

European Copyright Directive and its impact in Latin America and the Caribbean users: A perspective from civil society organizations.

The organizations signing this document are part of Al Sur, an organized group from civil society in Latin America that seeks to strengthen human rights in the digital environment. Upon the recent approval of the European Union Directive on Copyright in the Digital Single Market^[1], we express our concern as to how this Directive –and its future implementation in EU countries– will affect human rights and innovation on the internet not only in Europe but also in Latin America and the Caribbean.

The Directive ^[2] wants to limit how copyrighted material is shared online, particularly within social media platforms. As Wired stated: "The Directive on Copyright would make online platforms and aggregator sites liable for copyright infringement, and supposedly direct more revenue from tech giants towards artists and journalists".^[3]

Two articles have been especially controversial. On the one hand, Article 15 directs news aggregator sites, such as Google News, to pay publishers for using snippets of their articles on their platforms. The main problem with this article, according to Carolina Botero from Fundación Karisma (Colombia), is that "the payment is not just for news feeds or sites, anyone using journalist material will have to pay."^[4] On the other hand, Article 17 makes online platforms liable for copyright infringement in their systems, including third-party content, unless they take measures to filter or remove the infringing material proactively. As Mariana Valente from InternetLab (Brazil) has pointed out, "Article 13 does not only apply to music and audiovisual material, which have traditionally been industries more organized around catalogs, but also to images, texts and any other property protected by copyright, which makes everything more complex".^[5]

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It is not clear yet how internet companies will implement this new Directive. However, in designing means to implement it, big platforms that depend on User-Generated Content (UGC) as Facebook, Google, Twitter, Youtube, and other similar services will probably end up modifying their algorithmic systems so as to implement uploading filters - filtering content before it is published-.^[6] Even if smaller platforms are not strictly required to filter, during a short period of time, they could be over incentivized to do so, as it may be the only alternative to avoid liability. This could have a series of problematic effects even in our continent:

- **Latin American users will see their freedom of expression curtailed**

As the UN Special Rapporteur for Freedom of Expression, David Kaye, stated (regarding a previous yet very close wording version of Article 17), even though modernizing copyright legislation to adapt it to current digital challenges is required, "Article 13 of the proposed Directive appears destined to drive internet platforms toward monitoring

and restriction of user-generated content even at the point of upload. Such sweeping pressure for pre-publication filtering is neither a necessary nor proportionate response to copyright infringement online." [\[7\]](#)

We are deeply concerned about the impact that this EU directive could end up having in the freedom of expression of Latin American users. While the Latin American human rights system is strong in prohibiting prior censorship, since on the internet "code is law," the decisions taken in Europe will mean that global services will start to be designed per dominant legal frameworks. Filters will be applied in all jurisdictions as a preventive way of avoiding liability. Therefore, prior censorship will become the rule shifting our legal framework without us taking part in it.

- **Automatic filters and their lack of accountability to local users**

Automated filters have been criticized for two important reasons: their lack of transparency in how they work and adopt decisions; and the numerous "false positives" included within their outcomes (especially when algorithms are to navigate the complexities of local laws that have copyright exceptions and other legitimate uses, which is difficult even for specialists).

In addition to that, it is still uncertain what kind of appeals mechanisms will be enabled by platforms –not much of relief if we consider the problems of the current system–, and how they are going to respond to users affected in Latin America and the Caribbean. Additionally, these mechanisms have no oversight controls.

- **Automatic filters facilitate surveillance risks and increase economic homogeneity**

Julia Reda, a member of the European Parliament, has warned that the Directive will require "the installation of what amounts to surveillance technology." [\[8\]](#) Upload filters are, by nature, a form of proactive, prior scrutiny to every act of expression in a given platform, which can be collected, processed, and linked to certain users for profiling.

As Julia Reda also points out, because of high development costs, the upload filters for content monitoring will likely end up being outsourced to the few large US-based providers that have the capacity to do so. As a result, their market position will be strengthened, and they will be able to centralize information about the behavior of all EU internet platforms users.

