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THE NEW EUROPEAN PARLIAMENT'S DIRECTIVE ON COPYRIGHT: LIABILITY ON INTERNET, FUNDAMENTAL RIGHTS AND THE RISK TO INNOVATION

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ABSTRACT

The European Parliament sanction the Copyright Directive in the Digital Single Market, the assertive theme of intellectual property, its availability in communications between Internet users and issues related to its civil liability. The Directive was controversial, especially in its art. 13, in which it intends, in other words, to transform the faultless liability of online content providers and intermediaries into objective liability. (1) who are the stakeholders and what motivations have led to the existence of the Directive? (2) what the propose in terms of changes in civil liability on the internet? (3) what is its relation to fundamental human rights, given the concern of so many relevant names? and (4) what are the possible impacts of the Directive on society and the market? The results show that the controversy is in the scope of the relation between intellectual property, fundamental rights and tendencies of incentive to innovation.

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Key words: Author Rights. Copyright. Liability. Internet

1. INTRODUCTION

The European Parliament sanction on March 26 of this year the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, an assertive subject for intellectual property, its availability in the relations between internet users and issues related to civil liability in relation to their infringements. MEPs voted in favor of the Directive despite warnings from some of the world's biggest names and advocates of civil liberties that the law would undermine freedom of expression while strengthening the power of larger companies and costs for European startups (RANKIN, 2018).

Samuelson (2018) says that among the critics is David Kaye, UN Special Rapporteur for Freedom of Expression, Berners-Lee - creator of the World Wide Web - Vint Cerf and 89 other Internet pioneers expose themselves against controversial art. 13 Directive, controversial on issues related to the European Union's commitments to human rights and the transformation of the internet, an open platform for sharing and innovation, a tool for automated surveillance and user control.

The Directive has also caused controversy among consumers/users, intermediary content companies - Facebook and Google, for example - and those called edge providers, which create and make available content for users of online platforms such as digital influencers, youtuber, and instagramers. One of the points is Article 13 of the Directive, which proposes to make content sharing platforms, such as YouTube, responsible for copyright infringements committed by its users (KOTTASOVÁ, 2018).

Civil society organizations have also spoken out against Article 13 and, in addition to the internet's big names, have prompted a majority in the European Parliament to vote to give more attention to the directive before it is finalized (SAMUELSON, 2018), because the issues and raises concerns about freedom of expression, media democratization and internet neutrality.

In Brazil, the European frenzy has been causing discussions in the field of online content producers. Just type the phrase "article 13" into online search engines like google or bing, and some videos of famous YouTubers are presented, exposing criticisms to the directive. However, there are sectors interested in the success of the Directive, such as the mainstream media and large holders of authoritarian economic power, which consider that the

standard "guarantees more rights for content creators to seek fairer remuneration from Internet giants that benefit from the diffusion of the content produced by them "(O Globo, 2018).

Given this perspective and considering that the European tendency influences political debates in the world, this article aims to expose topics of the debate on Article 13 of the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market and of the civil liability of the providers (eg, freedom of expression, access to information and neutrality of the internet) to answer the following problem questions: (1) who are the stakeholders and what motivations have led to the existence of the Directive ? (2) what is the proposal in terms of changes in civil liability on the internet? (3) what is the relationship with fundamental human rights, given the concern of so many relevant names? and (4) what are the possible impacts of the Directive on society and the market?

2. THE ASPECTS OF THE INTERNET AND OF THE EUROPEAN PARLIAMENT DIRECTIVE ON COPYRIGHT

According to World Bank studies, 60.09% of Brazilians are on the internet (WORLD BANK, 2017). This trend has been growing since the advent of the 2000s and, along with it, the digital economy, as shown in Figure 03.

In 2014, the global e-GDP (Gross Domestic Product) already represents a 2.6% share, with Brazil being the 13th largest, with 0.9% representativeness (FONSECA & LOPES, 2016).

