Developments

Towards a European Approach in the Cross-Border Infringement of Personality Rights

By Jan-Jaap Kuipers[*]

A. Introduction

Globalization has led to the emergence of broadcasting services and books aimed at a global audience. Authors of books, journals, and articles have gained readers worldwide. Due to the Internet, the spreading of ideas on a global level has never been easier. The other side of the coin is that authors run a risk of being exposed to civil proceedings in many jurisdictions. What is considered to be proactive journalism, or a provocative academic comment in some jurisdictions is considered to be libel or defamation in others.[1] We speak of "libel tourism" when defamation proceedings are brought in a forum that has only vague connections to the case, but happens to be very plaintiff-friendly.[2]

The freedom of speech and the right to private life are both enshrined in the European Convention on Human Rights and the Charter on Fundamental Rights of the European Union.[3] Although the Member States of the European Union are united by common principles, they have struck different balances between the competing fundamental rights. The balancing of those fundamental rights becomes even more sensitive when the publisher or author and the alleged victim are not domiciled within the same jurisdiction. The infringement of the right to private life by foreign media becomes an international horizontal conflict between fundamental rights.

[*] Jan-Jaap Kuipers is an Assistant Professor of European Law at the Radboud Universiteit Nijmegen in the Netherlands.

[1] MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET (3d. ed. 2011).

[2] AVI BELL, LIBEL TOURISM: INTERNATIONAL FORUM SHOPPING FOR DEFAMATION CLAIMS (2008), *available at* http://www.globallawforum.org/UserFiles/puzzle22New(1).pdf (last visited 16 Aug. 2011); Trevor Hartley, *"Libel Tourism" and Conflict of Laws*, 59 INT'L & COMP. L.Q. 25 (2010).

[3] The freedom of speech is recognised in Art. 10 of the ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (also known as "European Convention on Human Rights"), and art. 11 of the EU Charter, Charter of Fundamental Rights of the European Union art. 11, 18 Dec. 2000, 2000 O.J. (C 364) 1, 11 [hereinafter EU Charter]. The right to private life is protected by art. 8 ECHR and art. 7 EU Charter.

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The freedom of speech, and the intrusion on private life that an individual has to tolerate in the name of public debate, are the reflection of a particular view on how a democracy should operate. The determination of the law applicable to a cross-border infringement of personality rights is therefore an extremely sensitive issue. Although the Commission's proposal for a Rome II Regulation did lay down a specific conflict of laws rule relating to the infringement of personality rights, the issue proved to be too controversial to reach agreement.[4] The determination of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, was therefore in Art. 1(2g) explicitly excluded from the scope of Rome II. The present paper attempts to analyze to what extent it is necessary to revise the "defamation exclusion" of Rome II. If it would be necessary to include defamation in Rome II, what would be the most appropriate conflict of laws rule?

B. The Need for Common Rules

The reconsideration of the defamation exception in Rome II is a matter that should not be taken lightly.[5] A proposal for a conflict of laws rule would be likely to meet the same resistance as encountered during the Rome II negotiations. Therefore, even if the European legislator would be committed towards the adoption of a uniform conflict of laws rule, success would be far from certain. Heavy-weighing reasons should therefore be adduced if one would propose to abolish the defamation exception. From a general point of view, it should be observed that in a common European justice area it is desirable that the outcome of a proceeding does not completely depend upon the forum before which an action is brought. The existence of a uniform conflict of laws rule will lead to a larger degree of legal certainty and foreseeability for both plaintiffs and defendants.

I. The Problem of Libel Tourism

The divergence between the substantive standards of protection of the right to privacy and free speech in the Member States and the diverging conflict of laws rules to establish the applicable law increase the risk of forum shopping. Although forum shopping is somewhat a general problem of private international law, it has a particular dimension in cross-border defamation cases. The mere risk of having to defend a publication before a foreign court,

[4] *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")*, COM (2003) 427 final (July 22, 2003) [hereinafter *Rome II Proposal*].

[5] On the online symposium *Rome II and Defamation*, both Hartley and Dickinson have expressed a preference to maintain the status quo. Martin George, *Rome II and Defamation: Online Symposium*, CONFLICTOFLAWS.NET (19 July 2010), http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium. *See* Andrew Dickinson, *Privacy and Personality Rights in the Rome II Regime—Not Again?*, CONFLICTOFLAWS.NET (19 July 2010), http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again; Trevor Hartley, *Hartley on the Problem of "Libel Tourism,"* CONFLICTOFLAWS.NET (19 July 2010), http://conflictoflaws.net/2010/hartley-on-the-problem-of-libel-tourism.

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under the application of a foreign law, may already have as such a negative impact upon the freedom of speech.

Libel tourism will have a chilling effect upon the freedom of expression and should therefore as a matter of public policy be discouraged. The scope of the problem should, however, be put into perspective. There is no evidence to suggest that the diversity in conflict of laws rules are a primary reason for libel tourism in Europe. Unlike Rome II, defamation proceedings are not excluded from the scope of application of the Brussels I Regulation. Under Brussels I, a defendant can be sued in the courts of the place where he is domiciled, or with regard to torts, the place where the harmful event materialized.[6] In *Mines de Potasse*, the European Court of Justice (ECJ) held that the place where the harmful event occurred could be both the place of the event giving rise to the damage as well as the place where the damage occurred.[7] However, the unqualified possibility to choose between those two fora would unduly strengthen the position of the claimant. In *Shevill*, the ECJ therefore developed the "mosaic principle."[8] The claimant could only bring proceedings in the courts of the place where the damage occurred insofar that damage actually occurred within that forum. Should the claimant desire to concentrate all proceedings before a single court, he would have to address the courts of the place where the harmful event giving rise to the liability occurred or the courts of the place where the defendant is domiciled.[9] A victim of a libel by a newspaper article distributed in several Member States could thus only bring an action for damages against the publisher either before the courts of the Member State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Member State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which would have jurisdiction to rule solely with respect to the harm caused in the Member State of the court seized.

In the joined cases *eDate Advertising* and *Martinez*, the ECJ is currently confronted with the question whether the mosaic principle should also apply to torts committed on the Internet.[10] Is the sole fact that an Internet site where the allegedly defamatory statement

[6] Council Regulation 44/2001, arts. 2 & 5(3), 2001 O.J. (L 012) 1, 3–4 [hereinafter Brussels I regulation].

[7] Case 21/76, Handelswekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA, 1976 E.C.R. 1735 [hereinafter *Mines de Potasse* case].

[8] Peter Mankowski, *Special Jurisdictions: Article 5*, *in* BRUSSELS I REGULATION 77, 192 (Ulrich Magnus & Peter Mankowski eds., 2007).

[9] Case C-68/93, Shevill v. Presse Alliance SA, 1995 E.C.R. I-415 [hereinafter *Shevill* case].

[10] Joined Cases C-509/09, eDate Adver. GmbH v. X & C-161/10, Martinez v. Société MGN Ltd. (29 Mar. 2011), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0509:EN:NOT [hereinafter *eDate* & *Martinez* cases].

was published can be accessed from the Member State in which damage to the personal reputation is alleged sufficient to establish jurisdiction, or are additional criteria required? If for the purposes of establishing jurisdiction the mere accessibility of an Internet site would be sufficient, the balance struck by the mosaic principle between the protection of the interests of the claimant and defendant would shift in favor of the former. Whereas in *Shevill* the ECJ required the distribution of a newspaper in the forum, information on the Internet is not actively distributed, but only passively made available. Jurisdiction would thus not follow from the distribution in the forum, but rather from the failure to limit the accessibility of the information to users domiciled in the forum.

