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## **The Position of Broadcasters and Other Media under 'Rome II' Proposed EC Regulation on the Law Applicable to Non-contractual Obligations**

**Mireille van Eechoud**

Institute for Information Law (IViR)

University of Amsterdam

The Netherlands

<http://www.ivir.nl>

### **Introduction**

The liability of broadcasters and the media in general for non-contractual obligations (civil wrongs) is diverse. They may be sued for alleged breaches of intellectual property rights or for acts of unfair competition or other torts. Compared to other industries, the (broadcast) media are more susceptible to claims in defamation, infringements of privacy or of other interests in personality. When such claims comprise international elements, e.g. where a broadcast causes prejudice abroad, or claimants are foreign, a country's rules on private international law provide the answer to three questions. Which court is competent to hear the claim? Which law should it apply? What is the effect of the ruling in other states? The first question, on jurisdiction, is governed by different rules than the second question, on choice of law. For issues of jurisdiction and recognition of foreign judgments, the principal European instrument is the Brussels I regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>1</sup>

In the area of choice of law, there are European rules for contractual obligations, but not yet for non-contractual ones. The Rome Convention on the law applicable to contractual obligations (1980) is being transformed into a Regulation ('Rome I'),<sup>2</sup> like the Brussels Convention (1968) before it. At the same time, work is nearing completion on a 'Rome II' Regulation, which will contain general rules on choice of law for torts/delicts and other non-contractual obligations like unjust enrichment. On 25 September 2006 the Council of the European Union officially adopted the common position, on which it had already reached agreement the previous June.<sup>3</sup> The

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<sup>1</sup> 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. Denmark is not bound by the Brussels Regulation (but by the Brussels Convention), as it has negotiated a general opt-out (with the UK and Ireland) of all EU legislation on private international law. The UK and Ireland have opted into the Brussels Regulation, and have announced their intention to opt into the Rome II Regulation as well.

<sup>2</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final of 15.12.2005.

<sup>3</sup> See further, Mireille van Eechoud, "Council of the European Union: Common Position on Rome II Excludes Defamation by Media", *IRIS* 2006-7: 5, available at <http://merlin.obs.coe.int/iris/2006/7/article6.en.html>.

proposal is now with the European Parliament for a second reading. Among the most contentious issues is defamation. Parliament wants it in, but the Council has taken it out.

In this contribution, a closer look is taken at Rome II as it now stands and the impact it will have on the broadcasting and media industries. The legislative background and objectives of Rome II will be set out, followed by an introduction to its general rules. Special attention will be paid to questions of intellectual property, unfair competition and violations of interests in personality (including defamation).

## **Background to Rome II**

The Rome II proposal is part of a much larger package of private international law instruments. The past few years have seen a surge in legislative activities in this field at the EC level. The primary cause is that the Treaty of Amsterdam has brought harmonisation of private international law squarely within the EC's competence. Before 'Amsterdam' entered into force in 1999, the conflict of laws was a so-called 'third pillar' issue, i.e. an area where the European Commission has no exclusive right of initiative, and a unanimous vote in the Council is required.

The competence to legislate private international law is regulated under the provisions dealing with the free movement of persons (Part III, Title IV, EC Treaty). Article 65 of the EC Treaty deals with judicial cooperation in civil matters having cross-border implications. It provides *inter alia* that where the proper functioning of the Internal Market so requires, measures taken shall include 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction'. Legislation is passed under the co-decision procedure with qualified majority voting. So far, newly introduced regulations deal primarily with procedural aspects of cross-border litigation, e.g. on service of documents and taking of evidence,<sup>4</sup> and of course jurisdiction and enforcement (Brussels I, *supra*). The adoption of conflict rules for torts would mean another major step towards a harmonised body of private international law.

Attempts to develop common European conflict rules for torts date back to the late 1960s. Originally, the idea was to include rules on non-contractual obligations in what became the Rome Convention (1980), but agreement could not be reached. Work was taken up again by the academic European Private International Law Group (GEDIP). It presented a draft in 1998, which served as input for the European Commission's preliminary draft proposal of May 2002. The preliminary draft was submitted to a round of public consultation, culminating in a public hearing in the Spring of 2003.

The actual proposal for Rome II of July 2003 differed substantially from the preliminary draft.<sup>5</sup> In its first reading, the European Parliament accepted over fifty amendments which again entailed major changes. The European Commission submitted a revised proposal to the Council in February 2006, which only included a few of the Parliament's amendments. Defamation by the media was taken out altogether. This area was very controversial, being one where the national standards in Member States are felt to differ considerably (see below).

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<sup>4</sup> European Enforcement Order Regulation (EC) 805/2004 of 21 April 2004, Service of Documents Regulation (EC) 1348/2000 of 29 May 2000, Taking of Evidence Regulation (EC) 1206/2001 of 28 May 2001 and Legal Aid Directive 2003/8/EC of 27 January 2003. There are also proposals pending for a Regulation creating a European Order for Payment Procedure and for a Regulation establishing a European Small Claims Procedure.

<sup>5</sup> Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM (2003)427 of 22 July 2003.

For other torts also, differences exist with respect to the illegitimacy of a given act, e.g. what acts constitute unfair competition, or what are the restricted acts requiring the authorisation of the owner of intellectual property. Some areas of private law have a long history of harmonisation at the EC level, such as trademark law, copyright and related rights law. The differences in illegitimacy standards there have become less acute, albeit primarily with respect to the definition of protected subject matter and the scope of exclusive rights.<sup>6</sup>

Other tort issues that are treated differently among Member States concern not only the concepts of liability (strict liability and fault-based liability, vicarious liability) and statutes of limitation. The available types of compensation for damages may also vary: direct or also indirect damages; material or also non-material; only actual damage or also punitive damages. The rules on liabilities, damages and limitations may be applied to civil wrongs in general, but are often also specific to certain torts (e.g. infringement of intellectual property, unfair advertising).

