THE ELECTRONIC PRESS: THE BELGIAN LEGAL FRAMEWORK

by

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A. Introduction

On the Internet, numerous sites periodically disseminate information in a form related to the newspaper or audio-visual industry. So, hundreds of online newspapers throughout the world are laid out the very same day of their publication on"paper" support, while others are published only on the Internet. As for the radio and television, there are already sites broadcasting real radio or TV programs (WebTV)[1]. With the generalisation of high flow lines (ISDN, ADSL, cable, satellite, optical fibres etc…) and the improvement of the systems of compression of images[2], the phenomenon will undoubtedly increase. Some even prophesy that within five years the quality of the video image on the Internet will be comparable, even higher, with that of television.[3]

In addition, the electronic press shows many advantages compared to the traditional media: possibility of access to a local radio or television retransmitted live or pre-recorded on the Internet, and this from any point of the globe, production costs often less high that makes it possible to create more easily „virtual" thematical televisions[4], possibility for the netsurfer of consulting on line at any time the files of the site thanks to data bases structured by topics, interactivity much more important than in the traditional networks by offering to the „televiewer" the faculty to participate on line in the shows. Moreover, soon, Internet decoders will be integrated into the television sets, thus creating a convergence even more important with the TV universe[5].

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1 The world reference in this matter is www.broadcast.com, which offers 30 television channels and 370 radios, and represents today one of the strongest values of Nasdaq, the stock market of IT companies in the United States.

2 Nowadays, the quality of the audio-visual applications on the Internet is particularly insufficient, which still constitutes a barrier to the development of Internet channels: small size and bad fluidity of the images, imperfect sound.

3 A. GAILLARD, „Les télés libres se déchaînent", *Web Magazine*, nr 5, September 1999, p. 38.

4 In general, creating Internet programs is ten times less expensive.

5 „Vidéo: la guerre des standards", *Netsurf*, nr 42, September 1999, p. 56.

In these circumstances, to what extent do the existing legal texts, likely to govern the press activities, apply in the cyberspace, knowing that they were generally conceived before the emergence of the information highways?

The question is of the most importance and notably relates to the question of the ownership of copyright for online publications, the concepts of "press crimes" and responsibility in series, the right to reply as well as to the penal texts repressing the acts inspired by racism or condemning the revisionism.

B. Copyright and journalism

When an editor decides to publish on its web site or that of a third party articles of press, which were already published first in his newspaper or review, what will be the extent of the copyrights of the authors of the articles in question if the contracts binding authors and editors do not settle the issue precisely?

In this respect, there are two conflicting theories.

On one hand, some editors affirm that the electronic publication would be only the natural prolongation of the „paper“ publication. There would thus not be a new exploitation subjected to prior agreement of the author.

On the other hand, the journalists and their associations support the thesis according to which that the publication by electronic way is a new publication, which supposes their approval and attribution to them of a distinct remuneration.

This last theory was adopted without hesitation by the French and Belgian courts.

In Belgium, the „Central Station“ company, founded on the initiative of ten editors of the daily and weekly Belgian press, had constituted an important data base of articles of press supplied each evening with the various editions of the newspapers belonging to its shareholders, consultable on the Internet against payment. This setting on line, however, had been operated without the agreement of the journalists who wrote the litigious articles.

In this case, in a decree of October 28th, 1997, The Brussels Court of Appeal decided that the online transmission of press articles constituted a new type of exploitation, different from the communication on paper originally agreed, and which consequently required the authorization of journalists[6].

In France, a lawsuit opposed the „Union Syndicale des Journalistes“ (SNJ) and the editor of the newspaper „Les Dernières Nouvelles d’Alsace“ (DNA), to which it was reproached for having given the authorisation to a company to reproduce on a web site the newspaper „Dernières Nouvelles d’Alsace“ and this, in an illicit way, as the assent of the journalists was not obtained.

