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Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law

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Abstract
This article considers the current situation in European private international law regarding the protection of privacy and personality rights in social media. When privacy infringements occur on the internet, difficult questions as to determining jurisdiction and the applicable law arise. This field is so far only partially governed by European Union law and still leaves a gap that must be filled by the domestic choice-of-law rules of the member states. The article addresses these problems taking into account the recent case law of the Court of Justice of the European Union.

Keywords Jurisdiction · Choice of law · Social media · Privacy and personality rights

1 Introduction

The protection of privacy in the context of social media raises intricate and so far not fully resolved questions. Social media platforms such as Facebook or Twitter operate in an international environment; frequently, the habitual residence of a user of social media in Europe and the seat of a service provider diverge, as the latter is often based in the USA. Moreover, social media platforms are in most cases open to users from different jurisdictions. In cases of a violation of privacy (including claims for defamation), lawyers thus have to solve the problem as to which substantive law applies to the litigation. The answer may be found in international contract law (regarding claims against the service provider), international tort law (regarding the relations among social media users), or even international successions law (concerning the right to terminate the Facebook account of a deceased person, for example). In addition, data protection rules belong to public law and may be characterized as overriding mandatory provisions that have to be taken into account regardless of the otherwise applicable law. In the light of the inherently transnational character of the internet, the utility of traditional territorial connecting factors such as lex loci delicti commissi is significantly diminished, leading to the question as to whether new objective criteria should be developed or whether the scope of party autonomy should be further extended in cyberspace cases. This article will analyse these challenges from the perspective of European private international law. After identifying the objects of protection according to European law (2) and the existing legal sources (3), this text focusses firstly on the legal relationship between social media providers and their (potential) customers (4). It will then discuss the relations between the users themselves (5) before giving an outlook (6).

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2 The object(s) of protection

From a glance at primary European law, it can be noted that privacy and personality rights are of great importance to the European legal framework. The right to privacy is recognized as a fundamental right and therefore explicitly protected (article 7 EU Charter of Fundamental Rights; article 8 European Convention on Human Rights [ECHR]) as is the right to protection of personal data (article 8 EU Charter of Fundamental Rights). According to the European Court of Human Rights, respect to privacy does not only consist of a right to be left alone, but it also obliges the Member States to ensure the effective protection of privacy against infringements by private parties [21, paras. 55, 58, 20 para. 26]. Privacy as a legal term comprises various aspects worthy of protection

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that essentially determine the personality of a human being, such as a person's name [18, para. 24], picture [19,20, para. 50–53] or reputation ([22, para. 64], [23, para. 54], [25, para. 26]). Besides that, the European Union takes into account the ever expanding technological possibilities and thus the growing threats to personal data in article 8 of the Charter of Fundamental Rights. This proves a high awareness of the significance of personal data protection in European politics (also: [3, para. 1]). The scope of article 8 extends to the right to decide on the disclosure and use of personal data comprising not only intimate details, but also more public aspects like one's professional situation [8, para 89 f.]. With regard to private international law, article 1 (2) (g) Rome II Regulation indirectly confirms that the violation of privacy and rights relating to personality, including defamation, can be the cause of tortious liability. The same law, however, excludes those claims from the scope of the regulation and hence from the EU framework on choice of law, whereas the Brussels I*bis* Regulation provides for rules governing jurisdiction as well as the recognition and enforcement in these matters (see Sect. 3.2.1). Although the need for a protection of privacy is undisputed, reaching a consensus between the member states on choosing the applicable law faces serious difficulties concerning the specific balance between privacy and freedom of speech. Nevertheless, the Rome II Regulation may indirectly influence the protection of privacy through litigation related to claims against social media providers concerning unfair competition (see Sect. 3.3.2).

3 Legal sources

Despite the conflicting approaches to the protection of privacy in Europe, EU law provides numerous rules on that matter.