National conflict rules were generally judge-made law well into the 20<sup>th</sup> century. In recent years a number of Member States have codified or redrafted (part of) their conflict rules in private international law statutes (e.g. Belgium 2004, Netherlands 2001, Italy 1995, Germany 1999, Austria 1998, United Kingdom 1995). For non-contractual obligations, the proposed Rome II Regulation would replace the national rules almost completely because its rules are of so-called ‘universal application’. This means that courts of Member States must apply the conflict rules regardless of whether they lead to the application of the law of another Member State or a third country. All international torts must be judged under the Rome II rules, regardless of the place of establishment or residence of the parties involved,<sup>7</sup> or the place where the civil wrong was committed. Understandably, the large impact Rome II will have on the recently codified national rules does not encourage compromise. The inclusion of the principle of universal application has also drawn criticism for reasons of competence.<sup>8</sup> As stated above, the EC’s competence to legislate private international rules is framed in terms of securing the proper functioning of the Internal Market. Critics argue that for Internal Market purposes, it suffices if Rome II only governs cases where a tort is committed in a Member State.

## Objectives of Rome II

According to the Explanatory Memorandum and the Recitals of the Common Position, the principal objective of Rome II is to increase legal certainty by making it foreseeable for parties which law governs their liability for civil wrongs. In turn, this should stimulate cross-border (economic) activity. At the same time, foreseeability should not trump a reasonable balance of the interests of the injured party and the tortfeasor.<sup>9</sup> As we will see, this balance is a very difficult one to strike, as the debate over the appropriate conflict rules for defamation and infringements of

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<sup>6</sup> In the area of enforcement of intellectual property rights, the latest –and controversial– European Commission initiative concerns criminal sanctions, not civil remedies (Amended proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM (2006)168 of 26 April 2006). The rules on remedies, standing to sue, etc. are partially harmonized in EC law, notably under the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004.

<sup>7</sup> Compare the Brussels I regulation on jurisdiction: in principle, these rules only replace national rules where the defendant is established in the EU.

<sup>8</sup> O. Remien, ‘European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice’, in: *Common Market Law Review* 2001, 53-86; I. Thoma, ‘La définition et l’exercice des compétences externes de la Communauté Européenne au domaine de la coopération dans les matières civiles ayant une incidence transfrontière’, in: *European Review of Private Law* 2002, p. 397-416.

<sup>9</sup> Explanatory memorandum to Proposal for a Regulation of the European Parliament and the Council on the Law applicable to non-contractual obligations, (“Rome II”), COM(2003)427 fin, p. 7, 12ff. [hereinafter: Explanatory memorandum to Rome II proposal 2003]

privacy shows. In its original proposal, the European Commission noted that in precisely these areas, national conflict rules differ substantially and are often unclear. So, for this area in particular, harmonised rules would greatly increase legal certainty.<sup>10</sup> As it stands, however, the tort of defamation and other infringements of interests in personality will be excluded from Rome II (see below). The instrument would cover many torts relevant for media, ranging from claims in unfair competition and infringement of intellectual property to pre-contractual liability.

Another reason to harmonise the conflict of laws for torts is that the co-existence of various national conflict rules is perceived as (potentially) causing distortions in competition. An action brought by a company in one Member State's court may be adjudicated under a different substantive law than a similar action brought by a competitor in another court. It should be noted that the creation of a 'level playing field' cannot be an objective as such. The EC is only competent to harmonise conflict rules where the functioning of the Internal Market demands so. The Court of Justice of the European Communities (ECJ) has unequivocally ruled that a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom, are not sufficient to justify the choice of Article 95 as a legal basis.<sup>11</sup> Since Article 95 is the centrepiece provision for Internal Market integration, one may assume that the same reasoning applies to other Internal Market based articles, including Article 65 of the EC Treaty. Consequently, for the EU to act, there must be a real and noticeable effect of diverging private international law rules on the Internal Market. Whether that is the case is not elaborated upon in the initial or later proposals.

Rome II also aims to facilitate recognition of judgments from other Member States. The idea is that the mutual trust in each others' judicial decisions is greater when Member States apply the same substantive law in similar cases.<sup>12</sup> It should, however, be noted that under the Brussels Regulation, the enforcement of a decision from another Member State cannot be refused on the ground that it does not conform to the conflict rules of the forum of recognition.

Another supposed advantage of Rome II is that it will discourage forum shopping: when courts all apply the same conflict rules to similar cases, it is no longer interesting for parties to 'shop around' for fora that apply a law favourable to them.<sup>13</sup> Of course, expectations about the applicable law are only one –and possibly a minor– factor in the choice of forum. Considerations of expediency, language, (dis)advantages of a forum's procedural law, costs, etc., also influence the preferences of parties. More importantly, the most obvious way to prevent forum shopping is to reduce the number of competent courts.

## **Principal Conflict Rules**

Rome II gives rules for a wide variety of torts, ranging from liability for defective products, traffic accidents, environmental pollution, infringement of intellectual property and unfair advertising. A limited number of issues are exempt, typically connected to family law and finance. As already signalled, the most important exclusion for the media is in Article 2(g) of the Common Position: non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

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<sup>10</sup> Explanatory memorandum to Rome II proposal 2003, p. 17..

<sup>11</sup> Case 45/86 [ECR 1987, 2671] *Generalized Tariff Preferences* (Commission vs. Council). 84.

<sup>12</sup> Explanatory memorandum to Rome II proposal 2003, p. 7.