The free circulation of information on the Internet has certainly increased the potential for cross-border defamation, but the difference between the digital and real worlds should not be overestimated. National newspapers circulate across Europe. If in a case such as *Martinez*, where the defamatory statement was published in the online edition of a major English newspaper, the article would have been published in print, the courts in all 27 Member States would potentially have enjoyed jurisdiction since the newspaper concerned would have been distributed in all Member States.[11] The mere fact that the defamatory information was published online, instead of in print, should not lead to a different outcome in private international law. The main safeguard in the mosaic principle against opportunistic behavior on the part of the applicant is the requirement of the existence of damage, being in defamation cases the infringement of a personal reputation. The average man on the Clapham omnibus will only have personal reputation in one Member State. Jurisdiction on the grounds of the place where the damage to his personal reputation occurred will therefore be limited to that Member State. The mosaic principle will only give rise to the potential for forum shopping with regard to a very small number of international celebrities enjoying a personal reputation in all, or a significant number of, Member States.

Although the problem of libel tourism will be limited to persons enjoying a broad international reputation, publishers and broadcasters will prefer to cover the personal life of Kylie Minogue or Brad Pitt rather than that of our man on the Clapham omnibus. If libel tourism would only be problematic with regard to individuals enjoying a broad international reputation, an amendment of the jurisdictional rules or the harmonization of the conflict of law rules would not be necessary. Limitation of jurisdiction would be possible by giving a more narrow interpretation of the notion "personal reputation." An American movie star may for example be known in the United Kingdom, but to what extent is his reputation really local? In order to limit jurisdiction flowing from the *Shevill* doctrine, one could, for instance, require a qualified personal reputation exceeding the mere existence of reputation in the forum as inseparable segment of a worldwide reputation. It would be upon the plaintiff to demonstrate that the worldwide reputation

[11] *Id*.

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has a particular connection with the forum. Another solution requiring neither the amendment of *Shevill* nor the harmonization of the conflict of laws rules would be limiting the amount of damages that can be obtained in defamation proceedings. Despite the United Kingdom being named the "international libel capital of the world," French substantive law, to mention an example, is much more in favor of a broad recognition of personality rights. France is, however, much less attractive for libel tourists since the amount of damages awarded are generally rather modest.[12]

Nevertheless, it remains true that *Shevill* was decided in an era predating the emergence of the Internet. Not only is the method of dissemination for digital media radically different, but information circulates on the web perpetually, and therefore the affront to the personal reputation is potentially much more intrusive. A.G. Cruz Villalón has therefore proposed to adapt *Shevill* to the requirements of the digital age by introducing an additional head for jurisdiction based upon the place where a court is in the best position to balance the freedom of expression against the personality rights. A plaintiff could initiate proceedings for the recovery of the entirety of damages before the court of the place where the center of gravity of the conflict is located.[13] Whereas there is certainly merit in the argument for a revision of *Shevill*, one should be careful with introducing yet another ground for jurisdiction. The current grounds for jurisdiction are already rather generous and do not only pose problems in the context of defamation cases brought by international celebrities against the press. The potential for forum shopping in academic circles has been illustrated by two recent cases. In one, an Israeli resident filed in France for the criminal prosecution of a New York professor for the publication of a negative book review, written by a German law professor, on a U.S. website.[14] In another, an Ontario resident brought a libel case in Canada for a negative book review, written by an Australian academic, and published in an American journal.[15] The book in question was written while the applicant worked at different universities in the United Kingdom and was ultimately published by an American publisher. While in the first case, the French court declined jurisdiction and awarded damages against the plaintiff on the grounds of abuse of procedure,[16] the Ontario Court of Appeals found that Ontario courts did have jurisdiction.

[12] Hartley identifies the high amount of damages to be a significant factor explaining the attractiveness of the United Kingdom as place for defamation proceedings. Hartley, *supra* note 2.

[13] *Martinez* case ¶¶ 33–67.

[14] Tribunal de grand instance [TGI] [ordinary court of original jurisdiction] Paris, 3 Mar. 2011, Case No. 0718523043 (Fr.).

[15] Paulsson v. Cooper (2011), 105 O.R. 3d 28 (Can. Ont. C.A.) [hereinafter *Paulsson* case].

[16] The court first observed that the applicant had recognized that she merely brought criminal proceedings in France because that would be less costly for her and because the French court was most likely to find in her favor. The court found that since the plaintiff was a French/Israeli citizen who had studied law in France, she should have known that on the merits her action would not stand a chance of success. Tribunal de grand instance [TGI] [ordinary court of original jurisdiction] Paris, 3 Mar. 2011, Case No. 0718523043 (Fr.).

A real and substantial connection with Ontario existed because the plaintiff was a Canadian citizen, the book was published several months after the return of the plaintiff to Ontario, 81 copies of the review were distributed in Ontario,[17] and the applicant alleged that the publication had impacted upon his academic reputation in Ontario.[18] Had Brussels I been applicable, a court in a Member State would have reached on the basis of *Shevill* a similar conclusion. Such an outcome, however, feels counterintuitive. Where the plaintiff first benefitted, by publishing his book with a US publisher, from a generous protection of the right to free speech, the plaintiff subsequently applies for a remedy in a forum having a less absolute protection of the right to free speech when it his work that is the subject of criticism.

The profit margins in international academia are, at the very best, rather slim. The mere obligation to defend an academic publication before a foreign court will entail significant financial consequences for an academic journal. It is in these circumstances immaterial whether the damage is limited to the damage sustained by the plaintiff in the forum, or not. The *Shevill* doctrine does not work satisfactorily here. The focus on the allegedly sustained damage, and hence the personal reputation of the victim, does not adequately address the challenges posed by a global debate. National boundaries have, in certain academic disciplines, only a relative meaning. The plurality of fora strongly favors the position of the applicant, who may factually impose the local values of the forum recognizing the broadest personality rights upon a global debate. The mere threat of the possibility of being brought before a foreign jurisdiction risks the imposition of self-censorship, hampering genuine scientific debate. The solution to the problems posed by the internationalization and digitalization of society should not be found in introducing yet another head of jurisdiction, but rather in discouraging forum shopping by applying self-restraint in accepting jurisdiction in international cases.

Although empirical studies have demonstrated that libel tourism within the European Union is not at all that common,[19] the current rules in Brussels I may, in certain circumstances, have a chilling effect upon the freedom of expression. The adoption of a uniform conflict of laws rule would certainly contribute to the discouragement of forum shopping, but the harmful effects upon the freedom of expression follow from the generous grounds for jurisdiction of national courts. If the prevention of forum shopping would be the primary motive to reconsider the Rome II defamation exception, a stronger

[17] The total circulation of the review in question (Slavic Review) was 3528. *Paulsson* case ¶ 12.

[18] *Paulsson* case ¶¶ 25–45.

[19] Working Document of the European Parliament on the Amendment of Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II)—Work in Progress (23 May 2011), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/836/836983/836983_en.pdf (last visited 15 Aug. 2011).

argument could be made for revising the jurisdictional rules, or refining the *Shevill* doctrine, rather than the harmonization of the conflict of laws rules.