Online content intermediation platforms such as Youtube also profit, as well as their edge providers, which produce content for the end user - followers. By 2018, the world's top ten youtubers earned a combined $ 180.55 million (ROBEHMED & BERG, 2018). This sum belongs only to the profits of the youtubers as generators of content, not the intermediary company.

"The current copyright legislation, Law 9.610 / 98, does not provide for the protection of copyright in cyberspace, remaining obsolete in this sense" (MOURA, 2018). Thus, the Brazilian national - and world - panorama, there is this doctrinal space to be developed with regard to copyright and internet providers.

> With regard to the Internet, it is important to highlight the existence and differences between so-called providers. They are responsible for the creation of information, its availability or its dissemination in the virtual network. There are the access providers, which connect the user to the World Wide Web (WWW) network and, for that, offer the means for the user to enter cyberspace, characterizing a service contract. Data warehouse providers are the ones that store content. To do so, these providers "lease" spaces on their hard disks in order to maintain third-party sites connected to the World Wide Web. There are, finally, service providers, which encompass the roles of storage and access providers, thus enabling the user to enter the network and forward information (MOURA, 2018).

The process of creativity and development of technologies is being altered by digital platforms, which also influence the emergence, as well as the follow-up, of new business

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models, such as startups, "(EUROPEAN COMMISSION, 2016), providing new legislative needs for readjustment of civil liability.

The task is delicate, since it falls within the field of fundamental rights to freedom of expression and contemporary issues of democratization of access to information as a resource for human dignity in educational and informational terms, requiring adaptations or exceptions to avoid the censorship or media oligopolies. However, as new types of uses have emerged, the question arises as to whether exceptions are still appropriate to achieve a fair balance between the rights and interests of authors and other rightsholders, on the one hand, and the users, on the other hand (EUROPEAN COMMISSION, 2016).

3 ARTICLE 13 OF THE EUROPEAN PARLIAMENT DIRECTIVE ON COPYRIGHT

Specifically, Article 13 of the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market contained in Chapter II on the use of content protected by line services – internet –, is worded as follows:

> Article 12.: 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, **Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission**. (EUROPEAN COMMISSION, 2016). Our Griffin.

In this sense, the Directive imposes on content providers - which are not necessarily those who produce, but who makes available - the duty of observance of the preservation of the copyrights of third parties. It is in this material relation that a great part of the debate is found, firstly because, between technological, market and judicial costs and the cancellation of the offer of the service, the most probable option - or less costly - is the cancellation of the offer of the service as it is.

In the last few years, the E-commerce Directive (Directive 200/31 / European Community) in Articles 12 to 15 exempts the provider from liability in the European Community provided that, in taking notice of the illegal content, it blocks the access of its users to this content (MOURA, 2018).

> Article 15. 1: Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of

> recipients of their service with whom they have storage agréments (EUROPEAN COMMISSION, 2000).

Notwithstanding the absence of mandatory monitoring of the content transmitted, the Directive allowed Member States of the European Union to establish duties to inform public authorities of legal violations and to provide information on violators. In a different way, as seen, Article 13 of the Directive seeks to authorize Member States to make civil servants responsible for intermediaries.

4. ARGUMENTATIVE RESULTS OF THE REVISED DATA

The hermeneutic exercise as an interpretive effort on the norm of article 13 of the Directive, will be presented in summary, divided to answer the research problem-questions: (1) Stakeholders and Motives; (2) Civil Liability of Internet Providers; (3) Relationship with Fundamental Rights; and (4) Impacts.

4.1 Stakeholders and Motivations

Concerning the stakeholders in the validation of the Directive, music industry organizations are invited to invite the new administration to reform the system of "safe ports" (Colangelo, Maggioli, 2018). On the side of those who do not want approval, there are providers and intermediaries of content online, as well as the user, who provide content. These organizations, such as publishers, record companies and film studios, are struggling with new intermediaries, such as online service providers, platforms and digital delivery companies; what they are really fighting is who eats the "biggest piece of pie" (LITMAN, 2018).