3.1 EU law on data protection

After providing for a minimum level of data protection in Europe with the Directive on data protection in 1995,[1] the EU passed the General Data Protection Regulation (GDPR)[2] in 2016 after four years of negotiations. The GDPR will substitute the directive from 25 May, 2018, onwards and will guarantee a uniform protection standard in great measure. First assessments of the impact of the GDPR have been made (see e.g. [28,33,36,41,43]). Currently, the EU is preparing to pass a new ePrivacy regulation [17].

3.2 Jurisdiction

The question as to whether a violation of privacy leads to a claim for damages or to an injunctive relief depends on the applicable rules of private law. The crucial difference between cases occurring on social media and those taking place in the offline world is that the latter are mostly local in character, while the former are mostly international. It is not surprising that online cases often show various connections to different countries (e.g. place from where a site is accessed as opposed to the users habitual residence, diverging nationalities, server location). This makes it necessary to clarify whether a case falls within the jurisdiction of a national court.

3.2.1 The Brussels I*bis* Regulation

The Brussels I*bis* Regulation creates a European uniform standard for jurisdiction concerning violations of privacy and personality rights. It applies when the defendant is domiciled in a member state (article 4 Brussels I*bis*), in cases ruled by a jurisdiction agreement selecting a member state court (article 25 Brussels I*bis*) and in cases regarding EU consumer contracts [article 18 (1) Brussels I*bis*], while the remaining cases are governed by the national rules of civil procedure. Within the scope of the regulation, claims may be brought before the courts of the state where the defendant is domiciled (general jurisdiction, article 4 Brussels I*bis*). Where there is a valid jurisdiction agreement, it prevails over both general and special jurisdictions (article 25 Brussels I*bis*).

In contractual cases, the defendant may be sued in the courts for the place of performance of the obligation in question [article 7 (1) Brussels I*bis*]. In social media cases, however, bringing a claim on contractual grounds in the state where the plaintiff is domiciled will usually be possible because the relation between a user and a social media provider can be classified as a consumer contract (article 17, 18 Brussels I*bis*). In cases between users, a contractual relation between the parties is usually lacking; thus, violations of privacy and personality are, in those cases, subject to general jurisdiction and tort jurisdiction [article 7 (2) Brussels I*bis*]. Art. 7 (2) Brussels I*bis* will also be applicable when a user claims tort liability of the social media provider instead of contractual liability. Insofar, defining the place where the tort committed on the internet actually occurred poses difficult challenges: according to the principle of ubiquity [6], the plaintiff has the right to choose between the place where the wrongful act was committed (*forum actus*) and the place of damage (*forum damni*, i.e. the place where the protected right was injured) [31]. Unlike physical objects of protec-

[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

[2] General Data Protection Regulation of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, applicable from 25 May 2018 (OJ L 119, 4.5.2016, p. 1).

tion, though, personality is not limited to a certain territory and can therefore be affected in various places. Hence, the CJEU decided in 1995 that the place of damage in privacy violation cases against print media is located in every state where a journal was intended to be distributed, but limited to the damage actually having occurred in this country (*mosaic principle*) [7]. However, the CJEU has considerably modified this approach for internet cases. In eDate [9], the Court created specific rules for violations of personality rights in cyberspace. According to this ruling, the place of damage is found at the plaintiffs main centre of interests, i.e. usually his or her habitual residence (for closer analysis, see [34]). This case law is in line with the requirements of a fair trial enshrined in article 6 of the ECHR. The European Court of Human Rights recently found Sweden in breach for having denied access to a court to a person who wanted to bring defamation proceedings in his country of residence arising out of the content of a television programme broadcast from the UK [24]. While the Swedish courts had assumed that the case should have been brought before the UK courts because the company responsible for broadcasting the alleged defamatory content was based in London, the Strasbourg Court considered such a restrictive approach to jurisdiction as a violation of article 6 ECHR [24, paras. 65].

3.2.2 The GDPR

Besides Brussels I*bis* the GDPR will provide specific rules concerning jurisdiction: according to article 79 (2) GDPR, a suit against a controller or a processor may be brought before the courts of the member state where the data subject has his or her habitual residence.

