

Is the remuneration right arising in Brazil?

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Several Brazilian Bills of Law that were appended to the Fake News Bill (Bill No 2,630/2020) intend to create the Brazilian version of the European remuneration right. If such Bills become law, internet service providers shall compensate journalistic companies for the use of journalistic content, in the form and based on criteria to be regulated in the future. According to the proposed wording, the remuneration right will not be triggered when the user of the provider's platform only shares the uniform resource locator (URL), hyperlinks of original journalistic content or in cases of uses permitted by limitations and exceptions disposed on the Brazilian Copyright Act (Federal Law No 9610/98 or "LDA").

The limitations/exceptions to copyright provided under the LDA, the main law applying to copyright, are those indicated in Chapter IV, which comprises Articles 46, 47 and 48 ("Limitations on Copyrights"). According to Article 46 (VIII) of the LDA, the reproduction, in any works, of small passages of preexisting works, of any nature, does not constitute offense to copyrights, provided that (i) the reproduction itself is not the main purpose of the new work, (ii) it does not harm the normal exploitation of the work reproduced; and (iii) it does not cause unjustified prejudice to the legitimate interests of the authors.

The LDA does not define, however, what "small passages" would be. The analysis of the possibility of applying the exception of Article 46 (VIII) should be carried out on a case-by-case basis and there is no consensual case law on the subject. Thus, it is not possible to abstractly define the limits to be adopted to define whether a reproduction of a work is the reproduction of a "small passage" of that work or not.

As the Fake News Bill does not define what is included in the "use" and "journalistic content" expressions mentioned in the text, it will be necessary to examine, on a case-by-case basis, what can be considered as such. The Fake News Bill also does not define if the platforms should specifically compensate authors that created the journalistic content, but rather addresses such right to the "journalistic companies" (i.e., the publisher). Lastly, it does not define how such remuneration will be made and what are the responsibilities of the service providers in respect to detecting if a certain content shall trigger the remuneration right.

According to the proposed wording, a further regulation will establish the criteria, way, and parameters for such remuneration. In this regard, it is possible to foresee that if such regulation is not timely implemented or does not cover all the gaps of the current Fake News Bill, the Brazilian Judiciary will be constantly called upon to resolve controversies related to the matter, which would further stifle a sluggish Brazilian dispute resolution system.

Furthermore, it is possible that platforms may choose to exclude or prevent the circulation of journalistic content from journalistic companies that do not authorize its free use or do not accept their remuneration terms. In this case, there would be a reverse effect of what is sought with the measure, contrary to what the Bill intends to face (i.e., the dissemination of disinformation): the reduction of the circulation of journalistic content, which shall impact on the rights of access to information of the Brazilian citizens.

In Europe, the Directive 2001/29 already seeks to harmonize copyrights and neighboring rights in the information society, ensuring that authors shall have the exclusive right to authorize or prohibit the reproduction by any means and in any form of their works. Moreover, the EU Directive 2019/790 established that publishers of press publications also have such

reproduction right secured when their press publications are used by information society service providers. In this sense, authors shall receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

Even though Europe is specifically addressing the theme, it remains controversial and in dispute between providers and publishers. In a different but no less worrisome way, such topic is not properly addressed through the Fake News Bills. The current wording may end up distorting the initial objective of the Bill, which was to curb the spread of fake news in the Brazilian territory.

In April 2022, the plenary of the Chamber of Deputies rejected the request for urgent processing of the vote on said Bill. Without the urgent approval, the proposal will have to go through the thematic committees of the Brazilian Congress before being voted on. As such, it will hardly enter into force before the Brazilian general elections in October this year.

The Fake News Bill does not consider the complexity of the discussion related to the publishers' remuneration right. Such theme should be analyzed and addressed through specific and appropriate vehicles, with due attention. In any case, Brazilian legislators shall keep in mind that digital human rights, like access to knowledge and free expression, must also be taken into consideration in this debate. What remains now is to observe how said right will be received in Brazil, as the tendency is for it to be incorporated into the national legislation in one way or another, considering that the flame of this debate has already been lit in Europe and countries like Australia.

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