The Cyber-journal and the European Union (EU)
- The Law of the Information in the Internet Era -

General part: cyber-journal, Freedom of information, and the EU legal order

1. The notion of cyber-journal embraces all the different forms of e-publishing in cyber-space (the virtual and non geographical world generated by the Internet) to the extent that they provide news reporting, such as e-versions of newspapers, news bulletins and TV news; news (section of) mail-lists, search-engines and portals; web-zines, personal news web sites, etc. This wide notion appeals both to technical and legal reasons. Technically, news-reporting (considered as the whole of its publishing and journalistic profession terms) consists of the process of selection, organisation and diffusion of facts considered to be relevant to the social community, regardless of the practical form this process implies. Legally, as a consequence of its social function in modern democracies, news-reporting is the most important expression of the principle of Freedom of information. We can say that Freedom of information becomes news-reporting when the information provided acquires, for its content and form, a public dimension. Though news-reporting is subject to the same general protection of Freedom of information, it may give rise to more particular problems, mostly for its economic implications, which will be considered in the next paragraphs.

The right of Freedom of information is recognised to every individual by international law, particularly in the Universal Declaration of Human Rights adopted in 1948 by the General Assembly of the United Nations (ONU), the International Covenant on Civil and Political Rights and the European Convention of Human Rights. All these international acts proclaim the ability of everyone to exercise Freedom of information “regardless of frontiers”. The latter principle is the main point of our discussion. Cyber-journal corresponds exactly to that: news-reporting provided by any individual at its pure no-frontiers dimension. This is a real phenomenon: it is a matter of fact - an increasing number of news-sites managed by individuals are accessible from everywhere, through the Internet. A proper legal regime of cyber-journal, or on-line news-reporting, has to adapt law to this new reality of Freedom of information not to repress it.

2. In the era of traditional mass media, which are characterised by poor economic resources and linked to their national location, each state had reason to impose restrictions on news-reporting and therefore on Freedom of information itself, with both internal and external restricting effects. This policy aimed to ensure, firstly, the most rational use of the available resources on the purpose of a wide and pluralistic information (“economic” aspect of the Information) and, secondly, the respect in news content of specific values relating to the concept of internal public order (“legality” aspect of the Information). The first goal was attained by reserving the exercise of news-reporting activity to those few subjects who proved to be compliant with specific requirements established by the law: the publishers, who have the economic means to pay broadcasting public rights, and the journalists, who have a specific professional status. This had the effect, at least potentially, to rule out effective exercise of Freedom of information by the majority of people. For example, individuals couldn’t legally exercise news-reporting on TV because they did not, and could not pay broadcasting licences and they were prosecuted if they broadcasted without a license. Every individual have not the ability to exercise Freedom of information (internal restricting effect). The second goal refers particularly to the protection of privacy and other personal rights, intellectual property, as well as the objectivity of news-reporting through the clear distinction between what is news and what is advertising. Internal public order values differ from a State to another. The different States prevented news coming from abroad, as an exercise of Freedom of information, to enter their
territory when infringing their specific values. The exercise of Freedom of information was not regardless of frontiers.

The Internet radically blows out these fundamentals. The new medium, on one hand, produces a naturally abundant, pluralistic, as well as uncontrollable circulation of news world-wide, from and to everyone (economic aspect of the Information); on the other hand, it promotes the rising of universally valid and self-governing public order rules in the Netizens’ global Community, as opposed to the different national laws colliding into Cyber-space and thus being unable to govern it (Legal aspect of the Information). These two factors undermine both the legitimacy and the effectiveness of State restrictions on news-reporting and on Freedom of information in general, making it necessary, at the same time, to adopt an over-national (Freedom of information regardless of frontiers) and more liberal approach (Freedom of Information for any individual).

