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## Some reflections on non-contractual obligations in cyberspace considering the Rome II regulation

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**Abstract.** Internet penetration has created a revolutionary change in people's communication nowadays. By creating immaterial and elusive cyberspace, without borders and limits of communication a three-dimensional territorial concept has been transformed by globalizing social relations and reducing importance of regional or national dimensions. All situations taking place on the Internet also occur somewhere in the reality. Sometimes it is difficult to measure whether the events are random or unrelated to particular events. Technological progress offers new possibilities to change a user's real location either consciously or subconsciously. However, the law is highly territorial in nature. This article focuses on existing conflict of law rules under the EU law and reveals its weaknesses in relation to non-contractual obligations caused by the Internet. Therefore, the author observes core concepts of the applicable law by analyzing the legal notions and information technology concepts and assessing the suitability of regulation in cyberspace. The EU regulation, the doctrine of European and domestic authors as well as the EU case law have been examined. As a result, a number of conclusions have been drawn on the suitability of non-contractual relationships in cyberspace considering Rome II Regulation.

### Introduction

Currently Internet penetration has created a revolutionary change in human communication. By creating immaterial and elusive cyberspace,<sup>1</sup> without borders and limits of communication it has been transformed into a three-dimensional territorial concept by globalizing social relations and reducing the importance of regional or national dimensions. As any other structural change it impacts on the economic processes and law. (Kinis, 2002: 66) Borderless nature of the Internet often leads to the situations where legal relationships arising out of torts or delicts established through the Internet involve more than one state, thereby more than one legal system. For example, the intervention of privacy, defamation, false statements, dissemination of the commercial confidential information, and infringement of intellectual property rights, unfair competition and other related activities shall occur in one country, but the consequences may affect persons in other countries. Therefore, it is of a great importance to settle applicable law similar to other cross-border disputes.

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<sup>1</sup> William Ford Gibson coined the term "cyberspace" in his short story "*Burning Chrome*" (1982) and later popularized the concept in his debut novel "*Neuromancer*" (1984). Gibson describes cyberspace as coherent hallucinations, each day felt by a billion of ordinary operators around the world with the following quotation: "*A graphic representation of data abstracted from banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the nonspace of the mind, clusters and constellations of data. Like city lights, receding.*" See more: A Dictionary of the Internet. (2009.) Oxford: University Press.

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There are three different concepts of the applicable law to damage caused by the wrongful act under Private International Law. In particular, the court may apply the law of forum (*lex fori*), the law of the country in which the tort occurs (*lex loci delicti commissi*). In case there is a more appropriate law in particular cases under common law rules, the tort should be governed by the “proper law of the tort”. (КАНАШЕВСКИЙ, 2006: 495) Such an approach to the contractual obligations was created in the nineteenth century by English judges and it meant that contractual obligations should be governed by the most appropriate law where the contract was made: either the applicable law chosen by the parties or those the contract has the closest connection with. (Morris, 2009: 353) Nowadays, the concept of closest connection is successfully used to state the law applicable to non-contractual obligations. (Clarkson, 2011: 203–205) While the concept of the *lex fori*, as proposed by the scientists of the nineteenth century, is not of great importance today.

Also, Friedrich Karl von Savigny considered that the court was not obliged to apply a local substantive law (*lex fori*). In his view, foreign courts should be given the same rights as their nationals. In his opinion, international comity dictated the need to the court to apply the foreign substantive law equally to the law of forum as a result of sustainable evolution rather than due to the compliance. (Savigny, 1880: 69 – 70) Therefore, a commonly used choice of law in tort is the *lex loci delicti commissi* or proper law concept. As a matter of history, the law of torts is largely a creation of the twentieth century, as a response to enormous changes in manufacture and distribution of products and in transport (as a source of increased danger) and communications. (Morris, 2009: 393).