II. An Area of Freedom, Security, and Justice

Despite the refinement of *Shevill* being a more effective method of discouraging forum shopping, additional reasons exist to reconsider the Rome II defamation exception. The creation of an area of freedom, security and justice seeks to ensure the free movement of persons and to offer a high level of protection to citizens. The carve-out of specific policy areas in an instrument seeking to provide common conflict of laws rules on the law applicable to non-contractual obligations risks undermining the objective of enhancing legal certainty by clear and predictable rules. The carve-out for defamation in Rome II is not limited to applicable law, but will have consequences with respect to the recognition and enforcement of judgments. In its proposal for the revision of the Brussels I Regulation,[20] the European Commission suggested abolishing the declaration of enforceability of a judgment (exequatur).[21] Abolition of exequatur would have, as a consequence, that a judgment pronounced in a Member State would be without any further requirements enforceable in another Member State as if the judgment would have been pronounced in that Member State. Consequently, the Member State in which enforcement is sought would be deprived of the use of any review mechanism, including public policy. The exequatur would, however, be maintained with regard to judgments in defamation cases and judgments relating to collective redress. According to the Commission, defamation cases "are particularly sensitive and Member States have adopted diverging approaches on how to ensure compliance with the various fundamental rights affected, such as human dignity, respect for private and family life, protection of personal data, freedom of expression and information."[22]

If the proposal would be adopted, it would thus be necessary to maintain the section of Brussels I on recognition and enforcement with regard to defamation and collective redress, while all other judgments would be governed by the revised Brussels I Regulation. The justification is mainly political. At the stage of recognition and enforcement, the review of a judgment pronounced in another Member State has always been excluded by Brussels I.[23] Although the abolition of the exequatur would prevent a court from resorting

[20] *Commission Proposal for a Regulation of the European Parliament and of the Council On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, COM (2010) 748 final (14 Dec. 2010) [hereinafter Commission Proposal].

[21] Paul Beaumont & Emma Johnston, *Abolition of Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?*, 2010 IPRAX 105; Peter Schlosser, *The Abolition of Exequatur Proceedings—Including Public Policy Review?*, 2010 IPRAX 101;

[22] Commission Proposal, *supra* note 20, at 6–7.

[23] Brussels I regulation, *supra* note 6, at art. 36.

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to any public policy mechanism, including a violation of substantive fundamental rights,[24] the effects should not be exaggerated. The author is not aware of a single case decided by a court in a Member State refusing, on the basis of Art. 34(1) Brussels I, the recognition and enforcement of a defamation judgment because of a violation of the public policy of the forum. Although there are significant differences between the Member States in the balances struck between the freedom of speech and the protection of personal reputation, the balance in one Member State is apparently not at variance to an unacceptable degree with the legal order of a Member State in which enforcement is sought, inasmuch as it would infringe a fundamental principle of the forum.[25] The carve-out for defamation in Brussels I is mainly political. The only effect that maintaining the exequatur has, will be that the recognition and enforcement of judgments in defamation cases will remain to be subject to a declaration of enforceability in the Member State where recognition is sought. The applicant will be forced to bear additional procedural costs even when it is manifest that the court before which recognition is sought would have reached a similar outcome. These political comprises unnecessarily complicate the rules of European private international law and do little to solve the problems flowing from diverging national rules. The media lobby has succeeded in keeping the enforcement of defamation proceedings as difficult as possible, by leaving all procedural hurdles intact. The carve-out of defamation in Rome II provides easy ammunition to argue for a special position of defamation in other instruments of European private international law. Already for that systematic reason, it is preferable to incorporate defamation in the structure of Rome II.

III. The Extension of Brussels I to Defendants Domiciled in a Third Country

The absence of the application of the public policy exception at the stage of recognition and enforcement would suggest that significant differences in substantive law may exist between the Member States, but that those differences are not insurmountable. The European jurisdictions are at least united by their adherence to the European Convention on Human Rights and the Charter on Fundamental Rights of the European Union. Even larger differences exist between Europe and the United States.[26] In the United States, the freedom of speech is protected by the First Amendment of the U.S. Constitution. Although

[24] Article 46 would create an extraordinary remedy in the Member State of enforcement which would enable the defendant to contest any procedural defects in the proceedings before the court of origin which may have infringed the defendants' right to a fair trial. *Id*. at art. 46.

[25] Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-1935; Case C-394/07 Gambazzi v. DaimlerChrysler Canada, Inc., 2009 E.C.R. I-2563.

[26] Robert Balin, Laura Handman & Erin Reid, *Libel Tourism and the Duke's Manservant—An American Perspective*, 2009 EUR. HUM. RTS. L. REV. 303; Richard Garnett & Megan Richardson, *Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases*, 5 J. PRIVATE INT'L L. 471 (2009); Aaron Warshaw, *Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims*, 32 BROOK. J. INT'L L. 269 (2006).

the protection of the First Amendment is not absolute, in comparison with Europe, the United States favors the protection of the freedom of speech rather than the protection of a personal reputation. In the United States, a public figure will generally only be successful in defamation proceedings when he manages to prove malice on the part of the defendant.[27] On the other hand, for example in the United Kingdom, if the plaintiff manages to prove that the statements were defamatory, the burden of proof is upon the defendant to demonstrate that publication was justified.[28] In the past years, U.K. courts have been confronted with "Hollywood libel claims" where plaintiffs domiciled in the United States have brought defamation proceedings in the United Kingdom against defendants domiciled in the United States, merely to prevent the strict application of the First Amendment.[29]

Until now, the application of Brussels I has been limited to defendants domiciled in the territory of a Member State.[30] Jurisdiction in civil and commercial matters with regard to disputes involving a defendant domiciled in a third country is still governed by national law. However, in its proposal for the revision of the Brussels I Regulation, the Commission has suggested to extend the scope of that Regulation to defendants domiciled in a third country. If the proposal would be adopted, the extension of Brussels I to defendants domiciled in third countries would turn the Hollywood libel claims into a European problem. The rigidity of the European jurisdictional rules would moreover risk aggravating the problem. In the United Kingdom, the doctrine of *forum non conveniens* could be used to strike out the abuse of jurisdiction rules by a plaintiff. However, with regard to the Brussels Convention, the ECJ has held the doctrine of *forum non conveniens* to be incompatible with the mandatory system of jurisdiction as established by the Convention.[31] The extension of Brussels I to defendants domiciled in third countries would thus deprive U.K. courts from the possibility of striking out Hollywood libel claims on the grounds of *forum non conveniens*.

[27] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81 (2005); Justin Wertman, *The Newsworthiness Requirement of the Privilege of Neutral Reportage is a Matter of Public Concern*, 65 FORDHAM L. REV. 789 (1996).

[28] A detailed comparative account is given by Collins, *supra* note 1. *See also* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION (2007).

[29] Garnett & Richardson, *supra* note 26, at 481.

[30] Brussels I regulation, *supra* note 6, at art. 4.

[31] Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383. *See* Jonathan Harris, *Understanding the English Response to the Europeanization of Private International Law*, 4 J. PRIVATE INT'L L. 347 (2008); Trevor Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L & COMP. L.Q. 813 (2005).

The possible extension of the jurisdictional rules to defendants domiciled in a third country should be reflected in the conflict of laws. For a long time, the discussion on the desirability of a uniform conflict of laws rule relating to defamation has evolved around the perceived needs of the internal market.[32] Rome II has however a universal scope of application.[33] The conflict of laws rule could lead to the designation of any law, including the laws of a third country. The unambiguous U.S. preference in favor of the protection of the freedom of speech instead of the right to personal reputation will not be likely to meet the minimum protection of the right to a private life as laid down by Art. 8 ECHR.[34] It is submitted that the real challenge with regard to cross-border defamation cases is not the internal market. Although significant differences may exist, Member States are at least united by their adherence to the minimum guarantees of the freedom of expression and the right to private life. Although a different balance may be struck between the competing fundamental rights, it can be presumed that Member States have not transgressed the limits of their margin of appreciation under the ECHR. Considerations of public policy will gain importance when a conflict of laws exists involving the laws of a country not abiding to the minimum protection of the ECHR. Currently, the generous grounds for jurisdiction in combination with the conflict of laws rules of the Member States risk too broad an application of European values to international cases, undermining the general goal of PIL to efficiently and fairly regulate problems stemming from the plurality of legal systems on the global level. Whereas it is not for the Member States to delimit the boundaries of public debate in third countries, an American citizen should not only have to say *civis Americanus sum "*to cloak himself in the immunity of the First Amendment."[35] Between those extremes, a pragmatic solution should be sought.