Traditional cultural market organizations are outraged that service providers and platforms are collecting much of the revenue from copyrighted works, and have invented the term "value gap" to describe how new intermediaries a lot of bargaining power and end up negotiating lower licensing fees than traditional organizations believe. In this case, the justification for political intervention would be based on the responsibility for the actions of the users as opposed to the efficiency or balance between innovation and harm (FROSIO, 2018), ending, as the main focus of the political dispute, not an interest in the improvement of the system of Copyright.

Thus, the response is unlikely to significantly change the copyright ecosystem because such a debate is less theoretically or politically compelling than many other problems faced

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by the copyright system (LITMAN, 2018), and this is only one of the issues motivation, and there are others, such as the "need" for monitoring and filtering.

Article 13 of the Directive imposes a general monitoring obligation since it requires the monitoring of the activities of all users. (STALLA-BOURDILLON et al., 2017), although the Court of Justice of the European Union has already observed that a filtering system would violate the right to protect personal data and the freedom to receive or transmit information that users have in accordance with Articles 8 and 11 of the Charter of Fundamental Rights of the European Union, by failing to ensure a balance between protection of intellectual property rights and freedom to conduct business, protection of personal data and freedom to transmit information (COLANGELO, MAGGIOLINO, 2018).

These questions raise the controversy over the lack of rational and well-intentioned copyright motivations, especially since the so-called "value gap" does not exist. The narrative that the Internet poses a threat and not an opportunity for industry actors to find no confirmation nor is it supported by empirical evidence or scientific data; on the contrary, there was an increase in profits for the music industry in the USA and Europe thanks to the online exploitation through streaming platforms (COLANGELO, MAGGIOLINO, 2018).

4.2 Civil Responsibility of Internet Providers and Content Intermediaries

The Directive imposes new control obligations on Internet service providers, thereby aggravating their liability regime (COLANGELO; MAGGIOLINO, 2018). If the purpose of the service is to provide access to copyrighted content submitted by users and it organizes and promotes such for-profit submissions, the service will no longer be protected but subject to liability (SAMUELSON, 2018).

It is intended to limit the "safe harbor" that intermediary providers have benefited so far to better protect and remunerate rightsholders against digital pirates (Colangelo, Maggioli, 2018). The excesses of Article 13 have led the Commission to exclude from the rule of responsibility, specifically, online encyclopedias such as Wikipedia, repositories of scientific or educational materials uploaded by their authors, open source software repositories, cloud services, cyberlockers and markets involved in selling digital copies online (SAMUELSON, 2018), and, despite the effort, the controversy over the danger of control and filtering persists.

The Directive aims to migrate from a fault liability regime to an objective liability regime (COLANGELO; MAGGIOLINO, 2018), in other words, suggests that accountability

is independent of actions or omissions of the provider or intermediary, but only that certain elements are identified for the configuration of liability, as a causal link and damage to the copyright holder. Such a stance is at least risky with regard to fundamental rights, as will be explained below.

4.3 Relationship with Fundamental Rights

Intellectual property rights suffer from limitations of important public interest that guarantee the safeguarding of fundamental rights, such as freedom of expression and information (GEIGER; FROSIO; BULAYENKO, 2018), mainly in the field of Internet Intermediaries, which play a crucial role in freedom of expression and communication of people around the world. (FROSIO, 2018).

The prohibition of the general monitoring obligations of the current Directive is one way of achieving the incentive for innovation which is essential for the flourishing of the Digital Single Market and for the protection of the fundamental rights of all Internet users, in particular Articles 7 and Article 8, Articles 9, 10 and 14 of the European Charter of Fundamental Rights and the requirement of due process of law, which lays the foundation for any democratic society (STALLA-BOURDILLON et al., 2017).