<sup>13</sup> *Ibid.*

The proposal contains three general rules (contained in articles 4(1), 4(2) and 14) for determining the applicable law, with exceptions for a number of specific torts, among which are unfair competition and infringement of intellectual property rights, to be discussed separately below.

The hierarchy of rules is that the tort is governed by:

- 1) the law chosen by the parties (freedom of choice, art. 14), lacking such choice
- 2) the law of the common habitual residence of plaintiff and injured party (common habitual residence, art. 4(2)), lacking that
- 3) the law of the place where the tort was committed (*lex loci delicti commissi*, art. 4(1)).

The last rule is commonplace throughout Europe. It reflects a central objective of (European) choice of law, which is to identify the legal system with which a legal relationship has the closest connection in a factual-geographical sense. The second rule, using the place of common habitual residence (or establishment) as the connecting factor, can also be traced back to the closest connection principle. It derives from the relatively recent focus on the compensatory function of tort law, the effects of which are felt mostly in the jurisdiction where both the tortfeasor and the injured party reside. The common habitual residence rule takes precedence over the *lex loci delicti* in the private international law statutes of, for instance, Belgium (Art. 99, Code on Private International Law 2004), the Netherlands (Art. 3(3), Act on the Law Applicable to Torts), Italy (Art. 62(2), Private International Law Act 1995)<sup>14</sup> and Switzerland (Art. 133(1), Act on Private International Law).

The place of the wrong and the common habitual residence are more than mere presumptions about the law most closely connected to a case. They are however not set in stone. The law of another country may be applied if it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with that country (Art. 4(3)).

In Rome II, predominance is given to the principle of party autonomy (Art. 14). The *lex loci delicti* and common habitual residence rules only come into play lacking a choice of applicable law by the parties. This freedom of choice mirrors the freedom of disposition parties have in (substantive) private law, for instance, when deciding to bring a claim or opt for an amicable settlement, limit it to certain aspects, etc. Allowing parties to choose the applicable law is generally also regarded as an effective means of ensuring legal certainty. As it stands, Rome II does make some important exceptions to the freedom of parties, e.g. with respect to claims for infringement of intellectual property (see further below).

#### *Determining the Place of the Wrong (Locus Delicti)*

Notwithstanding its venerable age and general acceptance across Europe, application of the *lex loci delicti* rule does not exactly yield uniform results. The reason is that Member States attach different values to the place of the wrong when cause (act) and effect (damage) are spread over more than one territory (multi-local torts). In the media and communication industries, such multi-local acts are commonplace. This is true in traditional broadcasting and the (international) print press, but even more so – almost by default – in the provision of information services over the Internet.

Currently, when determining the place of the wrong for choice-of-law purposes, some countries tend to opt for the place of injury (UK, the Netherlands). Alternatively, the plaintiff is given the choice between the law of the place of the act and that of the place where the injury arises

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<sup>14</sup> The Italian Act requires that the tortfeasor and the injured party also share the same nationality.

(Germany). Yet others provide a general ‘closest connection’ test for situations when the act and the resulting damage are not limited to one territory (Belgium).

Two reasons are often put forward to explain the preference for the law of the country where the injury arises. The place where the damage arises is the place where the injured party (or his relevant interest) is at the time the tort is committed. It is considered more just and in tune with the legitimate expectations of those involved if the (passive) injured party can rely on that law, more so than that the tortfeasor – i.e., the active party – must be able to rely on the law of the place where he acts. A second reason is that of the two principal functions of tort law – influencing behaviour and compensating for damage – the latter has become more dominant. It thus makes more sense to give more weight to the place where the damage occurred.

The classic example of the multi-local tort from the case-law of the ECJ is *Bier v. Mines de Potasse*.<sup>15</sup> In that case, the ECJ had to decide under the Brussels Convention 1968 which court was competent to hear a claim for damages resulting from environmental pollution: the court of the place where salts were dumped into the river Rhine (France), or the court of the place downriver where those salts caused damage (in this case: to crops in the Netherlands). The ECJ ruled that the plaintiff can bring a claim in both courts, as the tort is situated in both places (*Handlungsort* and *Erfolgsort*, as so aptly put in German).

In the landmark *Shevill* case,<sup>16</sup> the ECJ ruled similarly for defamation. The place where the publisher acts is where it is established, as that is where the defamatory statements are first expressed and enter into circulation. All places where the plaintiff is known and where the newspaper was distributed are places where damage arises, as it is in those places that plaintiff’s reputation is affected.<sup>17</sup> If distribution takes place in several countries, the courts there are only competent to deal with the defamation in their respective territories. The court of the place where the publication was initiated can hear claims for all territories.

The Common Position on Rome II clearly favours the *Erfolgsort*. Article 3 provides that the applicable law ‘shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur’. That indirect consequences/damages are not a factor in determining the place of the wrong has – again for purposes of competence under the Brussels Convention on jurisdiction – already been held by the ECJ in *Marinari*.<sup>18</sup> The ECJ has also ruled that the place where the damage arises does not refer to the place where a loss is financially sustained (i.e., where assets are located, often at the place of establishment). In this line of reasoning, what is relevant in the case of defamation, for instance, is where the injury to reputation is done. For infringements of intellectual property rights, what is relevant is the place where the market is affected (i.e., opportunities to exploit the rights by the right holder). In practice this is typically the country for which protection is claimed. The *lex loci delicti* thus coincides with the *lex protectionis*.

#### *Freedom of Choice (Party Autonomy)*

The major advantage of party autonomy is, of course, that it provides the tortfeasor and the injured party with legal certainty as to the law that governs any obligations resulting from an act of use. In some jurisdictions (e.g. the Netherlands), parties can make a choice before the dispute

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<sup>15</sup> *Bier v. Mines de Potasse*, ECJ 30 November 1976, case 21/76, [1976] ECR III-1735.

