press publications *when the link embeds the press publication rather than being a hypertext link* (i.e., a C-348/13, *BestWater* type of link to an unlawfully uploaded press publication), unless the embedded link shows a short extract of the press publication (and therefore falls within the other exclusion). In case of linking to lawfully uploaded content, the measure is, of course, copyright-irrelevant (C-466/12 *Svensson*).

AC 4: Targeted users

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

Yes. Although Section 48b Copyright Act is phrased generally, the LNI is intended to cover use by information society service providers as required by Article 15 and defined in Article 2(5) DSM Directive (Regeringens proposition 2021/22:278, p. 90). The term is, as such, not defined by the LNI but exists in Section 2 E-Commerce Act which refers to services 'normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service'. Essentially, whatever other words can be used to describe the relevant actor, the understanding is that the targeted use must take place within the frame of such activity (Regeringens proposition 2021/22:278, p. 91). As follows from the answer provided to Question 13, private and non-commercial uses are not targeted by the LNI.

Given the general definition there is nothing to indicate that an OCSSP could also not fall within the definition of an information society service (in fact, the definition of an OCSSP includes the exact phrase). This issue was not considered during transposition. However, for the sake of completeness, the regime under Article 17 excludes press publications as introduced by Article 15 DSM Directive (see Question 3 in the second part of the questionnaire).

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.

As a preliminary matter it should be noted that it is clear that the rights are intended to target exploitations by specifically information society service providers when providing the service. Only this makes it difficult to imagine a situation as envisaged by the question, unless, perhaps, the making available of the relevant content incorporated in the press publication as envisaged by Article 15 (the making available of the *press publication*) is part of the intended information society service *and* the service provider is either the original rightholder or a licensee.

Article 15(2) DSM Directive is understood to constitute instructions to national legislatures as to how the rights should be understood and limited (Regeringens proposition 2021/22:278, p. 92). Therefore, although it has not been implemented, the LNI is intended to be construed in light of the provision. The holder of the right to the press publication does not hold rights to the content incorporated in the publication and cannot invoke the right against the relevant rightholders. Similarly, however, the LNI does not provide a press publication right to rightholders whose creations are incorporated in the press publication.

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. As an initial matter, the LNI recognises the same exceptions and limitations as Article 15(1) DSM Directive, i.e., private and non-commercial use, hyperlinking, and individual words or very short extracts of a press publication. In case of the first category, the LNI only makes reference to use that does not take place for commercial purposes, which is merely an expression of legislative drafting, it being understood that private use is always non-commercial. Significantly, however, the exception applies to both physical and legal persons (Regeringens proposition 2021/22:278, p. 90).

Beyond these, the LNI also incorporates all other copyright exceptions that may be relevant in context as made clear in the opening statement of Section 48b paragraph 1 Copyright Act and as itemised in paragraph 4.

AC 6: Licensing

14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:
- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

Yes. Section 42h Copyright Act provides for an ECL arrangement for the benefit of operators of information society services affected by the exclusive right. The ECL arrangement applies only to works which are part of a press publication and covers the making available right as well as necessary reproductions. The author is, however, entitled to opt out from the ECL arrangement by communicating this to the relevant rights management organisation (ECL is thus the default position but not necessarily the final one).

The ECL may be granted by any organisation that represents many rightholders for the relevant type of work (representative organisation). This is a technical designation and includes organisations engaged in collective rights management without that necessarily constituting their main purpose. Notably, in certain segments of the creative industries, collective management of rights is part of membership in a professional body or trade union. In these instances, rights management is part of the membership terms (and, one could say, is mandatory as a matter of market arrangements). An example would be the Swedish Union of Journalists (sv. Journalistförbundet).

To the extent that an ECL would be obtained from a collective rights management organisation proper, falling entirely under the Act on Collective Management of Copyright, implementing the CRM Directive,[2] it will fall under supervision of the Swedish IPO that is the designated supervisory authority. Collective management undertaken by other organisations fall outside of some supervisory control (the Act applies only partly). The market reality is, however, more complex than what these arrangements may seem to account for because of a complex web of relationships that involves umbrella organisations representing several organisations engaged in collective rights management. It is, for example, not uncommon that such an umbrella organisation negotiates the terms, thereby providing a certain bargaining edge, but the actual contract is then signed by the organisation that has the direct mandate from the relevant author.

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.

Essentially yes. Section 48d Copyright Act entitles authors whose works are included in a press publication to 'an appropriate share' of the revenue that the producer of the press publication receives from the service provider targeted by the exclusive right. The right applies only to authors of works.

The right is viewed as being similar to the supplementary remuneration right set up under Section 45a Copyright Act, implementing Article 3(2b) Term Directive[3] as introduced by Article 1(1)(c) Term Extension Directive,[4] and to some extent the LNI is inspired by this framework. Regarding calculation of the share, neither the Copyright Act nor the preparatory works cast light on how the share is intended to be calculated, and intentionally leaves it to the relevant market actors (Regeringens proposition 2021/22:278, p. 98). Regarding collection and management, the LNI provides in Section 48d paragraph 2 Copyright Act exclusive competence to a

[2] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
[3] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[4] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

representative organisation (see Question 14 above regarding the term) to collect the remuneration and imposes on the organisation a duty to collect it and distribute it to entitled authors. Moreover, the provision makes clear that, for the purpose of distribution, authors who are not represented by the organisation are equated with authors who are represented by it.

AC 8: Term of protection

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

Pursuant to Section 48b paragraph 2 Copyright Act protection lapses after two years from the date of publication.

AC 9: Waiver

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

Yes and no, depending on the category of rightholder. On the one hand, the LNI is based on basic copyright principles in that it establishes an exclusive right for the benefit of producers of press publications, as opposed to an absolute obligation to obtain, and grant, licences. There is nothing to prevent a rightholder to issue a licence for free as matter of principle. Where a licence is issued by a collective rights management organisation, which is governed by the Act on Collective Management of Copyright implementing the CRM Directive, it is unlikely that a licence can be issued for free.

On the other hand, the LNI establishes a remuneration right for the benefit of authors whose works are included in a press publication. As an initial observation, waiver of remuneration rights can be discussed, as the CJEU's, admittedly scarce, case law on remuneration rights implies that they cannot be waived (C-277/10 *Luksan* v *van der Let*). However, Section 48d paragraph 2 Copyright Act provides exclusive competence to a representative organisation (see Question 14 above regarding the term) to collect the remuneration and imposes on the organisation a duty to collect it. The existence of this duty inevitably prevents free authorisation, regardless of any other order under which the organisation operates.