There is a direct interest in limiting the scope of European values in international cases. Too large an imposition of European values upon global debate could provoke retaliation from third countries. Moreover, the obtainment of damages would only be a nominal victory if the judgment cannot be enforced against the defendant. An effective remedy

[32] *See*, *e.g.*, DIANA WALLIS, REPORT ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ("ROME II") 39 (27 June 2005) [hereinafter WALLIS REPORT], http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0211+0+DOC+PDF+V0//EN ("In contrast to previous instruments where the Community has taken over an existing international convention on private law, in this instance there was no previous convention, which provides a unique opportunity to legislate in a specifically Community context.").

[33] Council Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations ("Rome II"), 2007 O.J. (L 199) art. 3 [hereinafter *Rome II* regulation].

[34] For example, the European Court of Human Rights (ECtHR) held that the protection of private life should prevail over the freedom of expression if the published photos and articles did not contribute to a debate of general interest. Von Hannover v. Germany, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005).

[35] LORD HOFFMANN, FIFTH DAME ANNE EBSWORTH MEMORIAL LECTURE: THE LIBEL TOURISM MYTH (6 Feb. 2010), http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth.

against a violation of personality rights therefore requires the enforceability of a judgment. Enforcement of the judgment will, however, become problematic if the defendant is domiciled in the United States and has no assets in one of the Member States. Under the *Bachchan* doctrine, U.S. public policy will prevent the enforcement of any foreign libel judgment when the court in the country of origin has not observed the freedom of speech as enshrined in the U.S. Constitution.[36] The *Bachchan* doctrine prevents the enforcement of the majority of foreign defamation judgments, but does not offer the U.S. defendant any protection abroad. The Free Speech Protection Bill was designed to further protect the interest of U.S. citizens.[37] The immediate cause for introduction of the Bill was a case decided by an English court where a U.S. defendant was sued by a Saudi national. Even though only 23 copies of the book were sold in the United Kingdom, the plaintiff managed to obtain a default judgment.[38] To discourage plaintiffs from suing Americans abroad, the Bill proposed to introduce a cause of action for a U.S. defendant against a plaintiff in a foreign defamation proceeding, provided that the publication would have been protected under the First Amendment.[39] The U.S. defendant could recover the amount of the foreign judgment, the costs of the foreign lawsuit, and the harm caused due to decreased opportunities to publish, conduct research, or generate funding. Treble damages could be awarded if it was found that the claimant brought the lawsuit abroad with the aim of intentionally suppressing First Amendment rights.

The Bill never became law. Instead, the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act) was adopted in August 2010.[40] The Act is much more moderated and in the main lines restricted to the codification of the *Bachchan* doctrine at the Federal level.[41] Although the SPEECH Act still requires the observance of the First Amendment by a foreign court, at least if enforcement of the foreign judgment in the United States would ultimately be necessary, the alternative was even less attractive. The Free Speech Protection Bill was certainly not free of the cultural imperialism it sought to redress. However, without going into its merits, the Bill demonstrates the potential for retaliation by third countries as a reaction to too broad an insistence upon the cultural values of the forum. The problem of libel tourism is not a

[36] Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992).

[37] 155 CONG. REC. S2323–01, S2342–43 (daily ed. 13 Feb. 2009) (statement of Sen. Specter).

[38] Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156, [22], [52] (Eng.).

[39] Garnett & Richardson, *supra* note 26, at 480.

[40] Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111–223, 124 Stat. 2380 (to be codified as amended at 28 U.S.C. §§ 1, 4101–05 (2012)).

[41] International diplomacy could have played a role here. *See* CULTURE, MEDIA, AND SPORT COMMITTEE, PRESS STANDARD PRIVACY AND LIBEL, 2009-0, H.C. 362-I, at 54. The report called upon the U.K. government to seek to discuss the situation with its U.S. counterparts in Washington.

problem that can be solved solely on either side of the Atlantic. On the contrary, the effective protection of free speech and the right to private life depends upon international cooperation. The unification of the conflict of laws rules in Rome II should therefore be seized in order to strive for a better coordination with the legal systems of third countries.

C. The Development of a Uniform Conflict of Laws Rule

There is thus a strong case in favor of a reconsideration of the Rome II defamation exception. The experience with Rome II suggests that the drafting of a conflict of laws rule relating defamation is an extremely delicate matter. The first draft Commission proposal for a Rome II Regulation suggested that a cross-border defamation claim should be governed by the law of the place where the victim is domiciled at the time of tort or delict.[42] The media lobbied intensively against a conflict of laws rule that would make broadcast and print media subject to a foreign law.[43] As a result, the Commission proposal took the general conflict of laws rule of Rome II as starting point with the caveat that otherwise applicable law would be displaced if that law would be contrary to the fundamental principles of the forum.[44] The law of the forum would apply instead. The Wallis Report of the European Parliament takes an even more favorable attitude towards the media industry. Although the starting point was the applicability of the law of place where the most significant element or elements of the loss or damage occurred, that rule in fact strongly favored the media industry, since that place was deemed to be the country to which the publication or broadcast was principally directed, or if this was not apparent, the country in which editorial control was exercised.[45] The Parliament's proposal was rejected by the Commission as being too generous to press editors rather than the victim of the alleged defamation.[46] Because of the impossibility to reach compromise on the text, the issue was left outside the scope of the Regulation altogether.[47] A review clause was inserted requiring the Commission to submit:

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[42] *Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations*, art. 7 (3 May 2002), *available at* http://ec.europa.eu/justice/news/consulting_public/rome_ii/news_hearing_rome2_en.htm (last visited 15 Aug. 2011).

[43] Rolf Wagner, *Das Vermittlungsverfahren zur Rome II—Verordnung*, *in* DIE RICHTIGE ORDNUNG: FESTSCHRIFT FÜR JAN KROPHOLLER ZUM 70. GEBURTSTAG, 715 (Dietmar Baetge, Jan von Hein & Michael von Hinden eds., 2008).

[44] *Rome II Proposal*, art. 6

[45] WALLIS REPORT 39, amends. 9 & 10.

[46] Wagner, *supra* note 43.

[47] *See generally* ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 234–38 (2008); Christopher Kunke, *Rome II and Defamation: Will the Tail Wag the Dog?*, 19 EMORY INT'L L. REV. 1733 (2005); Gerhard Wagner, *Article 6 of the Commission Proposal: Violation of Privacy—Defamation by Mass Media*, 13 EUR. REV. PRIVATE L. 21 (2005); Mireille van Eechoud, *The Position of Broadcasters and Other Media*

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> [A] study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[48]

I. The Absence of a Country of Origin Principle

As the Commission proposal for the revision of the Brussels I Regulation has demonstrated, defamation proceedings remain a controversial topic in private international law. Another attempt to develop a uniform conflict of laws rule is therefore likely to meet the same resistance as the Rome II proposal. One thing is, however, different. The Rome II negotiations occurred against the backdrop of the debate on the existence of a country of origin principle. The country of origin principle would prevent subjecting foreign service providers to the laws of the host Member State. The foreign service provider could therefore also in a horizontal situation insist upon the application of the law of the Member State where he was established.

It should first be observed that even if the fundamental freedoms or secondary law would lay down a country of origin principle, such a principle would necessarily be limited to publishers or broadcasters established in the territory of a Member State and would not provide for any solution if a publisher or broadcaster is established in a third country. Since Rome II has a universal scope of application, a separate conflict of laws rule in Rome II dealing with defamation when the publisher is established in a third country would be necessary.