Latin America has a specific and worrisome history vis-vis the use of technology for surveillance, and not enough legal guarantees to prevent abuse.

- **Restrictions on competition and innovation**

Articles 15 and 17 are theoretically to balance the earnings of big platforms that depend on UGC (user-generated content) at the expense of authors and media's copyright. However, they will impact the whole internet ecosystem. [\[9\]](#) Big companies will have the

resources to implement these mechanisms (at the expense of users' freedom of expression), but probably other small or newer services will see their costs increase, which could directly affect their economic survival. In other words, in order to punish big and dominant players, this measure will end up fortifying them and hurting new and small actors.

This preoccupation led the EU Parliament to include an exception.^[10] The approved text of Article 17 applies to all for-profit platforms, except those services which fit all three of the following extremely narrow criteria: (a) Available to the public for less than three years, (b) Annual turnover below €10 million, (c) Fewer than 5 million unique monthly visitors. According to MEP Julia Reda,^[11] this measure will not suffice because it is too narrow, and also because "all platforms, no matter how new or small, must still demonstrate they have undertaken 'best efforts' to obtain licenses from right holders such as record labels, book publishers and stock photo databases for anything their users might possibly post or upload – an impossible task."

This should be a matter of concern for local authorities in Latin America that, over the last decade, have been implementing public policies and funds to promote local innovators in the current internet economy. New barriers of entry in the form of mandated filters or costly licensing schemes can only further entrench incumbent players.

- **Impact on information diversity and media pluralism**

As can be concluded from the previous points, in the long run, this Directive would endanger the future of information diversity and media pluralism not only in Europe,^[12] but also in Latin America and the Caribbean, as only a few players –those already well-funded, consolidated or dominant– will be able to afford the costs imposed by these conditions.

In the current context of disinformation on the internet and with an already affected media ecosystem in our continent, Latin America and the Caribbean should be very aware of the impact that these measures will most likely have in our democracies. It is fundamental for local legislators to understand that, even in good faith, the EU has proposed a legal model that prioritizes copyright over human rights, including freedom of expression. Moreover, this legislation could have an impact on the diversity of information available diversity, media pluralism, and innovation in services and business.

- **A wrong model for local legislation, with only a few good new rules**

Debates and public outcry in the EU were focused on Articles 15 and 17 of the Directive (previously Articles 11 and 13 in the drafts), but European civil society worked during the last five years to stress public interest on issues such as achieving minimum rights for digital educational activities all over Europe and improving the legal framework for cultural heritage institutions. These issues made it to the Directive.

On behalf of cultural heritage institutions, Communia representative Paul Keller was more positive with the final result in this area. For Keller, the Directive includes some "significant improvements for cultural heritage institutions that will facilitate the (mass) digitization of out of commerce works, enable institutions to text and data mine works in their collections and ensure that digital copies of public domain works will remain in the public domain."^[13] Others are less enthusiastic about the language finally adopted and consider that the final text of the Directive does not properly reflect the discussion that education activists reached with the EU Parliament. Teresa Nobre denounces that due to the pressure of "more important issues," the agreements reached during 2018 at the Parliament "were gutted during the trilogue debates, which were conducted behind closed doors," and the final text did not satisfy the expectations of civil society.^[14]

Latin America's public interest scenario regarding copyright is weaker than the European one: there are no regional fora that can help us mitigate the terrible effects of existing copyright legislation on access to knowledge and culture.

- **The Directive is a bad example of the relationship State - Citizen participation in legislative processes.**

The legislative process for this Directive in Europe took five years. There was steady and permanent civil society participation that towards the end became particularly active in opposition to Articles 15 and 17. Over five million people signed the letter opposing these articles, and tens of thousands rallied in places like Germany, Poland, or Portugal.^[15] Still, EU officers downplayed citizen mobilization calling them bots and trolls and insisting that the outcry was driven by industry lobbying undermining real citizen concerns.

If the European Directive becomes an example to follow in our region, as some have already suggested,^[16] how can we strengthen the public space to promote an open debate that doesn't undermine and curtail citizen participation?