AC 10: Entry into effect

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

1 January 2023. The final text was adopted on 30 November 2022.

Regarding potential retroactive applicability of protection (cf. Art 15(4) paragraph 2 DSM Directive), having regard to the two-year protection period of press publications and the fact that LNI applies from 1 January 2023, protection provided by LNI extends to press publications first published in 2021 (Regeringens proposition 2021/22:278, p. 208).

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).

Yes. LNI was placed in a new Chapter 6b Copyright Act (sections 52i – 52u). The transposition does not take a textual approach. It is also not appropriate to describe it as adaptive to national circumstances. The LNI accounts for the CJEU's decision in C-401/19 *Poland* v *European Parliament and Council*, AG Øe's Opinion in the case, and the Commission's *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market* COM(2021) 288 final.

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.

LNI available at: https://svenskforfattningssamling.se/sites/default/files/sfs/2022-12/SFS2022-1712.pdf

A good unofficial translation follows below. The translation was made by the national expert. The original formatting (indentation) has been preserved.

Ch. 6 b Special provisions on certain online content sharing services

Application
52 i § This Chapter applies to such information society services of which the main purpose is to store and give the public access to a large amount of works uploaded online by its users, if

1. the service provider organises and promotes the works for profit-making purposes, and
2. the service plays an important role on the content market by competing with other types of existing or potential online content services.

Service provider's copyright liability
52 j § When a user makes a work available to the public* by uploading it to the service, the service provider is also considered to communicate the work to the public according to 2 § third paragraph 1.

The provisions in 18 § Act (2002:562) on electronic commerce and other information society services shall not be applied in relation to liability prescribed pursuant to this Act for such communication.

* *Note from national expert: although not explicitly clear from the preparatory works, the phrase 'makes a work available to the public' as used in the section does not refer as such to the making available prong of the communication to the public right, but instead to an umbrella term designating all exclusive rights in 2 § Copyright Act excluding the reproduction right. This follows indirectly from the subsequent reference to 'communication to the public' as well as the fact that references to 'communication to the public' are made as a matter of consistency (and proper designation for the exclusive right in question). It is merely an expression of legislative draftsmanship.*

Effect of obtained authorisation

52 k § If a service provider has authorisation to communicate works to the public according to 52 j § first paragraph, the authorisation shall also be considered to cover the communication to the public that is carried out by the user, on condition that

1. the user does not act for commercial purposes, or
2. the user's activity does not generate significant revenue.

The service provider's freedom from liability

52 l § A service provider shall not be liable for an unlawful communication according to 52 j § if the provider, in case of having received a well-substantiated notification from the rightholder, expeditiously disables access to the content. For liability not to subsist the provider must also do what it reasonably can be required to do to

1. obtain authorisation for those communications to the public that the provider carries out on the service, and
2. ensure that content which is infringing copyright to works about which rightholders have supplied the provider with relevant and necessary information is not made available on the service.

The assessment of whether the provider has done what it can reasonably be required to do pursuant to the first paragraph shall consider in particular

1. the type of service offered by the provider,
2. the public and extent of activity the service has,
3. the type of works users upload to the service, and
4. the existence on the market of, and the provider's costs for, appropriate and effective means to take measures pursuant to the first paragraph 2.

The measures that the provider shall take to not be liable according to this section do not prevent the provider from taking necessary measures to comply with its obligations in 52 o §.

52 m § The condition for freedom of liability prescribed in 52 l § first paragraph 2 does not apply to a service which has been available to the public in the European Economic Area for a shorter period than three years, on condition that

1. the service provider's annual turnover is lower than an amount equivalent to EUR 10 million, and
2. the average amount of unique visitors on the online service in the preceding calendar year did not exceed 5 million per month.

Right to information

52 n § A service provider shall on request from a rightholder or user provide information about the measures the provider takes pursuant to 52 l §.

If the provider has entered into an agreement with a rightholder on such communication to the public as envisaged in 52 j §, the provider shall inform the rightholder of the use that takes place on the basis of the agreement.

Protection of legal use

52 o § A service provider shall ensure that the measures that the provider takes to disable access to content pursuant to 52 l § do not prevent legal communications to the public to any significant degree. Methods for automatic blocking may only be used to disable access to content which may be assumed, with a high degree of certainty, to infringe copyright.

When access to content is disabled, the user shall expeditiously be informed about it.

Users' right to make material available

52 p § A user may, despite 2 §, make works available for the purpose of quotation, criticism, and review and for the purpose of caricature, parody or pastiche on a service envisaged in 52 i §. The provisions in 11 § second paragraph shall be applied in such cases.

The user has also the right to, without prejudice by measures taken pursuant to 52 l §, make available on the service content which does not infringe copyright.

The service provider shall inform users in its terms and conditions about their right provided in this section.

Complaints
52 q § A service provider shall have routines for being able to handle complaints from users of the service when access to content that they have uploaded has been disabled following a measure taken on the basis of 52 l §.

The rightholder concerned shall receive an opportunity to address the complaint and justify their request to disable access to the content.

Complaints shall be decided expeditiously. If the rightholder's request is not duly justified, the content shall be restored. A decision to not restore access to the content shall be preceded by manual review.

Damages
52 r § If a service provider intentionally or negligently disregards its obligations in 52 o § and a user suffers harm as result, the service provider shall compensate the harm.

Order to take corrective measures
52 s § If a service provider disregards its obligations in 52 o § or 52 q § first or third paragraph, a court may on penalty of a fine order the provider to take corrective action.

Proceedings concerning an order pursuant to the first paragraph may be initiated by a user or an organisation representing users.

Proceedings concerning the issuing of a fine is initiated by the relevant order applicant.

Application to neighbouring rights
52 t § References to works in this Chapter shall also be construed as references to subject matter referred to in 45, 46 and 48 §§ and photographs referred to in 49 a §.

Mandatory provisions
52 u § A contractual term which limits a user's right as provided in this Chapter is null and void.

AC 1: Subject matter

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

Having regard to the content of LNI and considerations during the legislative stage, there are several objects of protection. The LNI does indeed establish, in accordance with Article 17(1) DSM Directive, that targeted services carry out a copyright-relevant act. In this sense the object of protection is "rightholder-oriented". However, the literal legislative core of LNI is the introduction of a new safe harbour for the benefit of services that carry out such an act. Moreover, LNI introduces clear safeguards for the benefit of users of targeted services, both explicitly (user rights) and impliedly (thresholds required to satisfy the safe-harbour requirements and other obligations). Therefore, one can say that the object of protection is threefold.