In its current form, Article 13 gives priority to copyright over the interests of users in the privacy of information and fundamental freedoms (SAMUELSON, 2018). Thus, three important sets of ethical problems are identified: (1) organization and management of access to information; (2) censorship and freedom of expression; and (3) users' privacy (FROSIO, 2018).

Economic and political factors are also impacted, since the ability to search for data also has very important implications for the European economy, democratic participation and the citizens' right to information (GEIGER; FROSIO; BULAYENKO, 2018), exposing the counter- of the Directive because one of the basic and fundamental principles of copyright law is that the data is not protected; copyright protects only the creative form, not the information embodied in the protected work (GEIGER; FROSIO; BULAYENKO, 2018).

4.4 Impacts

It is doubtful whether the Directive is consistent with the interpretation of the notion of communication to the public provided by the case law of the Court of Justice of the European Communities and with the "safe harbor" guaranteed by the directive on electronic commerce

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(COLANGELO; MAGGIOLINO, 2018), may cause legal uncertainty. Moreover, the proposed solutions seem modest and unlikely to cause significant improvements (LITMAN, 2018).

For Frosio (2018), on the issue of filtering, transferring regulation and the adjudication of Internet rights to private actors (providers) jeopardizes fundamental rights, such as freedom of information, freedom of expression, freedom of business or right access to the Internet, and more, by enlisting online intermediaries as watchdogs, governments would actually delegate the online application to algorithmic tools and due process and fundamental guarantees are hampered by the application of technology, restricting fair uses of online content and silencing the discourse according to the prevailing ethical discourse.

In the context of the impact of encouraging innovation and the proliferation of startups, recent studies have reported that filtering technologies not only offer high costs that would be unsustainable to startups and small providers but also have limited effectiveness as they are easy to circumvent (COLANGELO; MAGGIOLINO, 2018).

Stalla-Bourdillon et al. (2017) states that a ban on monitoring is essential to: preserve legal certainty and ensure that private actors still receive a clear message; encourage innovation and ensure that automated means, such as screening technologies, do not act as a barrier to entry; and the prohibition of general monitoring obligations is a fundamental safeguard against human rights violations of all Internet users.

For Senftleben et al. (2017) it is unlikely that the proposed new legislation will support a free and pluralistic press but may prevent reconfiguration of competition in the publishing industry that could reduce the costs of information search and improve the information infrastructure for society as a whole. It is believed that the framers of the Directive lacked the inclusion of more diverse representatives of civil society to raise the opinions of diverse groups affected (LI, 2018).

5. THE LIABILITY OF THE AUTHOR-PUBLIC INTERMEDIATION PLATFORMS IN THE EUROPEAN UNION AND POSSIBLE INFLUENCES FOR THE BRAZILIAN LEGISLATION AND POLICY.

Article 13 is intended to replace the provision of the existing Electronic Commerce Directive which currently protects online platforms against copyright penalties provided that the content is displayed by a user. With the imposition of article 13, the execution of all

content through a copyright filter before being uploaded would be immensely heavy and expensive, especially for smaller platforms (BERNERS-LEE, 2018), and for startups, damaging the incentive to innovation.

One relevant point is that in many cases this pre-disposition to control information already exists and, on the YouTube platform, it is called Content ID, a Google proprietary tool for copyright owner control. Videos uploaded to YouTube are verified against a database of files uploaded to Google by the owners of the content, in this way, the owners choose what happens with the content, and may even maintain their placement to monetize their views - accounting by user views - getting paid for it (GOOGLE, 2019).

This is a situation which, in theory, would be enough to prevent the adoption of topic 1 of Article 13 of the Directive, since it would be regulating something towards a more primitive reality of the consumer - provider - author relationship that already occurs. Furthermore, there is a threat to the creativity and artistic and authorial freedom of the last few years, an incentive to the possible pre-censorship of content providers against whom they are made available and, consequently, a smaller number of people involved and a smaller diversity of content and access.

