

INFRINGEMENT OF PRIVACY VIA INTERNET

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Abstract

The development of the Internet has enabled instant access to information and its global transfer worldwide. Information whose content represents an infringement of personality rights and which was placed online on the Internet will go around the world in a moment. The question may be raised as to where the harmful event occurred, entailing the need for new legal regulation to possible privacy infringements. EU legislation that regulates this area has been placed to creative interpretations as it has been applied successfully in recent cases of damage inflicted by placing on the Internet content that infringes personality rights. Interpretation of the European Court of Justice is found unsatisfactory to majority of experts in private international law because it represents a limitation of the application of the relevant applicable law determined by conflict-of-law rules of a certain Member State for the purpose of ensuring the free movement of information society services. Many open questions regarding the Internet still need to be addressed by legislators and the entire legal profession.

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I Introduction

In 1993, X, of German nationality, was sentenced by a German court to life imprisonment for the murder of a famous German actor, whom he, according to the verdict, murdered in 1990 together with his brother. An Austrian Internet portal owned by the company Date Advertising, which is established in Austria, on

the pages dedicated to old news published a report on the murder identifying the perpetrator by his full name. X subsequently brought an action against eDateAdvertising before the German courts. He called upon eDateAdvertising to refrain from using his full name when reporting about the murder of the actor¹. eDate Advertising contested the action by calling into question the international jurisdiction of the German civil court.

Another controversial issue in this case is the question of which substantive law is to be applied, German or Austrian, and in this regard, the interpretation of the provisions of Article 3(1) and (2) of the Directive on Electronic Commerce².

This case and the judgment of the European Court of Justice of 25 October 2011 (which will be discussed later) are a good introduction to the issues of jurisdiction and applicable law in the case of indemnification of damage caused by placing online on the Internet content that may harm a person and violate his/her fundamental human rights.

The technological revolution we have witnessed in the last several years has greatly changed our lives and habits. The development of a new medium, the Internet, has enabled instant access to information and changed the way of communication, but it has also created the need for new legal regulation since it is a global medium that transfers information placed online today in Austria instantly to interested consumers in Japan. Information whose content represents an infringement of personality rights and which was placed online on the Internet will go around the world in a moment. Consequently, the question may be raised as to where the harmful event occurred.

Legislation that regulates this area is insufficient, but by means of creative interpretations it has been applied successfully in recent cases of damage inflicted by placing on the Internet content that infringes personality rights. However, there are many open questions regarding the Internet that still need to be addressed by legislators and the entire legal profession.

¹ Case C-509/09 eDate Advertising is available at: http://curia.europa.eu/jcms/jcms/j_6

² 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.

II The jurisdictional issue

For cross-border cases, jurisdiction is determined according to the rules contained in Article 5 of the Brussels I Regulation³ (hereinafter referred to as: “the Regulation”). A general principle of the Regulation is that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile⁴, save in situations in which other linking factors are allowed that are more closely related to the subject-matter of the litigation or that are determined by parties themselves. The domicile of a legal person is defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

Matters that are the subject of this paper fall under Article 5(3) of the Regulation that deviates from the principle of jurisdiction of courts where the defendant is domiciled (court determined), i.e., that prescribes the rule of special jurisdiction in such a way that “a person domiciled in a Member State may, in another Member State, be sued ... (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”. If the Internet is the medium through which the information causing violations of privacy and rights relating to personality, then there is no simple answer to the question referring to the place where the harmful event occurred, i.e., the place in which an action may be brought. Is it the court of each Member State in which the contested content may be accessed? Or is it the court in which the operator of the website where content is placed is established? Can an action be brought before a court of a Member State connected with the case in some other special way, for example, in the state in which the operator of the website would address the target user group, or in the State with the greatest number of visitors to the contested content, or in the State that has an objective connection to the contested content?