Furthermore, cyberspace related activities ranging from using the Internet to communicate, to do the online shopping or to spend the time, till the technological provision of equipment to provide an access to cyberspace have made a display of non-contractual relationship more diverse. Oxford University professor J.H.C. Morris pointed out that for centuries the law of torts has almost been ignored in the conflict of laws. Even J. Story, known as a creator of the term of Private International Law, in his treaty “Commentaries on Conflict of Laws” (1834) did not refer to torts at all. The survey to choice of law to torts was issued only in the second half of the twentieth century in the sixth edition of A.V. Dicey’s “Conflict of Laws”. (Morris, 2009: 393).

In most European countries such as Austria, Hungary, Poland, Greece, Italy, Germany, and the judicial practice in France, Belgium and the Scandinavian countries regarding the choice of law to torts is governed by *lex loci delicti commissi*. (КАНАШЕВСКИЙ, 2006: 496) In the Republic of Latvia the choice of law applicable to non-contractual obligations is based on *lex loci delicti commissi* as well. It is stated that obligations arising from a tort are governed by the law of the place where the tort occurs,<sup>2</sup> unless international treaties or the EU regulations state otherwise.<sup>3</sup> Thus, applying the law applicable to non-contractual obligations guided by the geographical references such as the place of wrongful act is difficult to refer to the actions in the Internet. Cyberspace with different locations is considered to be everywhere, while the laws are territorial. (Kinis, 2002: 67) Accordingly, conflict rules which should be applied in situations regarding the Internet can undergo some difficulties or become non-effective.

Everything that occurs on the Internet also takes place somewhere in the reality. However, occasionally it is hard to denote the place of real action, because it may be accidental or even unrelated to the event. Difficulties may arise with regards to determination of website user’s habitual residence as well. While the website is linked to a specific IP address (Internet Protocol Address), which is a unique identifier, yet it may differ from the Internet user’s habitual residence in reality. IP address unmistakably identifies the ISP (Internet Service Provider, hereinafter – the ISP), which is closely connected with the country where end-users are given access to the Internet. Firstly, all ISPs must be registered with the competent authority (the Public Utilities Commission in the Republic of Latvia) and to be certified to carry out their activities. Secondly, the ISPs provide Internet access only within a definite geographical

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<sup>2</sup> Law on 28<sup>th</sup> January, 1937. Civil Law of Republic of Latvia: Introduction, Article 20.

<sup>3</sup> Ibid, Article 25.

region. In the certain geographical region there are no particular problems regarding the valid law system.

In contrast, the end-user's IP address can be unsuitable to determine one particular end-user's location. Using a special proxy server, the Internet end-user can create a false impression of his location. Thus, if the end-user has its own domain, which is associated with a unique IP address and is not physically variable, the place of domain registration can differ from a user's habitual residence. For example, the Internet user with a habitual residence in the Republic of Latvia can register his domain in the Republic of Estonia while using a server (web hosting) and storing the data in another country that can be accessed from anywhere in the world with Internet browsers, such as the Internet Explorer, Firefox, Chrome and others. Consequently, the result achieved using a *lex loci delicti commissi*, can be quite distant from the actual event, or even absurd.

### **Regulation of Torts in the European Union**

As early as in 1967 there was a proposal from the governments of the Benelux countries to the Commission of the European Communities for the unification of Private International Law particularly in the field of Contract Law. It was planned to develop a new conflict rules in Contract Law by including these rules into conventional terms. However, the development and entry into force of this convention was delayed. Initially, the draft of convention covered non-contractual obligations, but later those rules were excluded from convention. Finally on 1<sup>st</sup> April, 1991 the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter – the Rome Convention), concluded in 1980, came into force. It was the first uniform conflict rules for contractual obligations throughout Community. (North, 2008: 667 – 668) As the Rome Convention did not contain regulation of non-contractual obligations the question of the issue had been left to the national level.