4. In this context, strong action is taken by the EU in its role of particular supra-national community. Freedom of information issues is not explicitly mentioned in the EU Treaty, but it has been transposed in the EU legal order from article 10 (about freedom of expression) of the Council of Europe’s Convention on human rights in which all Member States take part. As a consequence, news-reporting has insofar received just a timid protection in the EU, against Member States’ internal-external restrictions, mainly through the Court of Justice case-law on the free-movement of goods (as for the Press) and services (as for TV/Radio). Court of Justice has always held that it has no power to rule out national provision which restrict Freedom of information and news-reporting activity, unless such a provision imply restrictions to free movement of goods or services in the Single Market and thus concerns the application of EU law. More specifically, EU is only indirectly entitled to protect Freedom of information, by ensuring its respect, and not by enforcing it in any case, in the application of the Community law, accordingly with article 2 of the Treaty.

Things are now changing with respect to cyber-journal, because of the major relevance of on-line services for the internal market integration. Both technically and legally, any form of cyber-journal falls within the sphere of the Information Society (IS) services. The latter are those which are “provided normally for retribution, at a distance, electronically and after individual request from the consumer” , accordingly with definition laid down by the Directive 98/48 on legislative transparency in the Single Market. A set of EU directives has been adopted for the harmonisation of national laws being susceptible to restrain, either for their restrictive nature or mutual disparity, the freedom to provide IS services in the EU. The scope of the harmonisation covers, with regards to the cyber-journal, most of the national restrictions relating to both the economic and the legal aspect of the Information. As a result, on-line news-reporting is more liberalised as compared to Press and Tv/Radio news-reporting and, moreover, has a minimum core of uniform rules established at EU level, in which self-regulation is highly encouraged, accordingly with the forthcoming spontaneous international legal order of the e-Community.

Since the EU legal framework for the cyber-journal is the general policy which aims to ensure the freedom to provide services in the Single Market, it is appropriate to consider under which legal conditions the EU has the power to guarantee free exercise of on-line news-reporting activity and thus protect Freedom of information in the Internet. At present, any kind of service, including the cyber-journal, fall within the scope of EU provisions on free movement of services only if it is provided for commercial purposes, accordingly with article 59 of the Treaty. It follows that the principle of freedom to provide services and the set of directives in the field of the IS services can only apply to on-line news-reporting activities for which the provider receives an economic counterpart. This condition may give rise to some discussion with respect to the cyber-journal as on-line news-reporting providers take the most of their economic benefits from advertising and not from user subscriptions. Anyway, according to the case-law of the EU Court of justice, the notion of economic counterpart is not limited to direct payment from customers, but it covers any form of commercial benefit, including the sponsorship of a cyber-journal through the advertising of
services and products offered by the sponsoring company. Any form of cyber-journal providing just news and no advertising information will not have any legal relevance on EU law.

**Special Part: some specific issues of the EU regulation on cyber-journal**

1) Phase of access to on-line news reporting activity

**Specific issue on the economic aspect of the information: who is entitled to provide on-line information?**

- **The problem** – Firstly, it is worth saying that the EU principle of freedom to provide services has the fundamental objective of ensuring the development of Single Market in cross-border economic sectors, and thus it can have legal application to a particular kind of services solely to the extent that it is necessary to achieve the former fundamental objective with respect to these specific services.

With regards to traditional mass media, the question of who was entitled to carry out news-reporting activity has never caused concerns for the EU policy of free movement of services, since the entities who effectively, and almost exclusively, provided news-reporting, especially at EU level, were those who had the economical means to do it and, therefore, were subject in every Member State to law provisions on mass media: press publishers, radio and television broadcasters, and journalists working for them. Neither in national law nor in European law did exist the pure concept of news-reporting services, but just the media-based concepts of television service and press products. The notion of IS services, including on-line news-reporting, has been invented very recently by the European Commission expressly for the new on-line economy which is developing in the Internet.

Since only the information activities carried out by the “official” mass information providers had cross-border effects and relevance for the operation of the Single Market, only these ones fell into the scope of freedom to provide services under article 59 and, also, justified harmonisation measures under article 100 when “...action is necessary to ensure the operation of the Single Market”. In all its sentences ruling out national provisions as restrictions to free movement of services, the Court of Justice has always referred to publishers or broadcasters, never to simple news-reporting providers.