In addition to the aforementioned questions, can we claim with certainty that the former article (Article 5(3)) of the Regulation implies that the court of the Member State where the damage occurred is responsible for making a decision on an infringement of personality rights committed by placing online content on a

³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1, as Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

⁴ Recital 11 in the *preamble* to Council Regulation (EC) No 44/2001.

particular Internet site run by a legal person in another Member State and mainly intended for the public in that second State, and published in a foreign language?

The European Court of Justice, from which the German Federal Supreme Court requested the former interpretation following an appeal filed by eDateAdvertising, resolved the dilemma as follows. The Court finds that jurisdiction should be determined according to Article 5(3) of the Regulation for the place where the harmful event occurs or may occur has a special connection with the place where the court is placed so this special domestic connecting factor is a crucial factor due to which, in this case and in other similar⁵ cases, jurisdiction shall be determined in this way⁶, and not pursuant to the general rule set out in Article 2 of the Regulation according to which jurisdiction is provided for the court of the defendant's domicile. It is important to note here that the replies that the Court provided to the aforementioned questions partially used arguments from previous cases⁷ which also dealt with violations of the right to privacy, but by virtue of content published in newspaper articles. However, newspapers and similar publications differ from the Internet insofar as the information published on the Internet goes around the world in an instant and a large number of users around the world gain access to this information, regardless of whether it was the intention of the authors who placed content online on the Internet or not. Publications relate to a specific area and the Internet is ubiquitous, which brings us back to the complex issue of the place where the harmful event occurred. When it comes to the Internet, damage can occur in any part of the world, and a person whose right has been violated may also bring

⁵ Case *Olivier Martinez and Robert Martinez v MGN United*, C 161/10 is available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/cp110115en.pdf>; The French actor Olivier Martinez and his father Robert Martinez brought an action before the Tribunal de grande instance de Paris due to an infringement of the right to privacy and of the right of Olivier Martinez to his own image, that is, in their opinion, violated when the information was published online on the website of the British newspaper the Sunday Mirror. Namely, on 3 February 2008 a text written in English appeared on the website www.sundaymirror.co.uk with details of the meeting between Olivier Martinez and Kylie Minogue and their alleged relationship. An action was brought in the court pursuant to Article 9 of the French Civil Code, which protects a person's right to private life, against MGN Limited, a company governed by English law, that operates the contested website.

⁶ Similar positions are also advocated by T. Hartly, *Cross Border Privacy Injunctions: the EU Dimension*, *Law Quarterly Review* 2012/128, p. 197, M. Bogdan, *Defamation on the Internet, forum delicti and the E-Commerce Directive: Some comments on the ECJ judgment in the eDate case*, *Yearbook of Private International Law*, Volume 13(2011), pp. 483-491.

⁷ Case *Shevill v Presse Alliance*, C 68/98 is available at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993CJ0068.

an action for damages in a court of any EU Member State where the damage occurred. This makes way to a risk of abuse from foreign courts in relation to a more favourable choice of law (forum shopping). In addition, this “power of universal jurisdiction”⁸ can also be generally used to intimidate or silence the publisher⁹.

Can an action be brought only before a court of the Member State in which there is a special connection with the contested content or the website on which it was placed online? If such a special domestic connecting factor is necessary, what are the criteria which would determine that connection? Therefore, the European Court of Justice holds that the impact which content placed online is liable to have on an individual’s personality rights might best be assessed by the court of the place where this individual has his/her “centre of interests” because there is a special connection with the court of that place. This connection fully meets the criteria of predictability and legal certainty. At the time of placing the contested content on the Internet, the defendant (i.e., the person responsible for the placing online of content on an Internet website) is capable of identifying the centre of interests of the person whose rights might be violated by this act and he/she can also easily assume which court should be addressed for protection.

The alleged victim of defamation on the Internet still has the option to file a lawsuit before the court of any State on whose territory the damage occurred, i.e., in which the infringing online content was available.