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.

Having regard to the answer to Question 2, beneficiaries of protection are rightholders (new liability regime contingent on obtaining authorisation from rightholders), service providers (safe harbour), and users (user rights). At least as far as the last category is concerned, the LNI seems to go far beyond the literal requirements of Article 17 DSM Directive.

In respect of protection of rightholders, the regime is intended to cover all rightholder categories covered by Article 3 InfoSoc Directive, such as authors of works and holders of neighbouring rights. The regime excludes creators of press publications (Article 15 DSM Directive), as well as sui-generis database creators, which follows from a reading of Section 52t Copyright Act. A particular point of discussion was whether to include holders of rights to non-original photographs, as this category is not harmonised by EU law and is therefore not, as such, captured by Article 3 InfoSoc Directive. The creators of such subject-matter are also protected by the LNI (reference to Section 49a in Section 52t Copyright Act).

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")?

When reading the text of LNI it is important to bear in mind the terminology used (cf. asterisk note above regarding Section 52j Copyright Act).

Yes. As a matter of literal wording, the LNI protects against *communication to the public*. Whether the LNI should cover the entire right as envisaged by Article 3 InfoSoc Directive was, however, a contentious issue during transposition. Whilst the wording of the finally-adopted provision has not been changed compared to the original proposal by the Ministry of Justice, in the proposal the Ministry reasoned that the regime should only cover the making available prong of the communication to the public right, thereby not covering live transmissions, and moreover proposed to exclude acts of linking from the regime.[5] Essentially this was grounded in the understanding that Article 17 requires storage of content, which implies duration which is longer than merely transient, whereas acts of linking do not involve storage of copies. The government has however made a slightly different assessment. Whilst making the same interpretation of the term 'storage', which of itself excludes live transmissions, and similarly considers it obvious that acts of linking should not be covered as they do not result in storage of content (Regeringens proposition 2021/22:278, p. 113), which delineates the type of service falling under LNI, as far as liability under LNI is concerned, the intention is to also cover live transmissions (i.e. the communication to the public prong of the communication to the public right) if they take place on a service that is targeted by the LNI. Differently stated, the making available prong seems to qualify the type of service that is targeted by LNI but if other forms of communication to the public also take place on such a service (live transmissions particularly), they fall within the ambit of the regime and any measures to be taken necessarily extend over such uses. Essentially the idea is that the different types of communication to the public which may take place on a service targeted by the regime should be treated in the same way (Regeringens proposition 2021/22:278, p. 116).

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").

Yes.

Differently from the contents of Article 2(6) DSM Directive, the LNI uses a concise definition that merely explains which services the regime does cover, on the basis of the first paragraph of Article 2(6) and recitals 62 and 63 cumulatively. It was considered unnecessary to include an explicit exclusion in the text of the Copyright Act in view of the proposed definition, while including statements from the recitals was believed to provide more clarity. Additionally the view was taken that including an exclusion would risk causing uncertainty with regards to those services that fall outside of the regime (Regeringens proposition 2021/22:278, p. 109).

Hence the regime covers, as follows from Section 52i Copyright Act, information society services of which the main purpose is to store and give the public access to large amounts of protected subject matter uploaded by its users, if (1) the service organises and promotes the protected subject matter for profit-making purposes, and (2) the service plays an important role on the content market by competing with other types of online content services (that is, competes with such services to which users do not upload their own content).

[5] *See* further Szkalej K, *Article 17 DSM Directive: the Swedish proposal (Part 1)* (20 April 2022, Kluwer Copyright Blog), section 1.2, available at https://copyrightblog.kluweriplaw.com/2022/04/20/article-17-dsm-directive-the-swedish-proposal-part-1/

The text of LNI does not define any of the terms used in the definition. However, as far as the term 'large amounts' is concerned, the preparatory works make clear that an assessment of whether a service is sufficiently large ought to be seen, to some extent, in relation to other services available on the market. The regime targets services that provide content uploaded by users to such an extent and in such a way that a competitive advantage arises on the content market in relation to other types of services. The amount of available content that is necessary for such a situation to take place may vary depending on the type of market and type of work in each case, although the size of the service should be significant, without the service having to have a dominant market position or global outreach (Regeringens proposition 2021/22:278, p. 111).

Moreover, having regard to Question 4, the conclusion can be drawn that the LNI does not target services which only provide access to live transmissions or links, or, arguably, services which mainly engage in those acts.

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.

Notwithstanding Joined Cases C-682/18 and C-683/18 *YouTube/Cyando*, which came after the adoption of the directive, this is debatable. Direct liability cannot be precluded, but it may have little relevance in practice because of a broad definition of contribution to infringement and the existence of a sui-generis regime (addressed at the end of the answer)

As a preliminary observation it ought to be noted that liability for copyright infringement is strict under Swedish copyright law. Therefore, the existence of a copyright relevant act will normally implicate liability in the absence of consent, applicable limitations and exceptions, or when it is outside the confines of any suitable safe harbour or existing agreement.

Additionally, copyright infringement may also attract criminal liability under Section 53 Copyright Act, for which a fine, up to two years imprisonment or, since 2020, up to six years imprisonment for gross copyright infringement, may be prescribed. Such liability requires intentional conduct or gross negligence and is therefore normally more relevant in relation to "bad faith" services. However, the CJEU's ruling in C-160/15 *GS Media* and C-610/15 *Ziggo*, and indeed Joined Cases C-682/18 and C-683/18 *YouTube/Cyando*, seemingly conflates the requisites for the existence of a copyright relevant act as such and the requisites for criminal liability. This raises the question whether GS Media, Ziggo, and YouTube/Cyando-type of infringements can become criminal *ab initio* because of the knowledge requirement embedded in the determination of the existence of a copyright relevant act as such. Whether that nexus can be made is a matter for the court to finally determine, but interventions taking the form of linking, indexing information on a website or hosting combined with the often commercial purpose of the service and indisputably large-scale effect of such acts potentially render the entire spectrum of criminal liability relevant in view of such case law. The issue is immediately relevant in the context of the provisions of the E-Commerce Act, whose safe harbours do not apply to intentional conduct.