<sup>16</sup> *Shevill v. Presse Alliance*, ECJ 7 March 1995 case C-68/93, [1995] ECR 471.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Marinari v. Lloyds*, ECJ 19 September 1995, case C-364/93, [1995] ECR I-2719.

arises, which can be a particularly effective tool for parties in a contractual relationship to submit both issues of a non-contractual nature and of breach of contract to the same law. In other jurisdictions, a choice can only be made after the dispute arises, which was also the approach taken in the original European Commission proposal for Rome II. The European Parliament accepted an amendment to the effect that an *ex ante* choice should be possible in business-to-business relations. This solution was ultimately accepted by the Commission and the Council of the European Union. In the wording of the Common Position: ‘where all the parties are pursuing a commercial activity, the applicable law may also be chosen by an agreement freely negotiated before the event giving rise to the damage occurred’.

Another point of disagreement was whether the freedom of choice should extend to all types of wrongs. The preliminary proposal of 2002 did not exclude a party choice for infringement of intellectual property and violations of interests in personality (defamation, privacy and similar issues). As a special conflict rule for intellectual property was introduced in the 2003 ‘official’ proposal, the Commission stated in the Explanatory Memorandum that ‘freedom of will is not accepted... for intellectual property, where it would not be appropriate.’ This explanation is a rather unsatisfactory, considering that in a number of Member States –such as Belgium and the Netherlands– a party choice is possible.<sup>19</sup>

When defamation was still on the table, disallowing a party choice in cases of defamation was not deemed necessary. As long as only an *ex post* choice was possible, there appeared to be no need to protect the injured party –considered as the weaker party. Why the possibility to choose the governing law in unfair competition cases has disappeared is unclear. Somewhere between publication of the revised Commission proposal of early 2006 and the political agreement on Rome II a few months later, the conflict rule for unfair competition was complemented with a paragraph excluding a choice by parties (Art. 6(4), Common Position). Parliament was in favour of subjecting unfair competition claims to the general rules of Article 3, and apparently also of party autonomy.

Article 14 provides that a ‘choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties’. According to the European Commission, this wording should protect weaker parties such as consumers and employees from or from ill-thought-out choices.<sup>20</sup> Given the *ex post* requirement, under Article 14 it is not possible to include a valid choice in standard-form consumer contracts (e.g. ‘shrink wrap’ and ‘click wrap’ and other end user licences to which the consumer agrees by opening the packaging of a purchased product, or clicking an ‘I accept’ button in case of on-line distribution of content) containing a provision on the applicable law not just for breach of contract but also for non-contractual claims).

A general limitation to the freedom of choice of parties is provided for cases where the only ‘international’ element is the law chosen. Parties may submit their dispute to a foreign law even though all other elements are connected to one jurisdiction (i.e., a common place of establishment, which is also the place where the act giving rise to the claim in tort took place). However, by doing so they cannot circumvent mandatory rules of that jurisdiction.

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<sup>19</sup> Compare also the Swiss *IPRC*, Art. 110: intellectual property rights are governed by the *lex protectionis*, but where it concerns infringement, parties can choose the application of the *lex fori* to govern the legal consequences of the infringement. Whether the parties’ choice should be limited to the law of the forum –as the Swiss statute prescribes– is debatable.

<sup>20</sup> Explanatory Memorandum to Amended proposal for a European Parliament and Council Regulation on the law applicable to non contractual obligations of 21 February 2006, COM(2006) 83 final, p. 3.

## Escape Mechanisms

The Rome II proposal contains two escape mechanisms that allow for disapplication of the law that governs the tort under the rules on party choice or on the basis of the closest connection criterion as expressed in Articles 4 through 13. The public policy exception is laid down in Article 22, Common Position (*Vorbehaltklausel, ordre public*); the priority rules doctrine, in Article 16 (*Eingriffsnormen, lois de police, lois d'application immédiat*).

The public policy escape has a long history in national and international conflict of laws norms. Traditionally, it has two functions: positive and negative. In its negative function it acts as a shield against rules of foreign law, the application of which would go manifestly against fundamental rules of the forum (Art. 26, Common Position).

In the *Krombach* case, the ECJ was asked to rule on the public policy clause in the Brussels Convention, which allows the refusal of enforcement of a foreign judgment. The court ruled that recourse to the public policy exception is only allowed if the foreign rule is 'at variance to an unacceptable degree' with the legal order of the forum 'inasmuch as it infringes a fundamental principle'.<sup>21</sup> Public policy in the context of the conflict of laws is therefore a much narrower concept than internal public policy. Fundamental rights such as freedom of expression are arguably public policy candidates, but possibly only as a shield against the law of third countries which do not protect free speech at a level comparable to that of the European Convention on Human Rights.

In its positive function, public policy traditionally allows for specific rules of the forum to override (part of) the otherwise applicable law. This is not because the foreign rules are unacceptable, but because the forum rules are deemed mandatory in international cases. This positive function of public policy is increasingly being replaced by the doctrine of priority rules. The terminology is confusing at times, as in case-law and in legislative documents, the term public policy is now and again used in its positive function as a synonym for priority rules.