In 2003 the EU institutions focused on non-contractual obligations and a new regulation was developed. Since 11<sup>th</sup> January, 2009 in all the EU countries, except Denmark,<sup>4</sup> the Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter – the Rome II Regulation) has been available. The regulation was adopted to harmonize the rules of conflict of law regarding non-contractual obligations in the EU Member States. Regardless to the court resolving the dispute in any Member State, the same law has to be applied. The Rome II Regulation contains a universal application, which is derived from the Rome Convention.<sup>5</sup> Article 2 of the Rome II Regulation provides that any law specified by this Regulation shall be applied whether or not it is the law of a Member State. So a rule of conflict of law could indicate the law of any country in the world which the court should be obliged to apply. However, it is supposed to take into account overriding mandatory provisions as set out in the Article 16 of the Rome II Regulation: “Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.”

Essentially substantive scope and provisions of Private International Law relating to non-contractual obligations should be consistent with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter – the Brussels I Regulation). In the nearest future Brussels I Regulation intends to be

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<sup>4</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. Official Journal. 31.7.2007. L 199/40 – 49. Recital 40.

<sup>5</sup> Rome Convention of 1980 on the Law Applicable to Contractual Obligations. Official Journal. 08.7.2005. C169/10 – 22. Article 2.

modernized.<sup>6</sup> Brussels I Regulation refers to the competent jurisdiction, while the Rome II Regulation specifies the law applicable to the dispute. Therefore, the provisions of these regulations in terms of their application are designed as compatible as possible. None of these regulations contains specific conflict of law rules relating to actions in the Internet. Both regulations either as in terminology or application of the terms contain the Internet neutral standards. However, the deficiency of special Internet related provisions can cause some problems.

## Rome II Regulation

Rome II Regulation governs the whole range of issues. The concept of a non-contractual obligation varies from one Member State to another. Therefore, due to this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict of law rules should also cover non-contractual obligations arising out of strict liability.<sup>7</sup> For the purposes of Rome II Regulation, damage shall cover any consequence arising out of torts or delicts, unjust enrichment activities without proper authorization (*negotiorum gestio*) or pre-contract negotiations (*culpa in contrahendo*).<sup>8</sup> Furthermore the regulation refers not only to compensation for damage that has already arisen, but also to actions to prevent future damage, such as injunctions and other prohibitions.<sup>9</sup>

In contrast to the Rome Convention, which gave priority to the law chosen by the parties, the Rome II Regulation would not be a coherent choice. Article 14 provided an exception relating to situations where the damages had already occurred to the parties and they could choose the law applicable to non-contractual obligations. Thus, it would be possible to avoid further costs of the proceedings. Such an agreement cannot be concluded to choose the law relating to the infringement of intellectual property rights or unfair competition.<sup>10</sup> Generally, it is quite rare when the parties would choose the law applicable to the damages. In situations where the parties have not made such a choice, pursuant to Article 4 of the Rome II Regulation, the law applicable to a non-contractual obligations arising out of a tort or delict 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. It means that the regulation prefers the law of the country of the immediate damage (*lex loci damni*) to the law of the country of the harmful act, probably because it pays more attention to compensating the victim than to influencing the behaviour of wrongdoer. (Bogdan, 2010: 383).

It is noteworthy that the Rome II Regulation does not allow the victim to choose between the law of the place of harmful act and the law of the place of the resulting damages. As far as jurisdiction is concerned, under Article 5 (3) Brussels I Regulation, the claimant is entitled to choose between the courts of these two countries, and submit a claim at its own discretion. However, unilateral freedom of choice does not automatically point out the choice of law governing such non-contractual obligations.

If the wrongful act causes damage in several countries (or may occur in several countries), then according to Article 4 (1) of Rome II Regulation it means that the law of all countries would to be applied to various parts of such damage, linking the injury to a specific country. Thus, combining the provisions of Rome II Regulation and the Brussels I Regulation if the victim decides to bring the action in the country where a part of damages has arisen, the court will have jurisdiction regarding that part of

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<sup>6</sup> See more: Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Brussels, 14.12.2010 COM(2010) 748 final 2010/0383 (COD).