Now, the Internet enables all the individuals to provide and receive news world wide, particularly in the whole EU Single Market area, and, what is more important, to effectively exercise Freedom of information. In such a way, even those who are not “official” information providers according to national law, can now produce an important share of the information market in Europe. As a result, protection of freedom for everyone to provide IS, including on-line news-reporting, services becomes essential in order to ensure the operation of the Single Market in this specific sector. Any national provision which either restricts this freedom by reserving on-line news reporting to a small group of specific operators or makes it more difficult to exercise this freedom for individuals, would infringe article 59 of the Treaty. This should be enough to prevent Member States to extend their press or broadcasting law to the Internet in order to restrict news reporting and freedom of expression in general, on the clear purpose of preserving their control on the Information.

- **The EU solution**

  **Professional status** - Court of Justice case-law on the application of article 59 of the Treaty to professional qualifications, contains various general principles which, considered as a whole, are susceptible to become the base for protecting freedom to provide on-line news reporting services regardless of borders. Several sentences express concerns for the compatibility of professional orders with article 59. One in particular, states that: “(...) national legislation
which makes the provision of certain services on the national territory by an undertaking established in another Member State subject to the issue of an administrative licence for which the possession of certain professional qualification is required constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty. (…)” (Case C-76/90 Sager 1991, I-4221 §14). Another sentence states that “With regard to the specific question (...) as to whether a person may be so entitled (of freedom to provide services) even if he has not been enrolled on the relevant professional register, it should be stated that the conformity of such requirement with Community law depends upon whether the fundamental principles of Community law (...) are observed”. (Case C-5/83 Rienks 1983, 4233 §9. Among the Community law’s fundamental principles is the one of proportionality.

With regards to the typical cross-border dimension of on-line news-reporting activity carried out by any individual, it is opportune to underline one sentence of the Court which gives an extensive interpretation of the scope of article 59. This one states that “The first paragraph of Article 59 of the Treaty prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State” (Case C-384/93 Alpine Investments 1995, I-1141 §30).

If we apply these case-law principles to the sector of on-line news reporting services, it follows that national provision requiring inscription to a journalist professional register or delivery of a press card prior to entitle anyone to manage a cyber-journal, no matter if the individual is established in the country where such provision applies or in another Member State, it is to be considered a restrictive measure of freedom to provide services and so has to be declared incompatible with article 59, unless the restriction could be justified accordingly with the EU fundamental principles, such as proportionality. It should be a key point in Court of Justice approach to the problem the circumstance that proportionality of restrictive measures on news-reporting and freedom of information has to be assessed differently to different media, as the Supreme Court of USA and the Court of the Council of Europe have already made it clear. Government censorship on cyber-journal managed by an individual not officially recognised as a journalist would not meet the proportionality test. The objective to ensure good information to people which some government had insofar tried to achieve by requiring professional qualification to provide news-reporting will be better and more proportionally achieved by letting people comparing and selecting themselves the quality of the abundant news they can find on the Internet.

**General legal regime** - The new Directive on legal aspects of e-commerce specifically applies the EU Court’s general principles to IS services, by laying down in its article 1 that “This Directive seeks to contribute the proper functioning of the Internal Market by ensuring the free movement of Information Society services between the Member States”. To that end, article 4 of the directive, which is the key-point of the liberalisation process, prevents Member States from imposing prior authorisation regimes, or any other requirement having equivalent effect, on IS services. As far as the cyber-journal is concerned, the directive prohibits the extension to on-line news-reporting of those national measures, applying to Press and Radio/Tv news-reporting (news providers’ legal status, registration and broadcasting licensing, enrolment of journalists in professional lists, etc.), which are able to restrain access to on-line news-reporting activity.