Priority rules are rules of semi-public law that replace part of the otherwise applicable law, due to the overriding interest a state has in having them applied in the case at hand. The test as developed by the Dutch Supreme Court establishes: 1) there must be a direct and close connection between the case and the (social or economic) interest that the rule purports to serve, and 2) the interest(s) served by the priority rule must be greater than the interest of comprehensive application of the otherwise applicable law.<sup>22</sup>

## Intellectual Property

In the preliminary draft, no special rule for intellectual property was included. However, during the consultation round many stakeholders argued that Rome II must either not cover infringements of intellectual property rights, or contain the *lex protectionis*, i.e., provide for application of the law of the country for which protection is claimed. In practical terms, that is the country where (unauthorised) use is made of the protected subject matter, be it a work of authorship, phonogram or broadcast. It is for this territory that the right holder claims that the intellectual property right is infringed.

Stakeholders recalled the existence of the territoriality principle which is universally recognised as underlying intellectual property rights. This is also said to be evident from the multilateral treaties

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<sup>21</sup> ECJ 28 March 2000, Case C-7/98 *Krombach* [2000] ECR I-0000

<sup>22</sup> Dutch Supreme Court (*Hoge Raad*) 13 May 1966 [1967] NJ 3 (*Alinati*), 23 October 1987, [1988] NJ 842 (*Sorensen*), 16 March 1990, [1990] Ars Aequi 556 (*Bredius Museum*).

which assure international protection for *inter alia* copyright and industrial property (e.g. Berne Convention of 1886, Paris Convention of 1883). Some stakeholders claimed that these international instruments in effect prescribe the *lex loci protectionis*, as it follows from the territoriality principle.<sup>23</sup>

As a result of the views expressed during the consultation round, the European Commission did include the *lex protectionis* as the special rule for intellectual property infringements. The general rules for determining the applicable law were not deemed ‘...compatible with the specific requirements in the field of intellectual property’.<sup>24</sup> The Commission gave no further explanation of how and why the general rules are problematic for intellectual property.

In legal doctrine questions are often raised about the validity of the argument that multilateral treaties either directly or indirectly prescribe the *lex protectionis*.<sup>25</sup> The argument that the territorial nature of intellectual property rights necessitates adoption of the *lex protectionis* has been challenged for being based on circular properties: The territorial application of copyright and other rights is often defended with the argument of legislative sovereignty, which results in differences in national intellectual property laws, which in turn justifies the territorial application of such laws. This approach denies the fact that precisely because of their legislative sovereignty, states can adopt conflict rules that prescribe the application of foreign legal norms. And the reason that conflict rules are needed is because national (substantive) laws differ. Also, a strict territorial view of intellectual property points toward applying the law of the forum, i.e. the law of the country where the claim is brought before the courts. This is not necessarily the same country as the country for the territory of which protection is claimed. The principal rule of the Brussels Regulation for instance, which also covers jurisdiction for claims in intellectual property, is that the court of the place where the defendant is domiciled is competent. For copyright and related rights at least, a historical and teleological reading of the treaties does not support the argument that they prescribe the *lex protectionis*. The entire international intellectual property edifice is built on national treatment combined with substantive minimum rights. Neither the Berne Convention nor subsequent treaties on copyright and related rights have been drafted with a particular conflicts rule in mind. This is understandable because the Berne Convention was drafted in a period when copyright was a young and still tentatively defined area of private law. Likewise, the development of private international law was at a crossroads, with very different methods to determine the applicable law competing for dominance.

Given its roots in printing privileges, copyright was seen by many as strictly territorial in existence and operation; or even as (still) belonging to the realm of public law, which would have placed it outside private international law altogether. The uncertain position of copyright in private law at the end of the 19<sup>th</sup> century also helps to explain why countries did not ensure protection for foreign authors on the basis of general equality clauses. Such clauses, recognising that foreigners have the same rights and obligations under private law as nationals do, were written into civil codes in the course of the 19<sup>th</sup> century. In turn, the lack of protection of foreign authors under general clauses stimulated the conclusion of bilateral and later multilateral treaties on copyright. These treaties were focused on *de facto* harmonisation of substantive norms. Where harmonisation was premature, states agreed to grant foreign authors equal treatment (‘national treatment’ or ‘assimilation’) to national authors; sometimes combined with reciprocity requirements.<sup>26</sup>

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<sup>23</sup> See the submission on the consultations on the preliminary draft proposal, at [http://ec.europa.eu/justice\\_home/news/consulting\\_public/rome\\_ii/wai/news\\_summary\\_rome2\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/wai/news_summary_rome2_en.htm)

<sup>24</sup> Rome II proposal COM 2003(427), p. 20.

<sup>25</sup> See doctrine discussed in: Mireille van Echoud, *Choice of law in copyright and related rights. Alternatives to the lex protectionis*. The Hague: Kluwer Law International 2003, p. 95 ff.

<sup>26</sup> For an in-depth analysis of the choice of law calibre of copyright and related rights treaties, see Mireille van Echoud, *op. cit.*, chapter 4.

Admittedly, a literal reading of Article 5(3) of the Berne Convention on national treatment (and of similar provisions in subsequent treaties) gives the impression it does contain a conflict rule. Article 5(1) expresses the core of national treatment, providing that authors from contracting states shall enjoy the rights granted to national authors, with the minimum protection as provided by the substantive norms of the Berne Convention. Article 5(2) then specifies: ‘The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed’.

The last sentence is often read as containing a conflict rule. However, an analysis of the objective and of the development of the wording of Article 5(2) over time shows something else. Article 5(2) merely reaffirms two points that were agreed from the start, but which the courts of some contracting states initially did not take up correctly when deciding disputes over copyright of foreign authors.<sup>27</sup> The first point is that the protection of foreign authors may not be subject to any formalities (regardless of whether national authors need to comply with formalities). The second point is that no reciprocal protection may be required whatsoever, unless explicitly provided for in the Berne Convention. Another argument against reading the *lex protectionis* into Article 5(2), is that it speaks of the ‘country where protection *is* claimed’, which, if anything, points to the law of the forum.