<sup>7</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. Official Journal. 31.7.2007. L 199/40 – 49. Recital 11.

<sup>8</sup> Ibid, Article 2 (1).

<sup>9</sup> Ibid, Article 2 (2-3).

<sup>10</sup> Ibid, Article 6 (4) and Article 8 (3).

damages and will apply a law of forum. Conversely, if the victim brings the action in the home country of the wrongdoer or in the country where the wrongful act was committed, the court will have jurisdiction over whole damage in general, but it will have to apply the laws of all countries where some part of resulting damages arose. (Bogdan, 2010: 383).

The localization of the immediate damage can be problematic when the damage arises on the Internet. For example, someone distributes a virus damaging the merchant's website or even web server. Thus, the merchant's indirect consequences of the damage such as business interruption, loss of clients, etc., which undoubtedly are very important to the merchant, most likely will arise in the country of a merchant's habitual residence. By contrast, the direct consequences of the damage will occur in the country where the server is situated, respectively, it can be almost any place in the world. Article 4 (2) of Rome II Regulation provides an exception of the *lex loci damni* contained in Article 4 (1), namely, if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall be applied.

The second exception provided in the Article 4 (3) involves the concept of "closest connection" and excludes the application of Article 4 (1–2). Where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with a country other than that indicated in the Article 4 (1–2), the law of that other country shall be applied. As explained in recital 14, the objective of "doing justice in individual cases" is just a promise to create "a flexible framework of conflict-of-law rules", capable of accommodating various types of non-contractual obligations and open to exceptions for atypical situations. In this sense, "justice" is done if, for each individual case, a "proper law" can be found. (Dickinson, 2010: 13) Therefore, the provision of the Article 4 (3) seems to be more appropriate to determine applicable law to the non-contractual obligations in the Internet. Damage caused in the Internet, as mentioned above, has difficulties to be determined by its location and most often in cases when the damages have been caused in various places, one of them, however, will be dominant, while the other will only be subordinate.

Articles 5–9 of the Rome II Regulation contain a number of special conflicts of law rules relating to products liability, unfair competition, environmental damage and infringement of intellectual property rights. From the Internet point of view, special rules with a particular importance are denoted by the Article 5 of the Rome II Regulation. They require that the law applicable to non-contractual obligation arising from an infringement of an intellectual property rights shall be the law of the country for which protection is claimed (*lex loci protectionis*).

The most commonly country where the protection is claimed coincides with the country where the damage occurred. If the trade mark is illegally used on the Internet, there may be a violation of trademark protection in various countries at the same time, and laws of all countries where the injury occurred and protection is claimed shall be applicable. Infringements relating the Community trade mark will be governed with regard to the whole Union, in a first place by the EU law itself, so for example, the Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. On all matters not covered by this Regulation a Community trade mark court shall apply its national law, including its Private International Law.<sup>11</sup> In the case of a non-contractual obligation arising from the infringement of a unitary EU intellectual property rights, the law applicable shall, for any question that is not governed by the relevant EU instrument, be the law of the country in which the act of infringement was committed.<sup>12</sup>

Therefore, in the trade mark infringement case, a crucial role in the conflict of law will be the place where the infringement occurred, rather than the place where the damage occurred, as was described

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<sup>11</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. Official Journal. 24.03.2009. L 78/1-42. Article 101 (2).

<sup>12</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. Official Journal. 31.7.2007. L 199/40 – 49. Article 8 (2).

above under the Article 4 (1) of the Rome II Regulation. According to the *maxima lex specialis derogat legi generali*, special rule prevails over the general rule, namely, intellectual property rights applicable to the specific provisions, i.e., the Article 8 of the Rome II Regulation thereof, but the Article 4 shall not apply in this case. In the case of the infringement of EU trade mark committed through the Internet, this seems to mean that fortuitous the place where the wrongdoer acted may become decisive. (Bogdan, 2010: 384) Hence this place could be completely unrelated to the country where the damage occurred. In contrast to the Article 4 (1) of the Rome II Regulation, the Article 8 (2) does not contain exceptions as the principle of closest connection and the unity of habitual residence of the wrongdoer and a person sustaining damage. This adds complexity to the law applicable to infringements on the Internet. In addition, the law applicable under Article 8 may not be derogated from by an agreement.<sup>13</sup> So it is hard to comply with one of the fundamental objectives of the Rome II Regulation promoting the foreseeability of court decisions.<sup>14</sup>