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6 *A & M*, 1997, p.383 and S

By order of February 3, 1998, the County Court of Strasbourg considered that *„the reproducing on the Internet network of articles already published in the newspaper DNA is submitted to the prior consent of the authors, that is to say the journalists „*[7].

In a second case, the same SNJ, along with eight journalists, sued the „Société de gestion du Figaro“ for having organised a telematic edition offering the consultation, on the Minitel, of the records of the newspaper „Le Figaro“ comprising the issues published since two years, together with the possibility of obtaining copy of the articles, either by fax, or through an e-mail address.

On April 14, 1999, the County Court of Paris judged that was proscribed *„the reproducing of articles on a new support arising from recent technologies, and in particular on telematic networks without the preliminary agreement of the authors, and also that „in the absence of any explicit agreement concluded in the respect of the law, the author has not given to the press companies the right to dispose of his articles to third parties for reproducing by fax or e-mail“*[8].

Again in the same direction, by a July 21, 1999 order, the County Court of Lyon enjoined „SA Groupe Progrès“ from continuing the diffusions on the minitel and on the Internet of articles published beforehand in „paper“ publications. Appeal was however lodged[9].

In Belgium, the editor should nevertheless be able to exempt himself from such a consent in the event the initial transfer took place within the framework of a contract of employment, which would provide that the rights are assigned for all the known modes of exploitation, under the conditions set out by article 3, § 3 of the Belgian copyright law, and this understanding of course that at the time of the signature of the contract, the „setting on line“ on the Internet was a known mode of exploitation.

However, in the case of data base compiling on the Internet articles coming from various sources by headings themes, the author could call upon his „moral right“, which in particular authorises him to object to any alteration to his work which would be prejudicial to his honour or his reputation. Thus, a journalist, whose contract of employment or one of its endorsements, would stipulate a „general“ transfer of his patrimonial rights, could be opposed to such an exploitation of his articles, for the reason that, by doing this, the editorial or philosophical line to which he adheres is inevitably faded[10].

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7 Civ. Strasbourg (ref.), 3 February 1998, quoted and with accompanying notes by S., «Les prestataires techniques en première ligne», February 1998, p.146. The ordinance is available at: http://www.juriscom.net/jurisfr/dna.html.

8 Text of the decision available at http://www.juriscom.net/jurisfr/figaro.htm. For an analysis of these judgements: L. COSTES, „Quels droits pour les journalistes sur les réseaux numériques ?“, *Cahiers Lamy, adroit de l'informatique et des réseaux*, nr 116, July 1999.

9 Text of the judgement available at http://www.legalis.net

10 In the *Central Station* case, the Court of Appeal of Brussels ruled: „*... the journalist writes for the largest possible audience, but within the framework of the newspaper or the review which publishes him („his“ newspaper or „his“ review); that his article is inserted among the articles of his/her colleagues, who work, within the framework of the same journal, for the same*

With this respect, in order to avoid any harm to his morals prerogatives, it should be recognised to the journalist a certain right of inspection on the design and the economy of the web site, and in particular on the hypertext links which link his articles with other contributions or other sites.

In the same way, the editors will have to be attentive not to attack the integrity of the articles through, for example, of curtailed reproductions or reducing summaries.

C. The "press crimes" : competence of the „Court d'Assises" (Assize Court) and responsibility in series

The press crimes are breaches of common law (libel for example) but made by way of „press". The distinctive feature of such press crimes is that only the „Cour d'Assises" is competent to hear about it, except for the press crimes inspired by racism and xenophobia, which are submitted to the criminal court since May 1999. Moreover, there are subjected to the mode of the responsibility in series by virtue of which the author of the press crimes is only responsible if he is known and domiciled in Belgium (articles 150 and 25 of the Constitution). If not, the responsibility is transferred „in series" to the editor, the printer and finally the distributor.