Despite the apparent drawback of the necessity of developing a different conflict of laws rule when the publisher is established in a third country, the existence of a country of origin principle was often invoked by the lobbyist representatives of the media. In particular, the E-Commerce Directive would lay down a conflict of laws rule leading to the

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Under the Proposed EC 'Rome II' Regulation on the Law Applicable to Non-Contractual Obligations, 2006 IRIS PLUS, no. 2006-10, *available at* http://ssrn.com/abstract=973774 (last visited 15 Aug. 2011).

[48] *Rome II* regulation art. 30(2).

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application of the law of the place where the service provider was established.[49] In that respect, the freedom to provide information society services was seen as an absolute freedom excluding the application of the defamation laws of any Member State but the country of origin.[50] The specific declaration that the E-Commerce Directive does not lay down a conflict of laws rule should therefore be ignored.[51] Also, with regard to Art. 4 Data Protection Directive, which in oversimplified terms requires Member States to apply the national law implementing the directive to data processors established on their territory, it has been argued that the provision lays down a conflict of laws rule. The connecting factor used was the place of establishment of the controller, taken to be an application of the country of origin principle as deployed in the internal market. No resort to additional mechanisms of private international law would therefore be necessary.[52] The same argument could be made with regard to Art. 2 of the Audiovisual Media Services Directive, which imposes the obligation upon a Member State to apply national legislation to broadcasters established on the relevant territory, and with regard Art. 3(1), which prohibits other Member States from preventing the transmissions for reasons falling within the coordinated field of the Directive.

The ECJ is currently asked in *eDate Advertising* to clarify whether the E-Commerce Directive lays down a conflict of laws rule.[53] Although the ECJ still has to render its final judgment, it cannot be ignored that, since the adoption of Rome II, there has been a steady decline in the support of the country of origin principle.[54] It is established case-law that the freedom to provide services does not only protect the service provider, but equally the service recipient.[55] The fundamental freedoms do not contain a bias in favor of the

[49] Peter Mankowski, *Herkunftslandprinzip und deutsches Umsetzungsgesetz zur e-commerce Richtlinie*, 2002 IPRAX 257; Gerald Spindler, *Herkunftslandprinzip und Kollisionsrecht—Binnenmarktintegration ohne Harmonisierung?*, 66 RABELSZ 633, 651 (2002).

[50] For an account of the discussion, see Michael Hellner, *The Country of Origin Principle in the E-Commerce Directive: A Conflict with Conflict of Laws?, in* LES CONFLITS DE LOIS ET LE SYSTÈME JURIDIQUE COMMUNAUTAIRE 205 (Angelika Fuchs et al. eds., 2004).

[51] Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ("Directive on Electronic Commerce"), 2000 O.J. (L 178) 1, art. 1(4) [hereinafter *E-Commerce Directive*].

[52] Working Document on Determining the International Application of EU Data Protection Law to Personal Data Processing on the Internet by Non-EU Based Web Sites, EU. PARL. DOC. 5035/01/EN/Final WP 56, 6 (2002), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp56_en.pdf (last visited 15 Aug. 2011).

[53] *See generally Martinez* & *eDate* cases.

[54] A.G. Cruz Villlalón argues in his opinion in *Martinez* & *eDate* that the E-Commerce Directive does not lay down a conflict of laws rule. *Id.* at ¶¶ 68–81.

[55] Joined Cases 286/82, Luisi v. Ministero del Tesoro & 26/83, Carbone v. Ministero del Tesoro, 1984 E.C.R. 377; Case 186/87, Cowan v. Trésor Public, 1989 E.C.R. 195.

protection of the service provider at the expense of the service recipient. The E-Commerce Directive does not lay down an absolute freedom to provide information society services but merely requires that a Member State may not restrict the freedom to provide information society services from another Member State.[56] More recently, the ECJ accepted in *Gysbrechts* that the public enforcement of a Belgian rule on consumer protection to a service provider established in Belgium in relation to a contract concluded with a French consumer could constitute a restriction of Art. 35 TFEU.[57] The public enforcement of the *lex fori* to service providers established in the territory of the forum may thus be incompatible with the free movement of goods. If the E-Commerce Directive would require the unconditional application of the law of the country of origin, it would thus under some circumstances violate the freedom to provide goods or services.[58]

The argument that the Data Protection Directive and the Television Without Frontiers Directive favor the application of the defamation laws of the country of origin equally fails to convince. The fact that the licensing and prudential supervision would be the most effective if it would be conducted by the Member State in whose territory the operator was situated does not settle the law that is applicable between the data processor or broadcaster and a natural person. For example, Art. 4 of the Data Protection Directive imposes upon Member States a duty of enforcement. Similar to the E-Commerce Directive,[59] the Data Protection Directive departs from the principle that processors should be supervised at their source and according to the laws of that place. The directive allocates regulatory authority between the Member States, without determining the law applicable to a claim on infringement of personality rights. The directive therefore does not seek to determine the applicable law in a horizontal relation.[60] In the traditional public/private dichotomy, Art. 4 deals with public international law and not with private international law. The "best regulator" does not necessarily have the largest proximity to the contract. The question of which privileges an individual can invoke against a Member State should be separated from the question of law that is applicable to a horizontal relationship.[61]

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[56] DICKINSON, *supra* note 47, at 645.

[57] Case C-205/07, Gysbrechts v. Santurel Inter BVBA, 2008 E.C.R. I-9947.

[58] For greater detail, see JAN-JAAP KUIPERS, EU LAW AND PRIVATE INTERNATIONAL LAW: THE INTERRELATIONSHIP IN CONTRACTUAL OBLIGATIONS (forthcoming 2011) (manuscript at 329).

[59] *E-Commerce Directive* recital 23.

[60] The Mainstrat Study also concludes that Art. 4 constitutes a connecting factor but presupposes that "national law applicable" refers to both public and private law, without explaining it.

[61] Ralf Michaels, *EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory*, 2 J. PRIVATE INT'L L. 195 (2006).

Although the question whether the E-Commerce Directive lays down a conflict of laws rule is currently pending before the ECJ, the country of origin principle has certainly lost much of its force. Attempts to codify the country of origin principle in the Rome I and Rome II Regulation have failed. One commentator has noted: "[I]t might be premature to conclude that this result marks the demise of the country of origin principle's claim to be a conflict of law rule but it is certainly true to say that it marks a triumphant resurgence of a more traditional Savignyian conflict of laws approach . . . ."[62] It may be hoped that the demise of the country of origin principle as conflict of laws rule will facilitate the adoption of a uniform conflict of laws rule relating to the infringement of personality rights in Rome II.

II. The Mainstrat Study

The review clause in Art. 30(2) Rome II has resulted in a comparative study on the situation in the twenty-seven Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (Mainstrat Study).[63] The Mainstrat Study demonstrates an overwhelming support in favor of the harmonization of the law applicable to defamation. No less than 85% of the persons consulted, mainly legal practitioners, indicated that it would be desirable to adopt some form of uniform conflict of laws rule.

The most controversial question will evidently be what the most appropriate conflict of laws rule should be. Member States have taken different views on the matter. Only five Member States have adopted a special conflict of laws rule dealing with defamation.[64] Defamation is also excluded from the United Kingdom Private International Law (Miscellaneous Provisions) Act 1995. However, rather than adopting a specific statutory rule dealing with defamation, the result of the exclusion is that defamation is governed by the pre-existing common law rules. In the majority of Member States, defamation is governed by the general conflict of laws rules on the law applicable to non-contractual obligations. The most commonly used connecting factor is the *lex loci delecti*, leading to the application of the law of the place where the harmful event occurred. In the event where the place giving rise to the damage and the place where the damage occurred diverge, the conflict of laws rules of some Member States formally favor the former, but the result is in practice much more ambiguous. For example in Austria, in the absence of a

[62] Michael Wilderspin, *The Rome II Regulation; Some Policy Observations*, 26 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (NIPR) 408, 410 (2008).