That a strict territorial interpretation of intellectual property is not universally accepted and that the *lex protectionis* may be limited in scope, is also evident from national laws. A number of national laws subject infringement questions to the law of the place of use, but other issues, such as ownership, to the law of the country of origin (Greece, Portugal).<sup>28</sup>

Other national laws provide a specific conflict rule for intellectual property, covering all aspects, not just infringement, but existence, scope and duration generally, as well as questions of ownership and transferability. The range of conflict rules includes but is not limited to the use of the *lex protectionis*.<sup>29</sup>

That international treaties do not prescribe the *lex protectionis*, does of course not mean that it is not a suitable conflict rule for industrial property and certain aspects of copyright and related rights. On the contrary, it can be argued it is the appropriate rule for at least existence, scope and duration of rights considering the instrumental rationale of copyright and related rights law. Intellectual property laws all strike a balance between what is and what is not in the public domain, in an attempt to do justice both to the individual creators or producers and to the interests of the community in an optimal national climate for the production and dissemination of information goods and services.

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<sup>27</sup> Ibid., p. 67-70.

<sup>28</sup> See K. Siehr, ‘Das Urheberrecht in neuen IPR-Kodifikationen’, [1988] *UFITA* 108, p. 9-25; art. 67 Greek Act on Copyright, Related Rights and Cultural Matters 1993.

<sup>29</sup> For example, the Swiss private international law act contains a classic *lex protectionis*, i.e., ‘intellectual property is governed by the law of the country for which protection is claimed’. The Belgian Code on international private law contains a similar provision, but uses a general closest connection criterion for the issue of initial ownership of industrial property rights (Art. 93). The Italian private international law act points to the place of use as connecting factor. The Austrian private international law act speaks of the place of use or place of infringement as connecting factors for all intellectual property issues.

If the applicable law were to be based on a place other than the place of use (e.g. on the country of origin), the coherence of the local intellectual property system would be in danger. The cross-border use of information products and services has become all-pervasive (e.g. the broadcasting of television shows made abroad, webcasting, on-demand distribution of foreign music and software). Local use would not be subjected to foreign law now and again, but systematically and in a large number of cases. To maintain the balance that has been struck nationally, one needs to allow the law of the place of use to reign.

The question of which acts constitute infringement of intellectual property rights cannot be separated from the question of whether a right exists, what its scope is, and for how long it exists. Arguably, both questions should therefore be subject to the law of the place of use or *lex protectionis*.

The same is not necessarily true for the legal consequences of an infringement. It is conceivable that the law of the common habitual residence of the right holder and infringer governs the remedies and issues such as liability. It is also unclear why the parties to a dispute over infringement could not choose the applicable law, at least for all issues other than the (un)lawfulness of the act. Particularly where many jurisdictions are potentially involved, as may be the case with satellite broadcasting or publication on a website, dispute resolution may be helped by allowing parties freedom of choice. Equally, the right holder and alleged infringer whose dispute arises in connection with a contractual relationship (exploitation licence, production agreement, etc.) would benefit from the possibility to subject any legal consequences of infringement to the law that governs the contract.

As the Rome II proposal currently stands, it does not increase legal certainty for either owners of intellectual property or users. They may not assume that in a dispute with a company from the same country, their 'own' law applies. A party choice is not allowed, not even with respect to pre-contractual liability (prior dealings) resulting from failed negotiations over intellectual property contracts (Art. 13, Common Position Rome II). Under the Rome Convention on the law applicable to contractual obligations (1980), parties to an agreement involving intellectual property are free to choose the law that governs their contractual rights and obligations.

Furthermore, the unconditional application of the *lex protectionis* is particularly troublesome considering the non-material nature of intellectual creations, combined with the all-pervasiveness of modern communication technologies. In many instances, this causes the use of protected subject-matter to take place in many countries simultaneously. This exposes the content provider to liabilities under as many (contradictory) laws. A satellite broadcast may be initiated in one country and may be received in all places that are in the satellite's footprint, regardless of whether the broadcast is destined for all of those places. The posting of a music-file on a web-server in one country in principle makes it accessible throughout the world. Copies will be made on cache-servers located elsewhere. During the transport of a file from A to B, routers determine through which countries (copies of) the data packets, into which the file is split, travels. One can wonder whether all places where a work or other intellectual creation is reproduced or communicated should be considered places of use for choice-of-law purposes.<sup>30</sup> Even if a further criterion were developed to limit the number of applicable laws to those of states with a close connection to the

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<sup>30</sup> In substantive copyright law this is of course also a point of discussion. Art. 5(1), Information Society Directive, for instance, provides that the reproduction of a work is not an infringing act if it concerns an ephemeral copy with no independent economic value, which is made solely for the purpose of distribution in a network by an intermediary (e.g., a company that operates Internet routers, an access provider who operates a proxy-server) for third parties. Exactly which copies fall within the scope of Article 5 is disputed. See, for instance, the 21 September 2001 report on the implementation of the Directive into Dutch law by the *Studiecommissie Informatiemaatschappij* (Study Committee Information Society) of the Dutch ALAI Group (*Vereniging voor Auteursrecht*).

case, there may still be a large number of national laws to apply. Applying at least a single law to the question of what the legal consequences of infringement are could simplify matters.

The territorial approach chosen in Rome II seems to preclude the development of criteria for infringement aimed at identifying the jurisdiction with which there is a truly close connection. From that perspective, it may be preferable to exclude intellectual property torts from Rome II, so as to enable the courts of Member States to develop suitable conflict rules for ubiquitous infringements.