With the breadth of the exclusive rights and well-established principle of broad interpretation it would have been difficult to state that the activities carried out by such services consisting of storage of uploaded content and the provision of access to such stored content do not as such involve copyright-relevant acts carried out by the services, in particular acts of reproduction in the form of storage or the making available of content from servers respectively. Direct liability of hosting service providers was, however, not a fully settled matter in Sweden. Formulations in preparatory works are rather reserved, abstaining from conclusively addressing the issue, although some developments point in the direction of direct liability.

With regards to uploading and storage, in respect of which the right of reproduction is relevant, during the implementation of the E-Commerce Directive, when time the InfoSoc Directive was yet to be implemented, the assessment was made that the storage of uploaded copies ought not to attract direct liability of the hosting service. This was grounded in an understanding at the time that an intermediary cannot, as the general rule, be considered as the party reproducing copies which are uploaded by a user to, and which are subsequently stored on, the server space owned by the intermediary (Regeringens proposition 2001/02:150, p. 48). At the time, hosting services were described as renting out server space, although so-called bulletin board systems were also understood to fall within the category (Regeringens proposition 2001/02:150, p. 21). This understanding came to expression again during the implementation of the InfoSoc Directive (Regeringens proposition 2004/05:110, p. 339), which applies since 2005, and has been repeated in subsequent institutional reports (e.g., Ds 2007:29, p. 322). Such a position appears to presume that once content is uploaded, further (non-temporary) reproductions within the meaning of copyright

law do not take place, but also that liability for acts is attributed to the user rather than the service. At the same time, it was recognised in respect of hosting that, because such activities will not be exempted by Section 11a Copyright Act (i.e. Article 5(1) InfoSoc Directive) by virtue of the permanent character of the copy, thereby implying the existence of a copyright relevant act, freedom from liability of such intermediaries will, it was stated, be governed by the E-Commerce Act (Regeringens proposition 2004/05:110, p. 100). As the E-Commerce Act does not absolve from direct liability as such (infra), such a construction of the statement in respect of Section 11a might be read as implying that direct liability is after all possible.

With regards to direct liability under criminal law, it was accepted that passive storage of infringing content would not carry such liability (Regeringens proposition 2001/02:150, p. 90). This view aligns with earlier case law of the Supreme Court.[6] However, criminal liability is instead possible for breach of statutory duty (explained at the end).

With regards to availability of content from the servers and communication to the public right, the assessment was reduced to the statement that the question of an intermediary's liability is not entirely clear (Regeringens proposition 2001/02:150, p. 48). This assessment was also repeated during the implementation of the InfoSoc Directive (Regeringens proposition 2004/05:110, p. 339), making the position, quite frankly put, truly uncertain. It was, in any event, not precluded as such. For this reason, the introduction of safe harbours, limited in scope as they are, was justified with reference to potential strict liability for copyright infringement (Regeringens proposition 2001/02:150, p. 94 regarding reproduction and p. 95 regarding communication to the public).

Needless to say, the relevant service will normally fall within a safe harbour in the E-Commerce Act. These are contained in Sections 16 (mere conduit), 17 (caching), and 18 (hosting). The provisions essentially mirror Articles 12-14 E-Commerce Directive regarding the mechanics of applicability in the sense that they enshrine a passivity principle and condition the safe harbour on acting in case of receiving knowledge (hosting). However, the national provisions merely absolve service providers from financial liability for the information that they forward or store, without excluding the liability completely. Therefore, whereas the opportunity to seek a compensatory award against a hosting provider for hosting content a user has uploaded may not be possible, other remedies will be available; especially injunctions which, as it were, require either direct or contributory liability of the addressee to be issued. Moreover, by virtue of Section 19 E-Commerce Act, as stated above, criminal liability for acts falling within the safe harbour provisions may ensue in case of intentional conduct. Consequently, if it is accepted that Ziggo-type of exploitation, or indeed YouTube/Cyando-type of exploitation, creates a nexus with intentional conduct, such exploitation will likely fall outside the confines of the safe harbour provisions.

Systemically, therefore, it may not matter whether an intermediary is primarily or secondarily liable because the effect under the E-Commerce Act is virtually the same.

But regardless of liability under copyright law, since 1998 operators of websites are subject to a sui-generis statutory liability regime set up by the BBS Act.[7] Liability under the Act for copyright infringement is subsidiary to copyright law, meaning that it applies when liability under copyright law is not possible.

Under Section 5 paragraph 1 point 2 BBS Act the operator of what the statute refers to as 'electronic bulletin boards' is obligated to remove or otherwise prevent the dissemination of a 'message' if it is obvious that the user has, inter alia, infringed copyright or neighbouring rights by sending in (uploading) the message. Despite the seemingly narrow terminology, originating from the bulletin board system, the Act has broad application as it defines electronic bulletin boards as 'a service for electronic communication of messages' (Section 1 paragraph 1 BBS Act) and message as 'text, image, sound or information in general' (Section 1 paragraph 2 BBS Act). Consequently, it may, and it is understood to, apply to a variety of services which allow users to submit various types of content.

The decisive requirement for the applicability of the Act is that the user of the service is able to upload content to the service and be able to access content uploaded by others (Regeringens proposition 1997/98:15, p. 9).

[6] Supreme Court in case B 363-95 (judgment 22 February 1996); conventional national citation: NJA 1996 s. 79 (*BBS Case*).
[7] Lag (1998:112) om ansvar för elektroniska anslagstavlor.

The prevalent understanding is that the obligation in the BBS Act is compatible with Article 15(1) E-Commerce Directive because it does not require active investigation of facts or circumstances which can imply unlawful activity (Regeringens proposition 2001/02:150, p. 100). Indeed, Section 4 BBS Act states explicitly that in fulfilling the obligation under Section 5, the operator of the service shall exercise such control over the service as is reasonably required having regard to the nature of the service. The preparatory works state expressly that the obligation does not require a review of every incoming message (Regeringens proposition 1997/98:15, p. 15). As the obligation requires taking action where infringement is "obvious", the Act does not require taking action where that is not the case.

For the sake of completeness, it should be noted that the BBS Act continues to apply after the LNI.

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?

As explained in Question 6 above, the services would have benefited from immunity to some extent. The LNI excludes the relevant provision (18 § E-Commerce Act).

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.