**II) Phase of creation of cyber-journal**

1st specific issue of legal aspect of the Information: Intellectual Property
• **The problem** – The issue of protecting cyber-journal as an intellectual work and thus conferring the exclusive right of economic exploitation on an on-line journalistic work to its creator or owner implies two preliminary questions. The first one is to determine whether and how the cyber-journal as well as its single information units (simple news, articles, written and audio-visual reports) may be protected under the existing copyright provisions. The second one corresponds to the necessity of ensuring a right balance between protection of the owner’s economic rights and the faculty for his competitors to freely use the information material published on the Internet in order to provide their own on-line news-reporting. This balance should necessarily lean towards free use, for the reason that Internet, on one hand, by making the information more abundant and reducing costs for its distribution, also reduces its economic value (although not the creativity of the work in which information is incorporated); on the other hand, it enables a plurality of subjects to carry out information activity, thus concretely exercising Freedom of Information which has to be protected even against economic claims from intellectual property owners. The first question should be answered on the basis of the analysis of the structural elements which are common to the different forms of cyber-journal. As a matter of fact, the innovating element of e-publishing, and therefore of on-line news-reporting in general, is the hypertext structure which is shaped by the hyperlinks. Actually, an on-line news site may well not include hyperlinks and just spread all the news on its unique web page which readers have to consult title by title and article by article, as they normally do with a newspaper. Still, this practice would be in contrast with the Internet interactive nature and with what is the most economically profitable way of providing on-line information. This way consists into attiring readers attention by offering them a main range of options on the home page, by means of which they can research and easily find the news they are interested in, without loosing time to look for them. So, the hyperlink structure represents the access system (the form of diffusing news in Internet: using the “pull” modality unlikely the traditional mass media that use the “push” one) to the various news published in a Cyber-journal. It follows from functional point of view, a cyber-journal, to the extent that it works as a research system that gives access to different information units through different criteria (headlines, subjects, dates, etc.), it identifies with a particular kind of data base. Furthermore, the hypertext structure is also the more or less original form taken by the selection, the arrangement, as well as the co-ordination, of the information units which compose the cyber-journal. Therefore, we can recognise in the cyber-journal hyperlinks structure both the three elements of the general notion of news-reporting (selection, arrangement and diffusion) and the three traditional conditions influencing the assessment of the creativity and originality of a journalistic work and consequently its access to copyright protection, mainly for newspapers (selection, arrangement and co-ordination of the information units).

• **The EU solution** – In accordance with what has just been said, we should agree with this legal doctrine that considers that every hyperlink-based information access system, such as a Cyber-journal, falls within the scope of the Directive on data base protection. Article 1 of the Directive defines a data base as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”. Article 3 specifies that “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. (…)” This last definition includes both the element of selection, as a synonym of “choice”, and the elements of arrangement and co-ordination which are included in the EU law concept of “disposition”. Moreover, the 9° preamble states that “data bases represent a precious instrument for the development of an information market in the Community”. Now, it is clear that a cyber-journal will be as much susceptible to be protected as a data base as more original appears the particular choice or disposition of its information units which have to be in any case individually accessible. To this extent, even forms of on-line information with an hypertext
structure so simple that it can’t comply with the “disposition” criteria, for example a news section of a portal, consisting of a column of links each linking to a single item of news which itself links back to the initial menu, is susceptible to be protected by EU copyright on data bases if at least the news “choice” criteria appears to be original. A different protection will receive, on the contrary, both the single information units which compose the cyber-journal and the most basic forms of cyber-journal, that is to say those which are made like newspaper pages, lacking links and thus the interactivity that is needed to render the different information units individually accessible by the users, this being one of the conditions to qualify an intellectual work as a data base pursuant to the Directive. Both these last issues will continue to be regulated by the different national provisions on copyright. However, these provisions will be harmonised at EU level through the proposed Directive on copyright in general and the neighbouring rights, particularly in the Information Society, which is presently under discussion. If we exclude the non realistic issue of a cyber-journal being made like a newspaper page, in order to settle a European regulatory framework responding to the initial questions (proper legal regime and balance between economic and information rights), it is necessary to co-ordinate the two mentioned directives. The one on databases doesn’t allow for reproduction and free use, not even for personal use, of on-line protected works unless these operations are necessary for the normal use of the database. In the case of electronic databases, as cyber-journal is, this normal use would be limited to on-line consultation and thus to temporary reproduction of the cyber-journal on the random Access Memory of the user’s computer. Besides the copyright protection, the Directive on data bases provides for the sui generis right protection (assimilating to the traditional “unfair use” issue) which prohibits reproduction and use (ex. diffusion) of substantial parts of the databases content, even in the case that a database can’t be protected by copyright because lacking originality in the choice or disposition of its composing elements. For the scope of this provision, substantial parts are those whose creation requests a relevant investment. What is more upsetting is the circumstance that sui generis protection doesn’t provide for any derogation for news reporting purposes. The former prohibitions risk to restrain the freedom to provide on-line news reporting, should the substantiality and investment relevance criteria being interpreted in a too wide extension in every case in which an information provider reproduces and diffuses news content downloaded from an others’ cyber-journal. On the opposite side, the present proposal on the harmonisation of copyright legislation, which expressly excludes its application to data bases and software, provides for derogation to the exclusive right of reproduction and diffusion both for private use and for news reporting purposes (article 5). This derogation has to be co-ordinated with the 26° preamble of the database directive stating that “works protected by copyright and subject matter protected by related rights, which incorporated into a database, remain nevertheless protected by the respective exclusive rights (…)”. As far as cyber-journal is concerned, the works incorporated in the database are the information units. The exclusive rights by which they are protected, to the extent that they are works subject to copyright, are those provided for by the directive on harmonisation, including the relating exceptions.