It is particularly important for the Internet related torts, that the non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, are excluded from the scope of Rome II Regulation.<sup>15</sup> Unfortunately, it was left incomplete because no consensus was reached on the suitable applicable law to such issues. Some Member States were concerned about situations where their courts might become obliged to give a judgement against local publishers pursuant to foreign law even when the publication in dispute was perfectly in conformity with the local law and, in fact, enjoyed the protection of the constitutional rules of the *lex fori* on the freedom of expression. (Bogdan, 2010: 386).

Within the process of drafting the Regulation, the disputes arose to prevent the practice made by litigants to choose a forum which most likely would provide a favorable judgment (*forum shopping*). The courts of England and Wales are considered to be the friendliest jurisdictions to plaintiff in the world. However, major litigation related expenses and opportunities to get a large compensation in these jurisdictions have an unfavourable influence on the freedom of expression.<sup>16</sup> Consequently, the lack of regulation on non-contractual obligations arising out of violations of privacy and personality rights is even more important.

Even though, presently there are no unified conflict of law rules for violations of privacy and defamation in the EU level. The Brussels I Regulation lays down the jurisdiction of such violation cases according to the Article 5 (3). As the Court of Justice of the European Union (hereinafter – ECJ) has stated in joined cases *eDate Advertising GmbH v. X* (C-509/09) and *Olivier Martinez and Robert Martinez v. Société MGN Limited* (C-161/10), the phrase “Place [ . . . ], where the harmful event occurred or may occur” provided in Article 5 (3) of the Brussels I Regulation in matters relating to violations of privacy or defamation by dissemination of information on the Internet has occurred in several Member States, is interpreted as meaning that the person sustaining damage may choose one of three options to bring an action suing for damages.

Firstly, the action may be brought before the court in a country where editor of publications caused violations of privacy or the defamation is registered. Secondly, it may be brought in the court of any Member State where the publication was distributed and where the violations of privacy or the defamation occurred. Thirdly, there is also a possibility to take a legal action in the Member State

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<sup>13</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. Official Journal. 31.7.2007. L 199/40 – 49. Article 8 (3).

<sup>14</sup> Ibid, Recital 16.

<sup>15</sup> Ibid, Article 1 (2) (g).

<sup>16</sup> Draft Report on December 2, 2011 of the The European Parliament Committee on Legal Affairs with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)(2009/2170(INI), pp. 5.

where “centre of gravity of conflict” is located, which is liable to compensate infringement losses. It is assumed that the Member State of “centre of gravity of the conflict” is the one where the contested information is objective and of particular importance and which at the same time is a “centre of interest” of person sustaining damage.

In that case courts have jurisdiction only under the part of the damage caused in the territory where the court is seized and the legal provisions of national law (*lex fori*) would be applied. As recognized by the ECJ, “the conflict’s centre of gravity” would be the country where the infringement against the person sustaining damage becomes the most capacious and intensive. It is a territory where the media centre may foresee the consequences of such a violation to become a defendant there. In that view, the “centre of gravity” in the country where the court has the most favourable position to examine the legal proceedings relating involved interests in an integrated way.

The leading scientists from honorable European universities have pointed out that the freedom of expression is the basis of a democratic society. If this freedom is abused by harmful actions against privacy and rights relating to personality, there should be “balanced and reasonable” remedies available.<sup>17</sup> In order to avoid this deficiency, the amendments to the Rome II Regulation are prepared providing the implementation of a new framework “Article 5 (a) Private life and personal right”. New provisions state that the law applicable to a non-contractual obligation arises out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable as a habitual resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country in which the rights of the person seeking compensation for damage are.<sup>18</sup> This rule contributes the implementation of foreseeability of the legal consequences.