[63] MAINSTRAT, COMPARATIVE STUDY ON THE SITUATION IN THE 27 MEMBER STATES AS REGARDS THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF VIOLATIONS OF PRIVACY AND RIGHTS RELATING TO PERSONALITY (Feb. 2009), http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_privacy_en.pdf. [hereinafter MAINSTRAT STUDY].

[64] Belgium, Bulgaria, Hungary, Lithuania, and Romania.

choice of law by the parties, disputes relating to non-contractual obligations are governed by the law of the country where the harmful conduct takes place. With regard to defamation, Austrian courts have interpreted the *lex loci delecti* to be the place where the injured party has suffered the affront and where the effects are felt most deeply. That place will often coincide with the place of habitual residence of the victim.[65]

On the other hand, Member States such as Germany have adopted a principle of ubiquity. In case of a tortious act committed at a distance, the *lex loci delecti* refers both to the law of the place where the harmful event giving rise to the damage occurred and also to the law of the place where the damage was sustained. The applicable law shall in principle be the law of the country in which the liable party has acted. However, the plaintiff may require the application of the law of the place where the event giving rise to the harmful event occurred, instead.[66]

Some Member States place restrictions upon the application of foreign law in defamation proceedings. Although the U.K. Private International Law Act (1995) abolishes the "double actionability rule," the rule still applies with regard to defamation. The double actionability rule requires that, for the purpose of determining whether a tort or delict is actionable, the tort or delict should give rise to a cause of action under both the law of the forum and the law of another country. The abolition of the double actionability rule with regard to defamation proved to be too controversial. It was feared that the publishers or broadcasters established in the United Kingdom would be subject to defamation proceedings under a lenient foreign law. Defamation was therefore excluded from the scope of the 1995 Act.[67] The current common law rules thus protect publishers and broadcasters established in the United Kingdom, by providing that an alleged defamation should not only be actionable under a foreign law, but equally under the *lex fori*. A similar rule is applicable in Cyprus and Malta.

To remedy the divergences between the Member States, the Mainstrat Study proposed to introduce minimum harmonization of substantive law. The common principles would justify the adoption of a conflict of laws rule based upon the country of origin principle. The Mainstrat Study fails to convince. If finding a compromise on an appropriate conflict of laws rule for defamation is already a difficult exercise, harmonization, even if limited to minimum standards, will probably be even more sensitive. Even if minimum harmonization could be adopted, the ECJ has suggested in *Promusicae* that Member States enjoy a wide margin of appreciation in balancing the right to private life against other

[65] MAINSTRAT STUDY 81.

[66] Einführungsgesetzes zum Bürgerlichen Gesetzbuche [BGB] [Civil Code] art. 40(1) (Ger).

[67] DICKINSON, *supra* note 43, at 238.

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fundamental rights.[68] Moreover, the adoption of minimum standards between the Member States would not offer any solution for a conflict of laws involving the laws of a third country. The country of origin principle could only be adopted as a conflict of laws rule with respect to defamation claims involving a publisher established in a Member State, but not when a publisher is established outside the territory of any Member State. The application of different conflict of laws rules, depending upon whether or not the place of establishment of the publisher is situated in a Member State, would not do justice to the realities of a global information market.

III. A Conflict of Laws Rule in Rome II: Some Possibilities

The Savignian conflict of laws rules are value-free and do not favor the outcome of a substantive result. However, it is stating the obvious that a conflict of laws rule based upon the place of occurrence of the event giving rise to the damage or publisher's place of residence favors the party responsible for publishing the defamatory material. On the other hand, a conflict of laws rule based upon the habitual residence of the victim, or the place where damage to the personal reputation has sustained, factually favors the plaintiff.

The question of whether free speech should prevail over the protection of a personal reputation, or the other way around, should principally be left to the substantive law found applicable. Conflict of laws should refrain from adopting a bias either in favor of the plaintiff or the defendant, but rather should try to find the appropriate equilibrium. A conflict of laws rule based upon the publisher's establishment, or place where the editorial decisions are being taken,[69] is therefore unsuitable. Although the place of establishment of the publisher would provide a simple and predictable rule with regard to distance and multiple publications, such a rule would unduly strengthen the position of the publisher. It would not be a sensible outcome if a Dutch businessman would be deprived of any effective remedy when an article published in New York would jeopardize his personal reputation in the Netherlands, merely because under the law of the place of establishment of the publisher, such a publication would not be actionable.

It has already been observed that there would be significant costs involved if a publisher were required to verify in advance whether the limits of free speech would be transgressed under any law where harmful effects of the publication may be felt. There would be a chilling effect upon the freedom of speech if a publisher would run risk of being

[68] Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU, 2008 E.C.R. I-271. *See* Peter Oliver, *The Protection of Privacy in the Economic Sphere Before the European Court of Justice*, 46 COMMON MKT. L. REV. 1443 (2009).

[69] George, *supra* note 5. *See* Angela Mills Wade, *EPC on the Link Between Brussels I and Rome II in Cases Affecting the Media*, CONFLICTOFLAWS.NET (July 25, 2010), http://conflictoflaws.net/2010/epc-on-the-link-between-brussels-i-and-rome-ii-in-cases-affecting-the-media.

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sued under a multiplicity of laws.[70] The effective protection of the freedom of speech would thus require some limitations on the applicable law. The Belgian,[71] Bulgarian,[72] and Romanian[73] conflict of laws rules therefore incorporate, with regard to defamation proceedings, a requirement of foreseeability. Although the victim may choose between the application of certain related legal systems, including the law of the places where the harmful event or damage occurred, the application of that law shall not be forthcoming if the author could not have reasonably expected that harm would be caused in the jurisdiction of the chosen law.[74] The automatic application of the *lex fori*[75] would, for reasons of foreseeability, not be appropriate. There would be as many applicable laws as there would be competent jurisdictions. In Brussels I, the jurisdiction of the court where the damage materialized is based upon the existence of a particularly close connection between the dispute and the courts of the place where the harmful event occurred. That close connection justifies the attribution of jurisdiction for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.[76] The court where the damage materialized will, for example, be in a better position to assess the appropriate evidence. Whereas the existence of concurrent fora is not problematic per se, in the context of defamation, the concurrent application of different laws factually leads to the imposition of the law most favorable to the plaintiff. The plaintiff would choose to bring proceedings under the law that is most favorable to him, even if that law would only govern the damages suffered in the forum. The award of damages in one jurisdiction, even if limited to damages that occurred in the forum, will already have a chilling effect upon the freedom of speech. Application of the *lex fori* would therefore factually favor the protection of private life over the freedom of speech.

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[70] Mills Wade, *supra* note 69.

[71] CODE PRIVATE INTERNATIONAL LAW art. 99.2.1 (Belg.).

[72] CODE PRIVATE INTERNATIONAL LAW art. 108.3 (Bulg.).

[73] Law Concerning the Settlement of Private International Law Relations of Sept. 22, 1992, art. 112, no. 105 (Rom.).

[74] George, *supra* note 5. *See* Jan von Hein, *Von Hein on Rome II and Defamation*, CONFLICTOFLAWS.NET (19 July 2010), http://conflictoflaws.net/2010/von-hein-on-rome-ii-and-defamation.