The conclusion on the first initial question (proper legal regime) is the following: as long as one or more information units of any form of cyber-journal are not relevant in terms of investment and not substantial parts, so that they can’t be protected by sui generis right, they can freely be reproduced and diffused by others, for on-line news reporting, although they are protected by copyright. The creator of the cyber-journal database will however maintain, exclusive rights, without possible derogation, on the hypertext structure and data research system. The conclusion on the second question (balance between economic rights and Freedom of information) is that relevance of investments corresponding to the different information units should be assessed, in any case, taking into account the low cost of getting news material on the Internet by software research engines which not require any human or financial additional resources. In order to protect on-line Freedom of information as widely as it is made possible
by the new medium we believe that, in a general point of view, free use for news-reporting purposes, contemplated by the directive on harmonisation, should prevail.

**III) Phase of publication of cyber-journal**

**2\textsuperscript{nd} specific issue of legal aspect of the Information: Information and Advertising**

- **The problem** – As we said above, the different forms of the cyber-journal, like the most of Internet web sites and services, are editorial-based. The interactive nature of a news page in Internet gives rise to a new form of advertising, based on a new role for the customer which has to be active and no more passive as it is for the mass media advertising: the trick is not to impact on the Internet user with emotional quick spots, but to stimulate him to look for commercial communications on the Web. While traditional advertising is pervasive and superficial, on-line advertising is more “informercial”, it gives detailed information on products and services in which the user is really interested. Those who want to get information on the Internet, whether for journalistic or advertising purposes, has to click on the hypertext links. Words, texts (or videos and images), linking to commercial communication and those one linking to journalistic information could well be placed very closely to each other, or even in the same news report, so that it could be hard for a user to distinguish the advertising part form the journalistic part of the cyber-journal. Because of that, an unfair on-line information provider, for example, could easily take advantage of readers attention on a news report, by inserting in the text word-links to the commercial pages of the cyber-journal’s sponsor company and mixing them with words linking to other news or to in-depth articles about the same subject treated in the former news report. Such a practice is susceptible to give rise to the illegal issue of misleading or editorial advertising, because the main objective of that given article is to provide not news but hidden commercial information which will, obviously, turn in an economic counterpart to the cyber-journal owner from the sponsor company. Therefore, the question is to ensure the fundamental principle of news-reporting, regardless of its form, which claims for the impartial treatment of news.

- **The EU solution** – At a european level, the legal solution to this problem is to be found in two Directives, the one on misleading advertising (EEC 450/84) and the one on e-commerce which contains a special section on on-line advertising. The first directive states that advertising has to be “evident, truthful and clear” and prohibits misleading advertising by defining it as any advertising that “in any way, included its presentation, misleads, or is able to mislead, the persons to which it is addressed (…)”. The e-commerce directive specifies this principle with regards to Internet. It considers that hypertext linking to commercial web sites is a form of advertising when an economic relationship of any kind exists between the owners of the linking and of the linked site, respectively. Therefore, if a piece of information or an article appearing in a Cyber Journal contains hypertext links to a commercial web site which is owned by an economical partner of the Cyber Journal publisher, the illegal issue of editorial advertising will arise. Differently, hyperlinks to a commercial web site of another company don’t constitute a form of advertising when they don’t imply any financial consideration and are compiled in an independent way from the linked company.