The LNI introduces a new safe harbour in Section 52l Copyright Act,[8] consisting of three cumulative prongs, which is intended to transpose in one go Articles 17(4), (5) and partly (7). The result is a rather lenient duty of care to benefit from the safe harbour, whose construction is additionally affected by a self-standing obligation in Section 52o Copyright Act to not prevent lawful uses.

The first prong targets ongoing (individual) infringements requiring *ex post* intervention. In particular, a service provider is not liable for unlawful communications to the public if the provider, having received a sufficiently substantiated notification from rightholders ("well-substantiated"), expeditiously disables access to protected content. The onus of having to act commences the moment such a notification is submitted and is anchored in the contents of that notification. The notification needs to contain information that allows a service to take a justifiable and diligent decision by describing why the act is to be considered unlawful and point out where exactly the content is located. In case of doubt, the service may require evidence of rights ownership, but is not expected to make complicated assessments of whether an exception is applicable or not; it being instead required to act in clear infringement situations (Regeringens proposition 2021/22:278, p. 133, Ds 2021:30, pp. 158, 288).

The second and third prongs then require that services act towards rightholders as a collective. They require services to take such measures that they can reasonably be required to take (sv. *vidta de åtgärder som skäligen kan krävas*; cf. "best efforts") to, on the one hand, obtain necessary authorisation for the relevant acts that the service providers carry out on their service (second prong), and, on the other, to intervene *ex ante* by ensuring that unlawful content, about which the service has received relevant and necessary information from rightholders that essentially enables content matching, is not made available on the service (third prong). Expecting every conceivable service falling under the regime to procure expensive identification technology is, however, not the intention (Regeringens proposition 2021/22:278, p. 130, Ds 2021:30, p. 155).

[8] To avoid a misreading, in capital letters the relevant section is 52L.

The small-services exception in Article 17(6) is integrated into the safe harbour through Section 52m Copyright Act as an exception to the cumulative prongs of the safe harbour. For the safe harbour to be applicable to these services, it suffices that they comply with the first and second prong.

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.

It should be noted from the outset that the relevant standards have been implemented for *ex ante* intervention and necessity to (attempt to) obtain authorisation. *Ex post* intervention is governed by other requirements (see Question 8 regarding the first prong).

The legislator's understanding is that, on the one hand, "best efforts" constitutes an independent concept of EU law and, on the other hand, that the term ought to be construed in light of the objectives and text of Article 17 taken as a whole, anchoring this understanding in the Commission's guidance, p. 9 and recital 66 (Regeringens proposition 2021/22:278, pp 124-125, Ds 2021:30, pp 150-151). Realising that the imposition of best effort standards simultaneously with requiring that any resulting measures be proportional and that account be taken of many different factors creates an incomprehensible regime, the legislator has adopted a formulation that it believes aligns more compatibly with the assessments required that also avoids contradictory statements. In particular, and differently from the formulations in the Swedish and English language versions of Article 17, the relevant national provision (Section 52l paragraph 1 Copyright Act) requires of services to take "such measures they can reasonably be required to take" (sv. *vidta de åtgärder som skäligen kan krävas*). The understanding is that such a standard better expresses the need to make an overall assessment, while accounting for the proportionality principle, and implying that the service providers' obligations in this regard are not absolute (Regeringens proposition 2021/22:278, pp 125, 128, Ds 2021:30, p. 151).

Under the adopted standard the starting point for the assessment is whether the service provider has acted in accordance with high industry standards of professional diligence. Anchored in recital 66, the service provider is expected to take such steps a diligent operator would have taken, taking into consideration best practices in the industry and the purposiveness of measures taken in light of all relevant factors and recent developments. However, the assessment also needs to account for all circumstances in any given case. Whilst industry practices and use of most effective measures to reach the aim of preventing access are given particular importance, an economically weaker actor is not expected to use the most costly or sophisticated solutions on the market, even if these constitute industry practice. The service provider is instead required to choose the best method out of those available that can reasonably be required from the perspective of the service provider's situation. The more resources the service provider has at its disposal, the higher the requirement to act in accordance with industry practice (Regeringens proposition 2021/22:278, p 259). Moreover, the assessment also requires a consideration of the relative effects of possible measures to prevent access to unlawful content. A service on which unlawful content is only available exceptionally or to a very small extent is not required to invest in expensive solutions to identify such material. In such situations the provider cannot be expected to do more than to remove the content after it is requested by the rightholder (differently stated, it would appear that it does not have to satisfy the third prong concerning *ex ante* intervention). The same concerns situations where there is no technical or other solution on the market which makes it possible to handle, in a manner that is acceptable, the category of work that is available on the service (Regeringens proposition 2021/22:278, pp 259-260).

This being the case, the conditions for immunity are *ab initio* subject to a requirement that any measures taken cannot prevent use which is not unlawful. The requirement is understood to mean that the user's interest to make lawful content available is intended to come before the interest to prevent unlawful content (see further the answer provided to Question 20 and 22). Whilst the requirement tilts the assessment in favour of (legitimate) users, it should also affect the interpretation of the relevant standard of care concerning the procurement or use of relevant technology. With this in mind, and since a service provider is not expected to make difficult copyright assessments (such as determining the potential applicability of a copyright exception), it would appear that a service provider ought not be expected to procure or use technology that enables it to determine if a copyright exception is, or is not, applicable.

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

Essentially yes. The conditions for immunity are not subject to the principle of proportionality as a matter of adopted wording. However, that principle has clearly been observed during the transposition stage as the legislator has had both users' interests in mind, as well as the service provider's ability actually to be able to comply with the requirements.

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.

As a matter of drafting, there is an exemption in Section 52m Copyright Act for new OCSSPs similar to the one in Article 17(6) DSM Directive. The provision exempts relevant services from the third prong (*ex ante* intervention).

Moreover, the reasonableness standard embedded in the conditions for immunity under the LNI requires, pursuant to Section 52l paragraph 2 Copyright Act, account to be taken of the type of service, type of public and extent of activity of the service, type of works users upload, and existence on the market of, and the service provider's costs for, appropriate and effective means to take *ex ante* measures. The preparatory works are arguably somewhat obscure as to the exact parameters for making an assessment, nevertheless the factors to be taken into account and considerations in the preparatory works clearly enable courts to account for a variety of circumstances that may be relevant to the case. Significantly, these factors relate both to the initial requirement to attempt to obtain authorisation, as well as taking subsequent *ex ante* measures, as appropriate. As example of the latter, the preparatory works make clear that a service on which unlawful content of a particular type is made available exceptionally or to a small extent cannot be expected to invest in expensive technical solutions to identify the particular type of content, as the costs would be too high in relation to the benefit it provides. In such circumstances, the service provider should normally not be expected to do more than to remove the content after being notified by the rightholder. The same is understood to apply in relation to service providers that generally keep the amount of unlawful material low through various preventive measures such as clear terms and conditions, or rules or sanctions for copyright infringement (Regeringens proposition 2021/22:278, p. 130).