As Tim Berners-Lee (2018) puts it, article 13 can transform "the internet from an open platform for sharing and innovation, into a tool for automated surveillance and control of its users", against the global trends of sharing, democratization of the means and freedom of expression, which are even capable of influencing policies in countries, there is a strong concentration of economic oligopolies, such as Brazil.

Liability in Brazil is provided for in Law No. 10,406 / 2002 - Civil Code - in its art. 927: "He who, by an unlawful act (articles 186 and 187), causes harm to another, is obliged to repair it".

The art. 186 has the wording "He who, by voluntary act or omission, negligence or recklessness, violates the law and causes harm to another, even if exclusively moral, commits an offense." The art. 187, on the other hand, asserts that "The owner of a right which, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs, also commits an unlawful act."

In Brazil, the subject of civil liability of intermediary content providers is governed by Federal Law No. 12,965, of 2014 - Civil Landmark of the Internet - article 19:

> Article 19. In order to ensure freedom of expression and prevent censorship, the internet application provider may only be held liable for damages arising from content generated by third parties if, after a specific court order, it does not take

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> steps to, in the scope and in the technical limits of its service and within the deadline indicated, make unavailable the content indicated as infringing, except for legal provisions to the contrary. [...] Paragraph 2. The application of the provisions of this article for infringements of copyright or related rights depends on a specific legal provision, which shall respect the freedom of expression and other guarantees provided for in art. 5 of the Federal Constitution (BRAZIL, 2014).

This article expresses maximum respect for the constitutional dictates of freedom of expression and repudiation of censorship, according to art. 5, IV of the Constitution of 1988 to institute that "the manifestation of thought is free, and anonymity is forbidden" in section IX, "the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license".

The text also addresses the discussion on possible copyright infringement for specific legal prediction, with the duty to respect the constitutional issue of freedom of expression. The national norm that deals with violation of copyright and related rights is in art. 105, of Law No. 9.610 / 98.

> Art. 105. The transmission and retransmission by any means or process and the communication to the public of artistic, literary and scientific works, interpretations and phonograms, carried out in violation of the rights of their holders, shall be immediately suspended or interrupted by the competent judicial authority, without prejudice to the daily fine for noncompliance and other applicable damages, regardless of applicable criminal sanctions; if it proves that the infringer is a repeat infringer of the rights of the owners of copyright and related rights, the amount of the fine may be increased up to double.

Law 12.965 / 2014 and 9.610 / 98 are of an era of international politics in which the European Union also sets out the same guideline. With the new Directive, it is possible that this policy is also discussed in the Brazilian National Congress, in order to serve specific sector interests.

5. FINAL CONSIDERATIONS

The article exposes that the civil liability of internet providers and online content intermediaries is a subject that concerns both intellectual property, in the field of copyright - as well as fundamental rights, the incentive to innovation and the economy. Any discussion about the topic in question needs to be built by a complex of actors sympathetic to the impacts of public policy.

As Article 13 of the Directive of the European Parliament and of the Council on copyright in the digital single market does indeed create a controversial and contradictory environment for the internet and the online economy and the substitution of a responsibility

civil liability, to an objective civil liability, for online service providers and intermediaries, does not appear to harmonize with fundamental rights trends at the international level.

The art. 13 also does not seem to favor the growing impulse of encouraging innovation, creativity and the development of startups in the European market, especially in issues related to e-commerce and the creation of the digital single market, the center of the proposal, just as it does not look like a to resolve copyright issues, since it does not focus on the intellectual merit of intellectual property, but on accountability and monitoring, always intended for non-content creators; not focusing, however, on the issues related to works and creations from the human spirit, object of copyright protection and related.

In summary, Article 13 blurs the supposed intention of the Directive to improve the copyright system in the European Union, creating the digital single market and will not only be a step backward in democratizing access and use of the Internet, but a negative example for other democratic political systems around the world as in the case of Brazil, for small creative economies and for encouraging innovation.

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