Latin America should not be blind to the example. We encourage local authorities, academia, the private sector, authors & creators, and civil society to:

- ✓ Adopt a critical standpoint about this Directive and hear and comprehend the multiple voices in the world that have raised critical arguments around this legislation.
- ✓ Foster research on the effects that such Directive could have in our countries and enlighten the policymaking process so that we don't follow literal precedents from abroad, understanding that foreign rules can sometimes have differentiated effects in other regions.
- ✓ Foster discussions on copyright, access to knowledge, and how to balance creativity, author's rights, and freedom of expression in the online environment.
- ✓ The inclusion of issues of public interest on the Directive could be a good practice to consider in our regional debates.

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This document¹ was signed on April 17, 2019 by the following organizations:

- Internet Lab, Brazil (internetlab.org.br)
- Fundacion Karisma, Colombia (karisma.org.co)
- TEDIC, Paraguay (tedic.org)
- Asociación por los Derechos Civiles, ADC, Argentina (adc.org.ar)
- Hiperderecho, Peru (hiperderecho.org)
- Centro de Estudios en Libertad de Expresión, CELE, Argentina (palermo.edu/cele)
- IPANDETEC, Centroamérica (ipandetec.org)
- Derechos Digitales, América Latina (derechosdigitales.org)

[1] European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM (2016)0593 – C8-0383/2016 – 2016/0280(COD)) (Ordinary legislative procedure: first reading)

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0231+0+DOC+XML+Vo//EN>

[2] EU directives are a form of legislation that set objectives for member states to achieve. The approval of this new Directive will trigger its implementation by each of the individual countries within the Union.

[3] What is Article 13? The EU's divisive new copyright plan explained. Wired. 15 April 2019 <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>

[4] En Europa se mueve el activismo para salvar internet #SaveYourInternet. Karisma. February 15th 2019 <https://karisma.org.co/en-europa-se-mueve-el-activismo-para-salvar-internet-saveyourinternet/>

[5] A Diretiva sobre Direitos de Autor da União Europeia pode acabar com a internet? InternetLab. March 26th 2019 <http://www.internetlab.org.br/pt/opiniaao/a-diretiva-sobre-direitos-de-autor-da-uniao-europeia-pode-acabar-com-a-internet/>

[6] EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13. Techdirt. Apr 3rd 2019

<https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>

¹ Document coordinated by Paz Peña for “Al Sur”.

- [7] EU must align copyright reform with international human rights standards, says expert. OHCHR. 11 March 2019 <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298>
- [8] Article 13 in conjunction with Recitals 38 and 39 of the proposed EU copyright reform/expansion. Julia Reda. <https://juliareda.eu/eu-copyright-reform/censorship-machines/>
- [9] 240 EU businesses sign open letter against Copyright directive Art. 11 & 13. Nextcloud. March 19, 2019 <https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13/>
- [10] Continúan las batallas de derecho de autor en Europa. El Espectador. March 23th 2019 <https://www.elespectador.com/opinion/continuan-las-batallas-de-derecho-de-autor-en-europa-columna-846551>
- [11] Article 13 is back on – and it got worse, not better. Julia Reda. February 5th 2019 <https://juliareda.eu/2019/02/article-13-worse/>
- [12] EU must align copyright reform with international human rights standards, says expert. OHCHR. 11 March 2019 <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298>
- [13] European Parliament adopts the copyright directive: A boost for Europe's cultural heritage institutions. Europeana Pro. March 26 2019 <https://pro.europeana.eu/post/copyright-reform-passed-by-european-parliament>
- [14] The education exception was gutted during the Trilogues. Communia. February 27th 2019 <https://www.communia-association.org/2019/02/27/education-exception-gutted-trilogues/>
- [15] EU copyright bill: Protests across Europe highlight rifts over reform plans. DW. March 23 2019
- [16] Derechos de autor en la era digital. SIPIAPA. March 31 2019 <https://www.sipiapa.org/notas/1213115-derechos-autor-la-era-digital>