<u>AC 6: Right-holder cooperation</u>

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.

It is understood that the question presumes that, in the event that rightholder cooperation is a prerequisite, immunity does not apply when rightholders fail to cooperate.

No. The safe harbour requirements admittedly require, as an initial step, of service providers to attempt to obtain authorisation from rightholders (the requirement is to do what reasonably can be expected of such service providers). Failing this, service providers are required to take steps to ensure that infringing content is not made available on the service (*ex ante* intervention). In addition, services are required to ensure infringing content is removed from the service (*ex post* intervention). Only *ex ante* intervention is preceded by a requirement to attempt to obtain authorisation.

In case of both *ex ante* and *ex post* intervention, the requirement to take measures is conditional upon receiving relevant and necessary information from rightholders, adapted to the situation at hand (indirectly this is an obligation to notify the service in an appropriate manner if the rightholder elects to notify). In the event that rightholders fail to provide relevant information, a service provider cannot be viewed as having failed to comply with the requirements for immunity because taking measures is contingent on the substance of the information provided. There is, however, no formal obligation imposed on rightholders to provide information.

As follows from the answer provided to Question 8, the LNI distinguishes between the type of information that needs to be provided (cf. "relevant and necessary information" and "sufficiently substantiated notice"). In relation to the first prong in the LNI (*ex post* intervention) the rightholder ought to provide a sufficiently substantiated notification from rightholders ("well-substantiated"). The notification needs to contain information that allows a service to take a justifiable and diligent decision by describing why the act is to be considered unlawful and point out where exactly the content is located. In case of doubt, the service may require evidence of rights ownership, but is not expected to make complicated assessments of whether an exception is applicable or not; it being instead required to act in clear infringement situations upon receiving the relevant information (Regeringens proposition 2021/22:278, p. 133). In relation to the third prong in the LNI (*ex ante* intervention), right-holders are expected to provide relevant and necessary information that essentially enables content matching (Regeringens proposition 2021/22:278, p. 129). The specific content or format of the information depends on how the service intends to satisfy the third prong. If the service uses fingerprinting content identification technology, the provision of a fingerprint or reference material from which a fingerprint can be created constitutes relevant and necessary information. As to timing, the information relevant for *ex ante* intervention can be supplied either before the content is made available on the service or in connection with a request to remove infringing content (Regeringens proposition 2021/22:278, p. 259).

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 envisage such an outcome as a matter of adopted wording, nor does it treat differently unlawfully made available content that causes significant economic harm from such content that does not cause such harm.

In respect of *ex ante* measures the preparatory works envisage that the rightholder delivers such information which enables content matching.

As both *ex ante* and *ex post* intervention are contingent upon information received from rightholders, it is, essentially, up to rightholders to determine which (infringing) content they wish the service provider to disable access to.

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.

It should be noted that Article 17(8) first paragraph has not been implemented into LNI as such, and is viewed as being directed to Member States as opposed to service providers (Regeringens proposition 2021/22:278, p. 142).

As far as identification of infringing content is concerned, the conditions of immunity (in this respect) are based, initially, on information supplied from rightholders. Accordingly, and similarly to the neutrality principle of the safe harbour provisions under the E-Commerce Directive, the service is required to act only after receiving a substantiated notification from rightholders. It should be noted for the sake of completeness that the wording of the provision implies that if a service were to determine that such a notification is not substantiated, it would not be obligated to act in order to benefit from immunity.

Admittedly, the circumstances may force a service to monitor generally for the purpose of locating content that matches the content supplied by the rightholder (which will at least be the case for *ex ante* intervention). Significantly, however, the LNI does not expect the service to carry out assessments of whether a copyright exception is applicable or potentially that it is not applicable. Assessed together with the obligation in Section 52o Copyright Act to not prevent lawful use against the relevant condition for immunity (see Question 9), the obligation to take measures pursuant to the safe harbour is not only not absolute but is limited in scope (Regeringens proposition 2021/22:278, pp 131-133).

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

The LNI does not explicitly mention any specific kind of technology, limiting itself to 'appropriate and effective means which are available on the market and the service providers costs for them'. This is intended to be a flexible standard that requires a case-by-case assessment but in any event the service is not expected to procure the latest and most advanced technology. However, LNI imposes a limit on automatic blocking, as Section 52o Copyright Act requires of services to only use such technology to disable access to content which may be assumed, with a high degree of certainty, to infringe copyright. In this respect the conditions for immunity (Section 52l) are without prejudice to the obligations in Section 52o.

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.

As an initial observation, it should be noted that there are significant differences in wording between Article 5(3)(d) InfoSoc Directive and Article 17(7)(a) DSM Directive, and the latter does not make reference to the former.

Pre-LNI

Prior to the adoption of the LNI, national law essentially provided for the relevant exceptions, although in a manner that does not mirror Article 5 InfoSoc Directive.

a) Article 5(3)(d) InfoSoc Directive

New provisions or amendments to already existing provisions were not introduced into the Copyright Act during the implementation of the InfoSoc Directive. The Swedish legislator viewed the wording of Article 5(3)(d) literally in the sense that it solely concerns quotations (compare Article 17(7)(a) DSM Directive). Article 5(3)(d) is thus regarded as being implemented by Section 22 Copyright Act which succinctly provides:

> 22 §
> Var och en får citera ur offentliggjorda verk i överensstämmelse med god sed och i den omfattning som motiveras av ändamålet.
>
> Section 22
> Each and everyone may quote from published* works in accordance with good practice and to the extent justified by the purpose.
>
> ** Note from national expert: the term published (offentliggjord; lit. made public) is essentially intended to refer to having been lawfully made available for the public for the first time.*

The provision is regarded as not applying to works of art (Regeringens proposition 2004/05:110, p. 215 and earlier Regeringens proposition 1992/93:214, p. 77, NJA II 1961 p. 132). For such categories a separate exception exists in Section 23 Copyright Act which permits the use of published* works of art, in accordance with good practice and to the extent necessary for the intended purpose, in connection with the text in a scientific presentation not prepared for commercial purposes, the text in a critical presentation (but excluding digital form), or news reporting. Although regarded as the equivalent of the quotation exception for works of art, the provision, having received some amendments during the implementation of the InfoSoc Directive, is seen as implementing (being based on) Articles 5(3)(a), 5(3)(o), and 5(3)(c) InfoSoc Directive respectively.

b) Article 5(3)(k) InfoSoc Directive

The existence of the exception has been a contentious matter, but should be accepted by virtue of national post-*Deckmyn* case law.