What does mean the concept of „press" within the scope of articles 25 and 150 of the Constitution? These provisions do not specify the concept. Consequently does the concept encompass all the supports of press: newspaper, audio-visual and „multi-media" or electronic? The question is crucial insofar as, in practice, the press crimes are never submitted to the „Court d'Assises" (except an exceptional case in 1994), which makes some say that this secular system grants to the press a real impunity in penal matter.

Two interpretations are conflicting in this respect.

According to the first, only the newspaper industry would be affected in the sense of the press using the printed writing. Such an interpretation takes advantage in particular of the authority of several orders of the „Cour de Cassation" (the Belgian Supreme Court) as well as to the word „drukpers" chosen in 1967 for the Dutch text of the Constitution[11]. Consequently, neither the audio-visual press nor the press by electronic way would be affected, and any offence performed using these media would come under the competence of the criminal courts exclusively. In other words, lawsuits would be possible in this case...

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current of ideas in the same publication (...) the drafting of an article for being confronted in other articles coming from various tendencies in the same collection, proceeds of another prospect that that done in order to inform the reader of only one newspaper...». For an analysis of the application of this jurisprudence to the search tools on the Internet, see: Th. VERBIEST, „Entre bonnes et mauvaises références – A propos des outils de recherche sur Internet", *A & M*, March 1999, p. 34. Th. VERBIEST, "The liability of search tools, in French and Belgian law, on the Internet", to be published in the *International Journal of Law and Information Technology*.

11 For a more precise sight of the involved arguments: E. MONTERO, „La responsabilité civile des médias", in A. STROWEL and F. TULKENS (éd), *Prévention et réparation des préjudices causés par les médias*, Brussels, Larcier, 1998, p. 100 to 103.

According to the other thesis, referring to the „press“, the Constitution of 1831 intended to guarantee in a general way the freedom of speech and the freedom of the opinions. Of course, if the Constitution had then in mind only the newspaper industry, it is because at that time, no other mean of communication of mass was existing. The common sense would dictate to follow this interpretation. Such theory was at a time recognised by the Court of Appeal of Brussels with regards to the audio-visual press, but the Court reconsidered later its position.[12]

To illustrate the problem, let us take a meaningful example: two newspapers distribute the same day the same information, according to an identical presentation, but one is published on „paper“ support while the other is published exclusively on the Internet. To suppose for example that the same offence of slandering was made on this occasion, how to justify a different treatment with respect to constitutional protection?

Some recommended in this respect to naturally extend the system of the press crimes only to the telematic press on the grounds that electronic writings remain writings[13]. It is to forget that Internet is a multi-media tool which unceasingly combines the text with applications of „audio-visual“ type. Should one then operate a distinction within the same site according to the nature of information, „written“, „sound“ or „animated ?

At all events, the situation should quickly be clarified, that it is by a new standpoint of the Supreme Court or, ideally, to ensure a perfect legal certainty, by a revision of the Constitution.

If the choice is made to extend the constitutional protection of the press to new technologies of information and communication, it will remain to specify the delicate question of the responsibility in series on the Web.

Indeed, anonymity is frequent on the Internet. Moreover, signatures are sometimes transitory, and a site can be modified constantly, even removed or delocalized. In this case, if there is not a real „editor“ of the site in the traditional sense of the term - as the owner of the site can also be anonymous or „disappear“ – how to interpret the concepts of distributor or printer in an exclusively virtual universe?

Will it concern, by an audacious analogy, the access and/or web hosting providers, or even the telecommunication operators? Some recommended it. In our view, this solution should be excluded, in what it would undoubtedly lead to create an " objective " liability for these in-

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12 Several judgements and decrees within the competence of the Court of Appeal of Brussels indeed considered that constitutional protections of the press must be interpreted like also aiming the radio and television. Corr. Brussels, March 24, 1992, *J.L.M.B.*, 1992, 1242, obs. F. JONGEN, reformed by Brussels, May 15, 1993, J.T., 1994, p. 104 and obs. F. JONGEN. In a decree of January 14, 1994, the Court of Appeal of Brussels however put an end on this dissenting current. *J.L.M.B.*, 1994, 995, and obs. F. JONGEN.