[75] Gerhard Wagner, *Ehrenschutz und Pressefreiheit im europäischen zivilverfahrens—und Internationalen Privatrecht*, 62 RABELSZ 243 (1998); George, *supra* note 5. Bettina Heiderhoff, *Privacy and Personality Rights in the Rome II Regime—Yes, Lex Fori, Please!*, CONFLICTOFLAWS.NET (20 July 2010), http://conflictoflaws.net/2010/heiderhoff-privacy-and-personality-rights-in-the-rome-ii-regime-yes-lex-fori-please.

[76] Case C-220/88, Dumez France SA v. Hessische Landesbank, 1990 E.C.R. I-49, ¶ 17; Case C-364/93, Marinari v. Lloyds Bank PLC, 1995 E.C.R. I-2719, ¶ 10; Case C-189/08, Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA, 2009 E.C.R. I-6917.

Finally, from the perspective of international comity, the wide grounds for jurisdiction in Brussels I in combination with the automatic application of the *lex fori* would lead to a large application of European values to cases involving a link with a third country. The *lex fori* approach would for example not provide a just outcome in a "Hollywood libel" scenario. In order to circumvent the First Amendment, a Hollywood celebrity could bring a defamation claim against a U.S. publisher in a U.K. court. The protection of private life as laid down in Article 8 ECHR should, in such circumstances, cede applicability in favor of the First Amendment. The *Shevill* doctrine seeks to allocate jurisdiction between the courts of the Member States and should not stand model for a conflict of laws rule having a universal scope of application.

A conflict of laws rule based upon the place of injury would have the same drawbacks.[77] If the place of injury would be interpreted as meaning the place where infringement of the personal reputation occurred, European values would be applied whenever a publication is distributed in a Member State and the victim enjoys a reputation there. Different laws would govern a multistate tort. Moreover, the place of injury in a globalized world is difficult to determine. Splitting up personal reputation into different territories does not adequately reflect the realities of the present day society. Personal reputations are fluent and transgress national boundaries. For example, academics specialized in European Union law or private international law inherently have an interest in protecting their good names throughout the European Union. If a Swedish author would be accused of plagiarism by a Slovakian colleague in a law review exclusively distributed in Slovakia, there would be an apparent interest in redress since, even if the author does not have any connections with Slovakia whatsoever, he will have to work together with Slovakian colleagues in international working groups and conferences. The place of injury would be impossible to define here. In fact, there would be no possibility to sue under Art. 5(3) Brussels I in Slovakia or Sweden, since the author does not have any personal reputation in Slovakia and the publication reached no one in Sweden. Contrary to jurisdiction, with regard to applicable law, one cannot fall back on a general rule.[78]

The chilling effect upon the freedom of speech is inherent in the application of multiple laws. It would therefore seem to be preferable if publications that may produce harmful effects upon a personal reputation would be subject to a single law.[79] Also, the Commission originally proposed a single law to govern defamation proceedings throughout

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[77] George, *supra* note 5. *See* Olivera Boskovic, *Boskovic on Rome II and Defamation*, CONFLICTOFLAWS.NET (20 July 2010), http://conflictoflaws.net/2010/boskovic-on-rome-ii-and-defamation. Boskovic proposes to simply delete the defamation exception and make defamation subject to the general conflict of laws rules.

[78] Under Article 2 Brussels I a defendant can be sued in the courts of the place where he is domiciled. Brussels I report art. 2.

[79] Gerhard Wagner, *Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäische Deliktsgerichtsstand*, 2006 IPRAX 372.

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the Union. The connecting factor that was proposed, being the law of the place of habitual residence of the victim, certainly had a lot of advantages. It promoted foreseeability and international comity. European values would only be applied when the victim was domiciled in one of the Member States. The connecting factor was, however, fiercely opposed by the media lobby. That political resistance makes a connecting factor based upon the place of habitual residence of the victim unrealizable. From a dogmatic point of view, the place of habitual residence of the victim stands diagonal on the grounds for jurisdiction. As a general rule, Brussels I provides that a defendant should be sued in the courts of the Member State where he is domiciled. It would thus often only be possible to sue the defendant for the entirety of damages sustained in the Member State where he is domiciled, but the law governing the defamation claim would be the law of the place of habitual residence of the victim.

IV. Yet Another Proposal

The place of publication, the place where the damage materializes, the place of establishment of the publisher and the place of establishment of the victim all have certain benefits and drawbacks. All connecting factors have in common that they either take as starting point the publication or the personal reputation. Although facially neutral, the connecting factors at least implicitly favor the protection of one fundamental right over the other. However, the particular function of defamation proceedings makes it unsuitable for conflict of laws to have as its basis either the redress against an affront to the personal reputation or the protection of the functions of the media in a democratic society. Defamation laws set the boundaries of public debate in a democratic society. Since the balance struck between the freedom of speech and the right to a private life is the reflection of how a democratic society should operate, it is submitted that it would be more appropriate to seek connection with the law of the democratic society that is most closely affected.

A connecting factor based upon the principle of closest connection could be tailored to fit the particular circumstances of each case.[80] If the present bird's-eye view of connecting factors has revealed anything, it is that cross-border defamation proceedings are difficult to catch in hard and fast rules.[81] It is therefore suggested that struggle towards absolute

[80] In the same sense: Hartley, *supra* note 2, at 35; Michael von Hinden, *Ein europäisches Kollisionsrecht für die Medien*, *in* DIE RICHTIGE ORDNUNG: FESTSCHRIFT FÜR JAN KROPHOLLER ZUM 70. GEBURTSTAG .573 (Dietmar Baetge, Jan von Hein & Michael von Hinden eds., 2008). Von Hinden proposes a center of gravity test (*Schwerpunktbildung*) but falls for its determination back upon the place of habitual residence of the victim, provided that distribution occurred in that place.

[81] In the same sense: Thomas Thiede, *Sachgerechte Haftung der Massenmedien bei grenzüberschreitender Berichterstattung*, *in* MEDIENPOLITIEK UND RECHT 149 (H. Koziol et al. eds., 2010). Thiede proposes a flexible system based upon the closest connection when a publication occurs in several countries. The forseeability of the application of that law to the author and of the objectively most closely related legal system is relevant. The

predictability should be abandoned in favor of leaving a large margin of flexibility to national courts.[82] In the context of defamation, the principle of closest connection is often being equated with legal uncertainty. With regard to the possibility of introducing the principle of closest connection as an exception to the normal conflicts of laws rule, it has, for example, been observed that the exception "must be limited by giving clear guidelines to the judge as to how to use this exception clause in this field of law."[83]

The reluctance towards using the principle of closest connection can certainly be understood. The principle of closest connection was, in the absence of a choice of law, the principal connecting factor in the 1980 Rome Convention on the Law Applicable to Contractual Obligations (Art. 4).[84] It was presumed that a contract was most closely facially connected to the country where the party that had to render the characteristic performance was established.[85] Art. 4 was interpreted by national courts in various ways, giving rise to a lot of legal uncertainty.[86] At the occasion of the transformation of the Rome Convention into the Rome I Regulation, the general principle of closest connection was therefore replaced with a series of presumptions relating to specific type of contracts. However, the legal uncertainty surrounding Art. 4 Rome Convention was not as such the result of the principle of closest connection. Rather, national courts took different approaches towards Art. 4(5), which allowed courts to deviate from the presumption of characteristic performance when it appeared from the circumstances as a whole that the contract was more closely connected with another country. On one side of the spectrum, Dutch courts favored extreme rigidity to award a maximum degree of legal certainty to the presumption. Deviation from the presumption of characteristic performance was only

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latter depends upon the perception of affront by an average observer and the social connections of the person affected.

[82] The same is proposed by Kunke, *supra* note 47. Kunke proposes to introduce elements of the governmental interest analysis in Rome II while taking the place where the most significant elements of the damage occurred as ground rule.