In addition, there is a new approach to “freedom of choice” restrictions provided in the Article 6 (4) and the Article 8 (3) of the Rome II Regulation, namely, the law applicable under Article 5 (a) may be derogated from by mutual agreement pursuant to the Article 14. Whereas, the proposal designed to add a provision to the Rome II Regulation to govern the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation would be a much more progressive and XXI century approach to the resolution of such disputes and facilitate a move towards a more modern legal culture.

## Conclusions

Nowadays, Internet penetration has created a revolutionary change in human communication. By creating immaterial and elusive cyberspace, without borders and limits of communication it has been

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<sup>17</sup> See in particular the publications made in July 2010 in the online symposium *Rome II and Defamation*: <http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium> by Jan von Hein, Professor of civil law, private international law and comparative law at the University of Trier, Germany; Trevor Hartley, Emeritus Professor at the London School of Economics; Andrew Dickinson, Visiting Fellow in Private International Law at the British Institute of International and Comparative Law and Visiting Professor at the University of Sydney; Olivera Boskovic, Professor of Law at the University of Orléans; Bettina Heiderhoff, Professor of Law at the University of Hamburg; Nerea Magallón, former Professor of Law at the University of the Basque Country, at present teaching Private International Law in Santiago de Compostela; Louis Perreau-Saussine, Professor of Law at the University of Nancy, and Angela Mills Wade, Executive Director of the European Publishers Council. See also Jan-Jaap Kuipers, *Towards a European Approach in the Cross-Border Infringement of Personality Rights*, 12 German Law Journal 1681-1706 (2011). For the EU and fundamental rights, see Darcy S. Binder, *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*, Jean Monnet Working Paper No 4/95.

<sup>18</sup> Draft Report on December 2, 2011 of the European Parliament Committee on Legal Affairs with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)(2009/2170(INI), pp. 8.

transformed into three-dimensional territorial concept by globalizing social relations and reducing importance of regional or national dimensions. As any other structural change it impacts the economic processes and law. Borderless nature of the Internet often leads to situations where legal relationships arising out of torts or delicts established through the Internet are connected with more than one state, thereby more than one legal system. For example, the intervention of privacy, defamation, false statements, dissemination of the commercial confidential information, and infringement of intellectual property rights, unfair competition and other related activities shall be obtained in one country, but the consequences may affect persons in other countries. Therefore, there is a great importance to settle applicable law similar to other cross-border disputes.

The localization of the damage or finding of wrongdoer can be problematic when the damage arises on the Internet. Sometimes it is difficult to measure whether the events are random or unrelated to particular events. Technological progress offers new possibilities to change a user's real location either consciously or subconsciously. However, the law is highly territorial in nature. At the EU level Rome II and Brussels I Regulations create a useful legal framework of conflict of law rules applicable to non-contractual obligations and constitute an important step towards a comprehensive European Private International Law. However, none of those regulations contains specific conflict rules to the situations on the Internet. Regulations provide the rules regarding terminology and application which are neutral to the Internet. Therefore, the fact that both regulations provide no special rules to the Internet related situations, does not mean that those situations remain unregulated, but rather that the broadly formulated rules of regulations must be applied to these situations. If the conflict of law applied to the Internet related situations causes difficulties, these problems will have to be solved by a reasonable and flexible interpretation of the Rome II and Brussels I Regulations.

The absence of regulation regarding the non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, are excluded from the scope of Rome II Regulation, and it is particularly important for the Internet related torts. Thereby freedom of expression, which is the basis of a democratic society, is threatened. If this freedom is abused by harmful actions against privacy and rights relating to personality, there should be "balanced and reasonable" remedies available. It remains to be seen whether and how the ECJ which is competent to perform the interpretation, will be capable of reconciling them with the rapid development of information technology.

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