13 B. DEJEMEPPE, „La responsabilité pénale“, in A. STROWEL and F. TULKENS (éd), *Prévention et réparation des préjudices causés par les médias*, Brussels, Larcier, 1998, p. 140 and doctrines quoted by the author. It should be noted that in France, the assimilation of the telematic publications with the traditional writings within the framework of the law of July 29, 1881 on the press crimes did not cause the same debates. See the judgement of January 28, 1999 of the County Court of Paris available at: http://www.juriscom.net/jurisfr/costes2.htm.

termediaries of the network, and an actual immunity for the real authors of the press crimes committed on line[14].

In addition, such a regime would be perfectly contradictory with the system of responsibilities currently endorsed by the Commission and the European Parliament within the framework of the modified proposal for a directive on the electronic commerce of September 1, 1999[15].

Indeed, article 12 of the proposal institutes an exemption of liability when the technical provider acts like a simple conveyor of the information provided by third parties (such as the telecommunication operators) or like a simple provider of access. To profit from the exemption, the provider should not be at the origin of the transmission, does not have to select the recipient of the transmission and does not have to select or modify information being the subject of the transmission.

Article 14 institutes a limit of liability with regard to the activity for storage carried out at the request of the recipients (hosting activities). An exemption of liability is thus granted provided that the hosting provider is not aware of what a user of his service devotes to an illicit activity, and concerning the actions of civil liability (the project speaks about „action in damage"), provided that the provider is not informed of facts or circumstances according to which the illicit activity is apparent.

The proposal adds that the provider, as soon as he has such knowledge, must quickly take measures to withdraw information or to block its access.

It should be noted that in France, following the emotion caused by the order of the Court of Appeal of Paris of February 10, 1999 in the „altern.org" case[16], an amendment to the law of September 30, 1986 relating to the freedom of communication was adopted in first reading by the National Assembly on May 27, 1999, which also adopts a conditional system of exemption of liability for the access and hosting providers, at the antipodes of any system of responsibility in series transposed or adapted to the numerical networks.

By doing this, the National Assembly was far beyond the French Council of State in its report on the Internet and the numerical networks released in 1998[17], according to which it would be appropriate „*to maintain the responsibility of the editor for its own concern, that is to say the pub-*

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14 In this direction: E MONTERO, *op.cit.* p. 104.

15 Text of the proposal available at : http://europa.eu.int/comm/dg15/fr/media/eleccomm/eleccomm.htm

16 For a comment of this case: Th. VERBIEST, *op.cit.* p. 45. By doing this, France follows the way traced by Germany in its law of August 1, 1997. For a comment of this law: Th. HOEREN, „Liability in the Internet and the new German multimedia law regulations", *A & M*, December 1998, p.309.

17 La documentation française, 1998, p.174. Also available at: http://www.internet.gouv.fr/francais/textesref/rapce98/accueil.htm. For a comment: http://www.droit-technologie.org.

lishing function, but to keep a system of liability under the common law for all the other functions operated on the Web and in particular the functions of technical intermediation „.

Indeed, France also knows a system of responsibility in series which makes the director of the publication (or the editor) the person liable for the press crimes, and if he cannot be identified, the author, the printer, the salesman, the distributor or the bill-poster (article 42 of the law of July 29, 1881).

Regarding the „audio-visual communication", after the director and the author, the producer is responsible (article 93-3 of the July 29, 1982 law). In such a system, it is logical, in the absence of an overall reform, to consider that any activity of press, written or audio-visual, but operated on the Internet, is subjected to the responsibility in series, being understood that the technical intermediaries of the network which are the providers of infrastructure, access, or hosting are not comparable to directors, salesmen or producers.