[83] George, *supra* note 5. *See* Louis Perreau-Saussine, *Perreau-Saussine on Rome II and Defamation*, CONFLICTOFLAWS.NET (21 July 2010), http://conflictoflaws.net/2010/perreau-saussine-on-rome-ii-and-defamation.

[84] RICHARD PLENDER, MICHAEL WILDERSPIN & THE EUR. PARL., THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS (2009); STEPHAN RAMMELOO, DAS NEUE EG–VERTRAGSKOLLISIONSRECHT—DIE ARTT. 4, 5 UND 6 DES ÜBEREINKOMMENS ÜBER DAS AUF VERTRAGLICHE SCHULDVERHÄLTNISSE ANZUWENDEN RECHT VON 19.6.1980: EINE RECHTSVERGLEICHENDE ANALYSE OBJEKTIVER VERTRAGSANKNÜPFUNGEN (1992).

[85] Council Convention 80/934/EEC, On the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, 2, art. 4(2). This paragraph has been slightly oversimplified. A presumption was also established by Articles 4(3), relating to contracts for the right in an immovable property, and 4(4), relating to contracts of carriage.

[86] Case C-133/08, Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV & MIC Operations BV, 2009 E.C.R. I-9687. The different national approaches are discussed in the opinion of A.G. Bot. *See* Stephan Rammeloo, *Op de valreep . . . Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO*, 28 NIPR 20 (2010).

possible when the place of establishment of the party that had to render the most characteristic performance had, in the light of the particular circumstances of the case, no genuine value in establishing the applicable law.[87] On the other the side of the spectrum, English courts favored flexibility and already deviated from the presumption when the place of establishment of the party that had to render the most characteristic performance did not coincide with the place where the contractual obligation had to be performed.[88]

The controversy surrounding the principle of closest connection in the Rome Convention was therefore mainly concerned with the question of the circumstances in which it was appropriate to deviate from the presumptions. The lesson to be learned from the Rome Convention is that one should be careful in establishing presumptions that are too broad. The ability of courts to find an equitable solution in individual cases should not be underestimated. Rather than providing for a presumption, Rome II should leave the determination of the closest connection to national courts. Although inherently vague, a criterion of closest connection would not generate too much legal uncertainty. Even in multinational torts, there will often be indicators pointing towards a particular jurisdiction. Compare, for example, the two defamation proceedings currently pending before the ECJ. In *Martinez*, the alleged defamatory article gave account of an international news event concerning the possible reconciliation of the plaintiff with a famous Australian singer.[89] The article was published by an English newspaper, on a website with a co.uk domain name and was exclusively accessible in the English language. Moreover, the majority of readers were based in the United Kingdom. In these circumstances, the French nationality of the plaintiff was merely ancillary and more weight should have been attributed to the connections with the United Kingdom. On the other hand, in *eDate Advertising*, although the defendant was an enterprise established in Austria, and the alleged defamatory statement was published on an Internet site with an Austrian domain name, the defamation had closer connections with Germany. The publication concerned the coverage of the murder of a German actor by a German national in Germany. The mentioning of his full name on the Internet site impaired the defendant's ability to build up a new life in Germany.

[87] HR 25 september 1992, NIPR 1993, 105 m.nt. AA (Société Nouvelle des Papéteries de L'Aa SA/BV Machinefabriek BOA) (Neth.); HR 17 oktober 2008, LJN BE7201, C07/037HR, (Centraal Orgaan Opvang Asielzoekers/Baros AG) (Neth.); Stephan Rammeloo, *Die Auslegung von Art. 4 Abs. 2 und Abs. 5 EVÜ: Eine niederländische Perspektive*, 1994 IPRAX 243, 43–45; Teun Struycken, *Een* letter of credit *en accessoire aanknoping* 19 NIPR 204 (2001).

[88] Bank of Baroda v Vysya Bank, Ltd., [1994] 2 Lloyd's Rep. 87 (Q.B.D. (Comm. Ct.)) (Eng.); Marconi Commc'ns Int'l, Ltd. v. PT Pan Indonesian Bank, Ltd., [2005] EWCA (Civ) 422, [2007] 2 Lloyd's Rep. 72 (Eng.); Definitely Maybe (Touring), Ltd. v. Marek Lieberberg Konzertagentur GmbH, [2001] 2 Lloyd's Rep. 455 (Q.B.D. (Comm. Ct.)) (Eng.).

[89] *See generally eDate* & *Martinez* cases.

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In order to establish the closest connection, relevant criteria could thus be the place of establishment of the publisher, the place of establishment of the victim, the place where most of the damage materialized, the place where most publications were put into circulation, the international or local nature of the publication, the language of the publication, and the audience for which the publication was written. In cases of defamation via the Internet, importance could moreover be attributed to the domain name of the Internet site.

The search for the democratic society most closely affected would, however, be particularly difficult when the publication does not seek to contribute to the public debate in one particular society, but is part of a global debate; for example, academic publications relating to international or European law. An English-language book on judicial activism of the European Court of Justice by a Belgian author published in the Netherlands will not affect the public debate in one particular Member State. In such circumstances, the remaining criteria, such as place of establishment of the publisher and the place of establishment of the victim, gain importance. Rome II should refrain from preferring in abstract one criterion over the other, but instead should adopt a sliding scale. The relevance of the place of habitual residence of the victim will increase as the foreseeability for the author of the application of the law of that place increases. On the other hand, the relevance of the place of establishment of the publisher will increase as the proportion of books put into circulation in the place of habitual residence of the victim decreases.

The advantage of a connecting factor based upon the principle of closest connection would not only be that a single law would be applicable to a publication, but it would also not be necessary to develop a special conflict of laws rule dealing with online defamation. Finally, the principle of closest connection would strike an appropriate balance in a conflict of laws involving the laws of a third country. European values would only be applied when the defamation has the closest connection with one of the Member States. European citizens will not be deprived of any remedy when the tortfeasor is established in a country that de facto excludes defamation proceedings for specific categories of persons. Under the *Shevill* doctrine, a plaintiff may still initiate a defamation proceeding in any jurisdiction where the defamatory publication was distributed and damage to the personal reputation occurred. Public policy could be used to refuse the application of foreign law insofar as the application of that law would violate a fundamental principle of the forum.[90]

[90] The introduction of a specific public policy clause dealing with defamation would however be superfluous. Article 26 Rome II already provides that the application of a provision of the governing law may be refused if such application would be manifestly incompatible with the public policy of the forum.

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For these reasons, it is suggested that that the following conflict of laws rule should be incorporated in Rome II:

"*The law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country with which it is most closely connected.*"

D. Conclusion

Sound reasons exist to reconsider the exclusion of defamation from the scope of Rome II. There is a general need to discourage forum shopping. Moreover, the carve-out of specific policy areas risks undermining the aim of achieving a European area of freedom, security and justice by providing clear and predictable conflict of laws rules. Finally, the unification of a conflict of laws rule could be seized as an opportunity to strive for better coordination with the laws of third countries.

The difficult question of course remains what the most appropriate conflict of laws rule would be. The place of publication, the place where the damage materializes, the place of establishment of the publisher, and the place of establishment of the victim all have certain benefits or drawbacks. It is suggested that any attempt to catch the complexities of cross-border defamation proceedings in a hard and fast conflict of laws rule is futile. Instead, the connecting factor should leave as much flexibility as possible to courts to deal with the circumstances of each individual case. It is therefore proposed that the law applicable to a defamation proceeding should be established on the basis of the principle of closest connection. The principle of closest connection would enhance legal certainty by the application of a single law to an infringement of personality rights, while at the same time contributing to better coordination between the laws of the Member States and those of third countries. European values will only be applied when the defamation has its closest connection with one of the Member States.

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