Article 5(3)(k) was not considered during the implementation of the InfoSoc Directive. Prior to the InfoSoc Directive parodies were permitted by virtue of Section 4 paragraph 2 Copyright Act, which makes clear that transformative use of a work is not dependent on the rights to the original work if the use has been carried out in free connection to the original work and resulted in a new and independent work (it is a *freie Benutzung* type of provision). This continued after the implementation of the InfoSoc Directive. Despite the lack of an express parody exception and contentions in doctrine about requirements for a parody in view of the wording of the provision (the transformative use ought to become a *work*), Section 4 paragraph 2 Copyright Act is conventionally referred to as the "parody exception" (sv. *parodiundantaget*) as far as such use is concerned.

In 2019, the Patent and Market Court of Appeals (PMÖD) made an assessment in case PMT 1473-18 (*Metal pole case*), judgment on which was delivered on 15 July 2019, which sought to bring the parody exception in conformity with Article 5(3)(k) as interpreted by the CJEU in C-201/13 *Deckmyn* (no originality and harmonised definition of parody). The case was appealed to the Swedish Supreme Court, but on another issue, rendering therefore PMÖD's understanding the currently applicable interpretation of the law. The approach was confirmed in a subsequent case in 2021, admittedly from the same court.[9]

Therefore, it is to be stated that prior to LNI, if only since 2019, making parodies was permitted in the same manner as envisaged by the European legislator and the CJEU, despite the absence of a clear provision to that effect in the catalogue of exceptions in Chapter 2 Copyright Act, and before that by virtue of Section 4 paragraph 2 Copyright Act (which, according to the wording of the provision, and this national expert, would have required an originality assessment).

LNI

One can view the LNI as introducing the relevant exceptions, although it is more an expression of legislative drafting than it is a recognition of the use in the national copyright system as such.

Section 52p paragraph 1 Copyright Act mentions the entire phrase as used in Article 17(7) DSM Directive ('quotation, criticism and review, and caricature, parody or pastiche') and is formulated as an exception. Whilst, as follows from above, Article 5(3)(k) InfoSoc Directive has eventually been implemented through recent case law in Sweden, Article 5(3)(d) InfoSoc Directive, as implemented by Section 22 Copyright Act, only applies to quotations. The introduction of the entire phrase into Section 52p paragraph 1 Copyright Act, essentially as it is used in Article 17(7) DSM Directive, certainly avoids some shortcomings for the purpose of the new regime, including the difference in wording between Article 5(3)(d) InfoSoc Directive and Article 17(7) DSM Directive.

For the sake of completeness, it should be noted that the system of exceptions generally is currently under review in Sweden (Dir. 2022:125).

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

Yes. All of them apply.

The LNI makes explicitly clear in Section 52p paragraph 2 Copyright Act that a user has a right to make available on the service content which "does not infringe copyright". The phrase inevitably incorporates all existing exceptions, content to which copyright has expired, licenced content, as well as transformations falling under the free use provision in Section 4 paragraph 2 Copyright Act.

[9] PMÖD, B12315-20, judgment delivered on 23 June 2021 (*Swedish Tiger*)

AC 9: Licensing

18. **Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:**
    - **criteria for determining the height of compensation;**
    - **the process for negotiating compensation;**
    - **transparency duties (incl. data sharing obligations);**
    - **duties to engage in negotiations;**
    - **oversight by a government authority;**
    - **(mandatory) collective rights management.**

The LNI does not introduce provisions on licensing, except the requirement to attempt to obtain a license from rightholders. It is important to underline that as manner of drafting the liability regime is intentionally based on core copyright principles – if it is clear from the text that the service carries out a copyright relevant act, they need in the ordinary course of action to obtain a licence.

However, since 2013 the Copyright Act provides for a general extended collective licensing (ECL) arrangement within any specified area of use, covering any relevant economic rights, by virtue of Section 42k Copyright Act (Section 42h until end of 2022). The ECL arrangement under this provision is general in the sense that the purpose, scope, beneficiaries and sector are not pre-determined by statute. It is thus open to any market actor, whether private or legal person, on condition that the envisaged use is circumscribed. Therefore, arrangements which provide for an unbridled opportunity to exploit an exclusive right are likely not covered as such. Moreover, ECL must be the only realistic course of action, compared to e.g., obtaining individual licenses from all relevant rightholders.

The commercial circumstances are likely to warrant that the relevant service attempts to obtain the relevant licence from a representative organisation (see Question 14 in the first part of the questionnaire regarding the term), even if the LNI does not specifically designate collective management. Whilst the legal circumstances imply mandatory collective management as a matter of practice, in the event of successful negotiations, the arrangement inevitably takes the form of an ECL. Potentially, it could be viewed as a subset of the general ECL arrangement provided under Section 42k Copyright Act. The preparatory works do at least recognise that the opportunity exists.

Having regard to the BBS Act (see Question 6 above), and *YouTube/Cyando*, the existence of the ECL arrangement certainly provides room for the argument that a national version of Article 17 DSM Directive has been in place prior to LNI.[10]

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 and no. Licenses obtained by a platform cover the platform's users as specified by Section 52k Copyright Act. Licences by users do not cover the platform, but this category falls outside the LNI (a user may obtain such a licence if they so desire). However, the absence of a user licence that would cover activities of the service does not prevent reliance on the safe harbour because the safe harbour conditions are based on (relevant) information supplied by the rightholder.

Moreover, pursuant to Section 52o paragraph 2 Copyright Act, the service is obliged to expeditiously inform the user when content has been blocked, thus operating as a safeguard in the event that the rightholder, unaware of the fact that a user has a licence, challenges the use, which is then accepted by the service (see also below on safeguards).

[10] As suggested in Szkalej K, *Article 17 DSM Directive: the Swedish proposal (Part 2)* (21 April 2022, Kluwer Copyright Blog), section 4, available at https://copyrightblog.kluweriplaw.com/2022/04/21/article-17-dsm-directive-the-swedish-proposal-part-2/

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?