However, the Supreme Court of France recently delivered an order in matter of „minitel" which created confusion. Indeed, by a December 8, 1998 order, the Supreme Court retained the penal liability of a person, called the producer, for the reason that he had opened a telematic service, which allowed the exchange of racist opinions in a chatroom. It thus remains to know if the definition of producer retained by the French Supreme Court could be transposed to the web-hosting provider[18]. Such an analogy would be audacious. In a judgement of September 28, 1999, the magistrates of the Court of Puteaux, ruling in a matter of responsibility of a web-hosting provider, refused to adopt such an analogy[19].

As a result, taking into account the difficulty (or even the impossibility) of applying such a system to the major actors of the Internet as well as the increasing convergences between traditional media and telematic or electronic media, does keeping a responsibility „in series" in press matters in general still make sense? It is doubtful.

D. Right of reply

Any person has the right to require a right of reply if quoted by name or implicitly indicated in a „periodic writing" (law of June 23, 1961). A right of reply in the periodic audio-visual programs is also organised by the law (articles 7 to 15 inserted by a law of March 4, 1977), but its system differs in many aspects, in particular with regard to its conditions of admissibility and the recourse envisaged in the event of refusal of „insertion" of the right of reply. For example, for the audio-visual press, contrary to the newspaper industry, a procedure is organised before the Civil Court, which rules as in a preliminary injunction procedure but on the substance of the problem, and without any possibility of appeal.

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18 Judgement available at: http://www.legalis.net/legalnet/judiciaire/decisions/ccass_081298.htm. For a comment of the order : P. WILHELM et G. KOSTIC, „La hiérarchie des responsabilités sur Internet", *Cahiers Lamy Adroit de l'informatique et des réseaux*, nr 114, May 1999, p.12.

19 Available at http://www.legalis.net

To what extend does the legislation on the right of reply apply to the electronic press?

Many recommend to assimilate a periodic newspaper „on line" or a regularly updated web site to a „periodic writing".

As for the right of reply in audio-visual matters, nothing should be opposed, taking into account the formulation of the law, to apply it to periodic radio or television programs diffused on the Internet[20]. It should be noted in this respect that in France, within the framework of the law on the right of reply concerning the activities of „audio-visual communication", it is well established, since the emergence of the minitel, that the legal system also applies to the telematic networks[21].

However, how to qualify a web site which mixes texts and „audio-visual" applications? For example, a periodic electronic newspaper could easily combine its articles with video news or information, clickable via hypertext links or automatically. In the same way, certain „WebTV' S" are diffusing texts simultaneously or aside of their programs. Which system will have to apply when the right of reply is related to remarks made at the time of the video sequences or in the screened texts?

Sooner or later, the solution should be found in the harmonisation of the regimes, being understood that the new information technologies will have to be expressly addressed.

E. Offences resulting from acts of racism or revisionism

The offences inspired by the racism and the xenophobia, and committed by means of press, are now submitted to the ordinary criminal courts. The Internet network is often quoted as being the reference mark of the racists and the revisionists. It cannot be reproached to the Internet for being the cause of such a phenomenon. On the other hand, its worldwide nature creates a new challenge for the authorities. The diffusion is broader and the culprits are often out of attack or impossible to identify.

Thus, November 13, 1998, the County Court of Paris considered it necessary to discharge professor Faurisson, sadly famous for its revisionists writings, who was sued to have put „on line" a text entitled „*Les visions cornues de l'holocauste*", in violation of the French law condemning racism and the revisionism.

Indeed, although the litigious writings were „signed" with his name, the accused contested to be the author and to have put them „on line". Moreover, the Court had to note that no formal proof could have been reported by the public attorney as to the imputability of the revisionist writings to Professor Faurisson, and that in particular anyone would have had the possibility to pretend to be Professor Faurisson.