The place where a person has his/her centre of interest corresponds in general to his/her habitual residence, but depending on circumstances, it can be somewhere else, e.g., the place of business, or the place, i.e., the state in which family members and closest friends of the person whose right has been infringed¹⁰.

Another link that may be applied in such cases pursuant to the general principle is the place in which the person responsible for placing on the Internet content that caused harm to others is established.

⁸ L. Levi, *The Problem of Trans-National Libel*, *American Journal of Comparative Law* 201/60, pp. 512-523.

⁹ M. Reymond, *Jurisdiction in case of personality torts committed over the Internet: A proposal for a targeting test*, *Yearbook of Private International Law*, Volume 14(2012/2013), p. 209.

¹⁰ M. Bogdan, *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some comments on the ECJ judgment in the eDate case*, *Yearbook of Private International Law*, Volume 13(2011), p. 486.

III Restrictions on applicable law –the interpretation of the E-Commerce Directive

One of the questions submitted by the German Federal Supreme Court for a preliminary interpretation of the aforementioned case of *X v eDate Advertising* was whether the definition provided for in Article 3(1) of the E-Commerce Regulation is to be interpreted as having a conflict-of-laws character. This question has often been asked by experts in the field of private international law who consider this Regulation as one of the most controversial parts of the EU legislation¹¹.

But, first things first. Point 22 in the preamble to the Directive highlights *inter alia* the following: "...; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services¹² should in principle be subject to the law of the Member State in which the service provider is established¹³, but in the point that follows, point 23, it is said that "This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive." Point 25 in the preamble to the Directive reads: "National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive." Mere superficial reading of the text may indicate the problem. First, applicable law is proposed and then in the next point it is stated that the goal of the Directive is not to establish additional rules on private international law but to ensuring the freedom to provide information society services.

¹¹ M. Hellner, The country of origin principle in the E-Commerce Directive: A conflict with conflict of laws? In: A. Fuchs et al. (Eds.) *Les conflict de lois et le systeme juridique communautaire*, Paris, 2004, pp. 205-224.

¹² Pursuant to point (18) in the preamble, information society services span a wide range of economic activities which take place online; these activities cover in particular e-commerce services, online information services, in so far as they represent an economic activity, they extend to the transmission of information via a communication network, etc.

¹³ The place at which a service provider is established is defined as the place of the actual pursuit of an economic activity. The place of establishment of a company providing services via the Internet is not the place at which the technology enabling the provision of e-services is located or a state in which its service is accessible but the place where it pursues its economic activity.

These inconsistencies, to put it mildly, given in the preamble are included, now as part of the legal rules, in the general provisions of the Directive, i.e., Article 3(1): “Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field”¹⁴, and “This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts”¹⁵. It should be noted that the requirements covered by the concept of the coordinated field are generally and broadly defined to also include legal areas that are not unified in the EU and that are general in nature, and they concern, *inter alia*, those applicable to advertising and contracts, or requirements concerning the liability of the service provider.¹⁶

If the definition under Article 3(1) of the Directive is a conflict-of-law rule, then the Directive contradicts itself, which is a problem on a theoretical level, but more importantly, it also affects the application of the rules, hence the question arises as to which law to apply, the law of the state in which the electronic service provider is established, or the law referred to by the law of the state in which an online service is provided. The definition under Article 3(1) can be understood as a restriction or correction of the law that has been determined as applicable according to national conflict-of-law rules, or it can be interpreted in such a way that the law of the Member State in which the service provider is established¹⁷ should apply for the purpose of “ensuring the free movement of information society services between the Member States”¹⁸, or, in other words, conflict-of-law rules of the states in which the service is provided should be replaced by a rule from the Directive.

In response to previous questions, the European Court of Justice clarified the dilemma as follows. First, in addition to the rule itself, we should take into account the context it originates from and objectives meant to be achieved by the rule in question, as well as recitals that led to the adoption of the act (preamble). The

¹⁴ Pursuant to Article 2(h), coordinated field is defined as “requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.”