3.2.3 National procedural laws

Cases neither covered by Brussels I*bis* nor the GDPR are governed by national procedural laws. The vast majority of the national legal systems include some variant of *forum delicti commissi* (understood in a wider sense, i.e. potentially encompassing both *forum actus* and/or *forum damni*) in their jurisdiction on violations of personality rights, including defamation (e.g. France, Germany, Greece, Portugal, Spain and UK) [37].

3.3 Applicable law

Besides questions of jurisdiction, cross-border cases also require the determination of the applicable national private law.

3.3.1 Contractual relations

The law applicable to contractual obligations is determined by the Rome I Regulation. Party Autonomy is the basic principle (cf. article 3), i.e. a choice-of-law agreement prevails over the subsidiary objective connections (cf. article 4). This liberal approach is restricted in cases where a structural imbalance of bargaining power exists between the parties (e.g. consumer contracts, article 6) [42] and where provisions of the *lex fori* or the place of performance is considered as crucial for the safeguarding of a states public interests (overriding mandatory provisions, article 9) [12].

3.3.2 Tortious relations

As already mentioned, privacy, personality rights and defamation are explicitly excluded from the Rome II Regulation [article 1 (2) (g)] (cf. [4, pp. 9–10, [15] p. 5]). As a result, the law applicable to privacy cases within the EU is still determined by 28 different national legal systems. Therefore, it is to be welcomed that the European Parliament made a proposal to close this gap in 2012 ([16], [for a positive evaluation, see 35, pp. 340–343]). However, this proposal has not made any progress since then. A remarkable ruling of the CJEU in this context is the case *VKI v. Amazon* [11]:

Amazon EU Sàrl is a Luxembourg company which, via a website, addresses Austrian consumers with whom it concludes electronic sales contracts. The *Verein für Konsumenteninformation* (VKI Association for Consumer Information) brought an action before the Austrian courts for an injunction to prohibit the use of the Amazon general terms and conditions (GTC). The GTC stipulated inter alia that the relationship between *Amazon* and a contracting consumer was governed by Luxembourg law and that personal data would be shared with other companies. The CJEU decided that the Rome II Regulation remained applicable to claims relating to unfair competition (article 6 Rome II) although privacy or personality rights are affected as an incidental question. Therefore, it can be stated that the already existing uniform regulations are interpreted in a sense to diminish the consequences of the incomplete scope of Rome II.

3.4 E-Commerce Directive

Art. 3 (1) and (2) of the E-Commerce Directive[3] establish a country-of-origin principle according to which an information society service has only to comply with the law of the state of its establishment. This rule applies to social media

[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 116).

providers [30, p. 48] and includes all parts of private law [9, para. 58]. Hence, it can be relevant to cases of a violation of privacy or personality rights. The CJEU, however, has made clear that the directive does not establish a choice-of-law rule [9, para. 63]; therefore, this issue lies outside of the scope of this article.

4 The relationship between social media providers and (potential) users

4.1 Choice of law and jurisdiction agreements in standard terms

The Facebook (UK) standard terms (15(1))[4] stipulate that any claim must be brought before the courts "exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County". Furthermore, the standard terms as well as any claim between Facebook and its users are governed by the laws of the State of California.[5] It is doubtful whether these clauses are valid under European law. The jurisdiction agreement in favour of a third-state court violates article 25 in conjunction with article 19 Brussels I*bis* when the user is a consumer (cf. [10, paras. 58–66]) and is thus invalid (cf. [1]). The assessment of the choice-of-law clause, however, is more difficult. It is generally permissible to choose the applicable law in consumer contracts as well, but mandatory provisions favouring the consumer override the provisions of the chosen law [cf. article 3 (1) in conjunction with article 6 (2) Rome I]. In the case of Facebook, the invalidity of the choice-of-law agreement may be the result of the opaque phrasing of the clause, making it unfair towards the consumer. The CJEU recently decided that the applicable law to the validity of standard terms is determined by article 6 (1) Rome I regardless of the situation in which the clause is being attacked [11, para. 49–58]. Particularly, it is of no importance whether the term is subject to a contractual claim between the parties of a contract or if the clause is being assessed in the context of a claim for injunction against unfair terms. The court also decided that a clause failing to inform the consumer about the fact that mandatory provisions favourable to the user remain applicable irrespective of a choice-of-law agreement is unfair [11, para. 69]. Applying this judgement to the Facebook terms, article 15 (1)(2) is unfair as well and therefore invalid.