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20 F. JONGEN, „Adroit de réponse dans la presse et l'audiovisuel", in A. STROWEL and F. TULKENS (éd), *Prévention et réparation des préjudices causés par les médias*, Brussels, Larcier, 1998, p. 56

21 M. VIVANT, C. LE STANC and L. RAPP, *Lamy Adroit de l'informatique et des réseaux*, Lamy, 1999, nr 2454.

The Court had also to rule about its competence, denied by the accused Professor Faurisson, calling upon the fact that an American server hosted the litigious site. The Court retained however its competence with the reason that „*as a matter of press, it is accepted that the offence is committed wherever the writing has been disseminated or wherever the broadcast has been seen or heard. In casu, as far as the litigious text, broadcast from a foreign site, has been received and seen in the territorial resort of the County Court of Paris, as evidenced by the inquiry, the Court of Paris has competence to rule the case.*"[22]

The same principle is applied in Belgium[23] so that there is no doubt that the Belgian courts would be competent if the persons in charge with a website, emitting abroad, would preach there revisionist theses (law of March 23, 1995) or would encourage the racial hate (law of July 30, 1981).

The Faurisson's case should not let think that all the offences in this matter remain unpunished. Indeed, on 27 August 1999, the criminal court of the County Court of Strasbourg condemned a netsurfer to a 10 000 FF fine (half of the sentence suspended), to have expressed racist talks in a chatroom, managed by a French access provider (Infonie). Its employee, responsible for moderating and monitoring the chatroom had informed the management of the access provider, of the presence of several messages obviously encouraging the racial hate. After having identified the subscriber, the management alerted the „Brigade centrale de la répression de la criminalité informatique". Within the framework of the judicial enquiry, Infonie agreed to give the identity of the subscriber, which then recognised the facts.[24]

F. Conclusion

The litigations, which recently arise as regards respect of the copyright of the journalists on the new publications on line of their articles, are the reflection of a transitory situation. The Internet is more and more becoming a customary way of expression for the press, so that the question will be naturally settled, if it is not already the case, by the dialogue and the contractual way. However, the moral right of the authors, easily abused on the network, will have to be the subject of a keen attention. The temptation is indeed strong, in an entirely digitised and interactive universe, to modify, combine, mix or amalgamate works of all horizons.

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22 Integral judgement available at: http://www.legalis.net/legalnet/judiciaire/correc_paris_1198.htm. For a comment : http://www.droit-technologie.org.

23 It is the theory of "ubiquity", pursuant to which the Belgian courts are qualified as soon as one of the elements of the infringement was committed on the national territory, without it being necessary to seek if the infringement was entirely committed there. F. TULKENS and M. van de KERCHOVE, *Introduction au adroit penal*, E. Story-Scintilla, 1993, p.155 ; D. VANDERMEERSCH, *Le adroit penal et la procédure pénale confrontés à Internet*, in *Internet sous le regard du adroit*, Young Bar of Brussels, 1997, p. 271 ; Ph. GERARD and V. WILLEMS, *Prévention et répression de la criminalité sur Internet*, in *Internet face au adroit*, E. Story-Scintilla, 1997, p.157 to 158. For a recent application as regards defamation by way of broadcasting, voy. Brussels, December 5, 1991, J.T., 1992, p.387 and S., note F. JONGEN.

24 Judgement available at www.legalis.net.

The question of the press crimes is more delicate. It is certain that wishing to reserve the constitutional protection of the press to the printed press is a non-sense according to the elementary ratio of the initial constitutional texts. However, would it be really indicated to extend their application to the other media? Shouldn't the principle of the responsibility in „series“ be questioned? What will be its utility in a virtual universe, opened and volatile like the Internet?

As for the right of reply, a certain consensus seems to exist in order to extend the present legal system to the telematic press. However, applied to the networks, the different systems ruling the newspaper industry and the audio-visual press should be harmonised. A reform is therefore required in this respect.

Lastly, the offences inspired by racism and xenophobia call few comment since their application on the Internet is indisputable. The difficulty of the issue lies simply in the identification of the persons in charge and the imputability of the infringements. Such problems become banal as regards fight against criminality on line.