¹⁵ Article 1(4) of the E-Commerce Directive.

¹⁶ Article 2(h) of the E-Commerce Directive.

¹⁷ The terms “the country of origin” or “home country control” are frequently used in the professional literature.

¹⁸ Article 1(1) of the E-Commerce Directive.

objective is, as already mentioned, to ensure the free movement of information society services between the Member States, which will contribute to the proper functioning of the internal market. Obstacles to the proper functioning of the internal market are differences in legislation and legal uncertainty with regard to the national rules that must be applied to information society services¹⁹. The objective of the Directive is therefore not to harmonise law but to ensure the proper functioning of the internal market, so that, pursuant to point 22 in the preamble to the Directive, information society services should in principle be subject to the law of the Member State in which the service provider is established. According to the interpretation of the European Court of Justice, it is like that because at European Union level there are no mandatory rules referring to harmonisation, only the recognition of the mandatory character pertaining to national rules of the state in which the service provider is established can guarantee full freedom to provide these services.

The legal system of the Member State in which the service provider is established includes the field of civil law²⁰, and its application to the liability of service providers is expressly defined in Article 2(h)(i), in the second indent of the Directive²¹, which defines coordinated field. Although it is indisputable that the coordinated field also includes the field of civil law, it does not mean that Article 3(1)²² shall replace provisions of private international law. Such a definition can be interpreted

¹⁹ Point 5 in the preamble to the Directive.

²⁰ Point 25 in the preamble to the Directive states that “National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive” and the Annex to the Directive stating the civil rights and obligations to which the provisions set out in Article 3 do not apply.

²¹ (h) ‘coordinated field’: requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.

²² Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with their national provisions that fall within the framework of the coordinated field.

as an instruction to the court of a Member State in a specific case to correct or adjust the rule referred to by private international law such that it does not become a hindrance to achieving the free movement of services.

If we add the provision of Article 3(2), which prohibits Member States, for reasons falling within the coordinated field, to restrict the freedom to provide information society services from another Member State, and the aforementioned provisions and principles of the Directive which expressly set out that the objective of the Directive is not to establish new conflict-of-law rules, it follows that, if the conflict-of-law rules of the Member State in which the service is provided do not restrict the free movement of information society services, there is in principle no obstacle to that State to designate applicable law pursuant to the provisions of its private international law, but only if these rules do not provide for more stringent requirements for service providers than in the state in which he/she is established.

This interpretation of the European Court of Justice does not satisfy the majority of experts in private international law, including the author of this text because it represents a limitation of the application of the relevant applicable law determined by conflict-of-law rules of a certain Member State for the purpose of ensuring the free movement of information society services. Definition of point 25 in the preamble to the Directive²³ speaks in favour of this position. In essence, it allows the courts of the Member States, including civil courts, by resolving disputes of a private law character, to take measures to reduce the freedom to provide information society services, but again “in accordance with the provisions of the Directive”, which essentially means that courts cannot ignore the provisions pertaining to the application of law of the state where the service provider is established.

Based upon the response of the European Court of Justice to the aforementioned questions referred to it by the German Federal Supreme Court (do not forget that it is the court of the Member State in which the service is received), we may conclude that it would be better for the suitor to bring an action before the court of the state in which the service provider is established than before the court of the state in which the service is received because that court is obliged to correct applicable law and align it with the law of the Member State in which the service provider is established. In these proceedings, the outcome is always uncertain.

²³ “National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.”

The provision pertaining to the state in which the provider of the information society services is established can mean a lot in legal control of business activities of service providers but it is not as good as a conflict-of-law rule.

In conclusion, we can say that the interpretation of the European Court of Justice, at least as far as the interpretation of the Directive on Electronic Commerce is concerned, has not clarified doubts completely. There is still the impression that the principles of private international law have been sacrificed for the purpose of achieving the freedom to provide services.

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