## **Unfair Competition**

Under Article 6 of the Common Position, the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. Recital 19 presents this rule as a clarification of the *lex loci delicti* rule, i.e., the place where the unlawful act takes place is considered to be the market where competitive relations are affected or consumer interests damaged. In a number of Member States, this so-called ‘market rule’ is already explicitly provided for (e.g. Austria, Spain, the Netherlands). Parties to a dispute over unfair competition are not free to choose the applicable law (Art. 6(4), Common Position Rome II). The Common Position does not clarify what caused the change of heart; the original European Commission proposal did give freedom of choice.

If the anti-competitive act is directed at a particular competitor only (i.e., where the interests of other competitors or consumers are not directly affected), the general rule of Article 4 Common Position Rome II applies. Examples are where a competitor induces a breach of contract, or discloses business secrets.

For all practical purposes, the exception means that a dispute over acts of unfair competition in a foreign market, between companies established in the same country, will be judged under the law of their country of common residence. Another possibility is that where the competitors have a contractual relationship which is linked to the claim of unfair competition (e.g. disclosure of confidential business information, passing of), the law that governs their contract also governs the tort. However, the dominance of the contract statute must not be readily accepted, given the fact that Article 4(3) is meant as an exception, to be applied with great restraint.

Oddly enough, the deviation of the market rule does not go so far as to allow parties to a dispute which only affects their competitive relations to choose the applicable law. Article 6(4) explicitly excludes a party choice by agreement. This appears unsatisfactory, as claims of unfair competition may result from disputes over contracts or prior dealings (i.e., pre-contractual liabilities), and for those categories, parties are free to choose the applicable law. For contracts, this follows from the Rome Convention 1980; for pre-contractual liability, from Articles 12 and 14, Rome II proposal. Obviously, it is in the interest of parties to be able to choose one law which will cover both contractual and related non-contractual aspects of their relationship.

## **Defamation and Personality Rights**

For defamation and other harm to a person’s interests in personality, there are no harmonised standards of substantive law at the European level.<sup>31</sup> Because such issues often involve a balancing of interests between freedom of expression and a right to privacy, there is of course a

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<sup>31</sup> The Steering Committee on the Media and New Communication Services (CDMC) of the Council of Europe is undertaking to at least align the national defamation law with the caselaw of the European Court of Human Rights. See <http://merlin.obs.coe.int/iris/2006/5/article5.en.html>.

certain shared frame of reference in Articles 10 and 8 of the European Convention on Human Rights. Nonetheless, national laws reflect very different concepts of ‘personality rights’, which in part explains why Member States found it difficult to agree on a conflict rule for defamation.

For example, in Germany the position of persons affected by publications in the media is framed in terms of their general constitutional personality right which translates into a substantive legal right in civil law.<sup>32</sup> Infringement of personality rights are actionable under the general provision on civil wrongs in the Civil Code (Art. 823(1) *Bürgerliches Gesetzbuch*). Neither French nor English law recognises a similar general personality right. Under English law, interests in personality are protected piecemeal under specific torts. Of these, the tort of defamation is of primary importance, since it protects interest in reputation and to a very limited extent, privacy interests.<sup>33</sup> Invasions of privacy are not actionable as such. Like German law, French law contains a general provision on civil wrongs (Art. 1382 *Code Civil*). However, under French law, there is a strong connection between criminal press offences and civil liability. Press offences are regulated by Art. 23 *et seq.* of the French Press Act of 1881<sup>34</sup> and pre-empt the general rules on liability for civil wrongs. Consequently, offences such as defamation are not actionable under Art. 1382 of the *Code Civil* unless the facts are punishable under the Press Act. Article 1382 does have a residual function, e.g. for wrongs not (or no longer) regulated by the Press Act.<sup>35</sup>

What complicates matters further is the characterisation under national laws of rights of reply. The Council of Europe’s Convention on Transfrontier Television only provides a very non-specific instruction to contracting states to provide for a right of reply for broadcasting. This of course has no direct effect in horizontal relations between press and public. In the EU, the right of reply is harmonised in a minimalist fashion under the Television without Frontiers Directive, for television broadcasting only. For other media, the EU Council recently adopted a common position (Interinstitutional File COD/2004/0117) on a Council and Parliament Recommendation which suggests Member States guarantee a ‘right of reply or equivalent remedies in relation to on-line media, with due regard for their domestic and constitutional legislative provisions, and without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium’.

Lacking substantial harmonisation, local rules on the right of reply continue to reflect different concepts, with different positions in the relevant local legal framework.

In the Netherlands for instance, the rectification right of Art. 2:167 Civil Code is a corollary to the general right of compensation for civil wrongs (Art. 2:162 Civil Code, roughly equivalent to Art. 1382 French Civil Code and Art. 823 German Civil Code).<sup>36</sup> In Germany, the right of *Gegendarstellung* is regulated in the press and broadcasting laws of the German States and characterised as a specific media law issue, outside the normal realm of liability for civil wrongs and its standards of fault and damage. Consequently, if in an international case a court designates Dutch law as applicable to an alleged wrongful publication, it stands to reason the rectification

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<sup>32</sup> For an analysis in relation to the media, see M. von Hinden, *Persönlichkeitsverletzung im Internet*, Tübingen: Mohr Siebeck 1999.

<sup>33</sup> For an analysis of the protection of personality rights (economic and dignitary) under Anglo-Saxon law, see H. Beverley-Smith, *The Commercial Appropriation of Personality*, Cambridge: Cambridge University Press 2002.

<sup>34</sup> Loi sur la liberté de la presse du 29 juillet 1881, consolidated version of 19 April 2006, <http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm>

<sup>35</sup> On the relationship between civil wrongs by the media and press offenses, see N. Mallet-Pouhol, De la cohabitation entre la loi de 29 juillet sur la presse et l'article 1382 du Code Civil, *Légipresse* no. 234-II, September 2006, p. 93-100.