LNI does not explicitly mention the phrase but refers instead to 'legal communications to the public' (Section 52o Copyright Act) and 'content which does not infringe copyright' (Section 52p Copyright Act).

In this expert's opinion, legitimate uses are clearly treated as user rights proper. Whilst the LNI explicitly recognises this in Section 52p Copyright Act and provides for specific remedies for the benefit of users, the interpretation of the conditions for immunity is explicitly affected by the obligation to not prevent legal use and to use automatic blocking methods restrictively, pursuant to Section 52o; especially as the conditions for the safe harbour in Section 52l Copyright Act explicitly refer to Section 52o.

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?

Essentially yes. Section 52o Copyright Act refers to content which 'may be assumed, with a high degree of certainty, to infringe copyright'. This category of content may exclusively be subject to automatic blocking. Content which cannot be assumed to infringe copyright (or on a strict reading – absent a high degree of certainty) cannot be subject to automatic blocking.

The LNI does not expect the service to carry out assessments of whether a copyright exception is applicable or potentially that it is not applicable. The general understanding is that the conditions for immunity require the service provider to take measures to prevent unlawful uses on condition that this does not prevent lawful uses. Accordingly, the user's interest to make lawful content available is intended to come before the interest to prevent unlawful content. (Regeringens proposition 2021/22:278, pp 130-131).

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.

Arguably yes. The LNI provides specific remedies for failure to meet numerous obligations relating to legitimate uses, which may have a dissuasive effect or otherwise ensure compliance to the extent permitted by the clarity of the framework (see Question 23).

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.

The LNI is not a literal transposition of Article 17(9). The complaint mechanism is contained in Section 52q Copyright Act. It should be noted that the contents of this section ought to be seen in light of the user-oriented safeguards that are embedded in the safe harbour in Section 52l Copyright Act.

Essentially, Section 52q can be said to impose a burden on rightholders. This eliminates the need for some of the relevant user-oriented safeguards that Article 17(9) seems to have. Section 52q paragraph 1 requires that service providers have routines to handle complaints from users when access to content has been prevented following measures taken pursuant to the safe harbour in section 52l. Section 52q paragraph 2 requires of a service, in the event of a complaint from the user, to provide the rightholder concerned the opportunity to address the complaint and requires of the rightholder to justify its request that access to the content be disabled. Pursuant to Section 52q paragraph 3, complaints must be handled expeditiously. No specific time limit is prescribed but the expectation is that a complaint be handled without undue delay and within a few days, it being a matter for the service provider to provide the rightholder the opportunity to address the complaint in such a way that the complaint can be handled

without undue delay (Regeringens proposition 2021/22:278, p. 266). If the request is not *duly* justified (sv. *vederbörligen motiverad*), access to the content shall be restored. Similarly to the rhetoric underbuilding *ex post* intervention under the safe harbour, if it does not follow from the submitted information that the content is clearly infringing, access cannot be disabled. Pursuant to the same provision, when the service determines that it will not restore access to the content, the decision must be preceded by manual review (human review as used in Article 17). Hence, if the decision is favourable to the user, such review is not required.

For the sake of completeness, Section 52o paragraph 2 requires explicitly of service providers to expeditiously notify the user that access to content has been disabled.

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 main alternative is recourse to the courts. Pursuant to Section 52s Copyright Act, the LNI enables users, or in the alternative an organisation representing users, to initiate proceedings against services for failure to meet their obligations under Section 52o (protection of legal communications to the public and obligation to inform users when content has been disabled) and Section 52q paragraph 1 and 3 (respectively existence of complaints mechanism, and expeditious complaints handling, obligation to restore access to content when rightholder has not duly justified request to disable access, and obligation to rely on manual review following a decision to disable access to content).

In addition, pursuant to Section 52r Copyright Act a user is entitled to damages for intentional or negligent failure to meet the obligations under Section 52o that results in harm.

In light of the various components of the LNI and other factors focusing primarily on the economics of introducing an out-of-court mechanism, the legislator decided not to introduce it. Instead, the Swedish IPO (sv. *Patent- och registreringsverket*) is required to provide a list of persons willing to act as mediators in relation to the LNI (Regeringens proposition 2021/22:278, 150) for the benefit of those that would be interested in (ordinary) out-of-court dispute settlement.

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.

Yes. The LNI introduces remedies for users (see Question 24). As failure to meet the requirements of LNI implies copyright infringement, ordinary remedies ought to be available to rightholders.

AC 13: Information obligations

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

Yes. The LNI imposes several information obligations.

Pursuant to Section 52n Copyright Act a service provider is obliged to provide, on request from a rightholder, *as well as from a user*, information about the measures the provider takes pursuant to the safe harbour in Section 52l. If the provider has entered into an agreement with a rightholder on such communication to the public as envisaged in Section 52j, the provider must also inform the rightholder of the use that takes place on the basis of the agreement.

Pursuant to Section 52o paragraph 2 Copyright Act, a service provider is obliged to expeditiously inform a user when access to content has been disabled.

Pursuant to Section 52p paragraph 3 Copyright Act, a service provider is obliged to inform users in its terms and conditions about their right provided in Section 52p.

AC 14: Waiver

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

Being a liability regime, it is difficult to view the LNI as providing rights to rightholders, except the right to obtain information. As the LNI is based on basic copyright principles, as opposed to an absolute obligation to obtain, and grant, licences, there is nothing to prevent a rightholder from issuing a licence for free as a matter of principle. For the same reason there is nothing to prevent a service from obtaining a licence for uses for which the service does not need to obtain a licence. On the other hand, where a licence is issued by a collective rights management organisation, which is governed by the Act on Collective Management of Copyright implementing the CRM Directive, it is unlikely that a licence can be issued for free.

AC 15: Entry into effect

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

1 January 2023. The final text was adopted on 30 November 2022, with minor changes made to the proposal by the Ministry of Justice.

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. This relationship is, however, addressed impliedly (conditions for immunity, protection of legal use, and user rights).

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.

Yes. Any user rights provided for by LNI are mandatory pursuant to Section 52u Copyright Act. The provision does not explicitly refer to a particular right, but it is likely intended to cover the explicit rights in Section 52p, implied rights that originate from an obligation imposed on the service in Sections 52o (protection of legal use), 52r (damages), 52q (internal complaints mechanism and handling procedures) and the redress mechanism in section 52s Copyright Act.