<sup>36</sup> In principle, the normal standards of a tort (wrongful act, damage, causal connection between act and damage) need to be fulfilled, but rectification of false information may also be ordered if the defendant did not (have to) know the facts reported were false or misleading and is thus not liable (Art. 2:167(2), Dutch Civil Code).

right of Art. 6:167 Civil Code can also be invoked. If, however, the court concludes that German tort law governs the publication –for instance because it is a country of receipt– it is not evident that the right of reply as regulated in German media law applies as well.

The article on defamation in the preliminary Rome II draft proposal of 2002 provided that the right of reply and equivalent measures, on the one hand, would be governed by the law of the country in which the broadcaster or publisher is established. The unlawfulness of the publication or broadcast, on the other hand, would be governed by the law of the country where the victim is habitually resident at the time of the tort or delict. This orientation on the victim drew a lot of criticism during the consultation round. The publishing and media industries, in particular, opposed the idea that Rome II would expose them to liabilities under laws which do not favour freedom of expression. Also, the proposed rule would make it possible that a law governs the lawfulness of a publication even though it is not distributed in the country of residence of the plaintiff. For media established in the United Kingdom especially, Rome II would substantially change their exposure to defamation claims and similar types of claim. Under the 1995 Private International Law (Miscellaneous Provisions) Act, so-called ‘double actionability’ was abolished for torts, but continued for defamation.<sup>37</sup> Put simply, under the double actionability rule, a publisher sued before English courts can only be held liable for defamation under a given foreign law (e.g. of the country where publication took place) if the facts constitute a tort under both foreign and English law. The media favoured a rule based on the place of establishment of the publisher/broadcaster, or the exclusion of defamation altogether.

In the 2003 proposal, defamation and similar torts were subjected to the general rules (*lex loci delicti* and common habitual residence rule). It was provided expressly that foreign law must be disapplied in favour of the *lex fori* if it is incompatible with the public policy of the forum in relation to freedom of the press. Whether the public policy test envisaged here is different from the general one under Article 22, discussed above, is unclear.

In its first reading, the European Parliament took the position that the country with the closest connection to the violation should be deemed to be the country at which the publication or broadcasting service is principally directed or where editorial control is exercised. In addition, the Parliament adopted an amendment to the effect that not only the right of reply was governed by the country of establishment of the broadcaster or publisher, but that this law would also govern any preventive measures regarding the content of a publication or broadcast. These amendments were not acceptable to the European Commission. The conflict rules of Member States do not generally give outright priority to the interests of media over the interests of (legal) persons in protection of their reputation and privacy. The Council working group then discussed virtually all conceivable options, but could not reach agreement.

Consequently, in its revised proposal of February 2006, the European Commission excluded defamation and violations of privacy and other personality rights by the media. The concept of media would have covered television and radio broadcasting and print media, including distribution on the Internet. As it turned out, however, there was no consensus on the exact meaning of media either. Therefore, the Council of the European Union decided to drop defamation and violations of interests in personality altogether.

It is unlikely that the European Parliament will let the exclusion go by without discussion in its second reading. Rapporteur Wallis has already declared that a regulation not covering defamation and the like is unacceptable. However, it is even more unlikely that defamation will be re-introduced. The subject will remain on the table because of the review clause. Under Article 30 of

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<sup>37</sup> See [http://www.opsi.gov.uk/ACTS/acts1995/Ukpga\\_19950042\\_en\\_1.htm#tcon](http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950042_en_1.htm#tcon).

the Common Position on Rome II, no later than four years after the Regulation comes into force, the European Commission must report on a rule for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

### **Rome II: An Improvement?**

From the above, it is clear that the Rome II proposal is not likely to bring a significant increase in legal certainty for broadcasters or the media in general. The rules for intellectual property do not accommodate the realities of a networked world. The proposal allows parties to a (future) dispute very little freedom to choose the applicable law, as it excludes any choice involving issues of intellectual property infringement and acts of unfair competition. The situation with regard to defamation and the like remains unchanged, so in this area also, there is no improved predictability as to the applicable law. Another thorny issue that remains unclear is how Rome II relates to other Directives, notably the E-commerce Directive,<sup>38</sup> the ‘Television without Frontiers’ Directive and its proposed successor, the Audiovisual Media Services Directive.<sup>39</sup> What effect do the ‘home country control’ or ‘country of origin’ principles in these Directives have on the applicable law as determined by the Rome II regulation? The extent to which the various forms of the principle of mutual recognition (country of origin, home country control) are to be considered as conflict of law rules is the subject of debate, and one that goes beyond the scope of this contribution. No doubt, the Court of Justice of the European Communities will in time be asked how the directives are to be reconciled with the rules of Rome II.

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<sup>38</sup> See M. Helner, ‘The country of origin principle in the E-commerce directive – A conflict with conflict of laws?’ *European Review of Private Law* 2004/2, p. 193-213; M. Vermeer, ‘Electronic unfair competition and applicable law, an open spot in the European jungle’, vol. 7.5 *Electronic Journal of Comparative Law* (<http://www.ejcl.org>), A. Dickinson ‘Cross border torts in EC courts – a response to the proposed Rome II Regulation,’ *European Business Law Review* 2002-5, p. 369-388.

<sup>39</sup> COM(2005) 646 final. See further, Susanne Nikoltchev, ‘European Commission: Draft Audiovisual Media Services Directive’, *IRIS* 2006-1: 5, available at: <http://merlin.obs.coe.int/iris/2006/1/article7.en.html>