4.2 Law applicable to data protection

Like the data protection directive (cf. article 4 Data Protection Directive), the new GDPR applies mainly to activities of establishments, controllers and processors situated in the territory of the European Union [cf. article 3 (1) GDPR]. It is a novelty that according to article 3 (2) GDPR European data protection law will be applicable to data processing by a controller or a processor established outside the EU as long as data of citizens of the EU are concerned and further situational conditions fulfilled.

4.3 Potential users

Social networks pursue the objectives of steady growth and of increasing their number of users. That is why Facebook provides a function called finding friends: if a user allows access to his email contacts, Facebook automatically generates invitations to all contacts that are still non-users of the network without their consent. When a competitor or a consumer association attacks this way of promoting the network, the permissibility of such practices depends on competition law and thus the applicable law is again determined by article 6 (1) Rome II. The non-user himself might claim an infringement of data protection law instead. The German Federal Court of Justice (BGH) ruled on Facebook's finding friends and decided that this function violated article 13 (1) of the Directive 2002/58/EC on privacy and electronic communications [27].

5 The relations among users of social media

The legal questions arising from the relations between users of social media are still largely unresolved. As a contractual relation between users does usually not exist, claims for violation of privacy, personality rights and defamation of a social media user against another are mostly governed by tort law.

5.1 The connection between *lex fori* and *lex loci delicti*

The Brussels I*bis* Regulation applies to most of the cases with regard to jurisdiction, whereas the applicable law in privacy cases is still governed by national laws[6]. Therefore,

[4] "You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions", https://en-gb.facebook.com/legal/terms.

[5] For the sake of completeness, it has to be mentioned that both stipulations will not apply to German users according to special national Facebook terms, cf. Für Nutzer mit Wohnsitz in Deutschland (5), https://www.facebook.com/terms/provisions/german/index.php.

[6] See, Sects. 3.2.1 and 3.3.2.

it is important to compare the differences and the common grounds of the European legal traditions. In legal history, a close relationship between jurisdiction and choice of law concerning violations of personality rights can be observed. In many legal orders, both jurisdiction and choice of law were founded on some variant of *lex loci delicti* (place of acting and/or damage). In English law, the double rule established in Phillips v Eyre [(1870) LR 6 QB 1] turns *lex fori* (law of the court) into a ceiling for claims rooted in a foreign *lex loci delicti* (law applicable to the tort) (see [39, pp. 7–11]). In Germany [26] and Italy,[7] the principle of ubiquity is followed both with regard to jurisdiction and choice of law which leads to a parallelism in practice. If jurisdiction of German courts is approved because of the place of acting or damage, the plaintiff may opt for the application of German law as well, which happens in almost all cases. In France, both the law of the place of the action and that of the place of the damage may apply to torts; the court applies the law of the place which is more closely connected to the case [5]. This is an expression of the application of the proper law. The crucial question is how these general observations are applicable to litigation between social media users. The BGH took a stand on how to define the place of damage in the case *Seven Days in Moscow* [26]. The plaintiff had sued the author of a blog entry claiming a personality violation. Both the plaintiff and the defendant originated from Russia, where they had attended high school together. After having finished school, the plaintiff became habitually resident in Germany, the defendant in the USA. After a class reunion in Moscow years later, the defendant posted an entry on a website hosted by a German company. In this post, the defendant described the living conditions and the appearance of the plaintiff in rather unfavourable terms. However, the post not only concerned events that had taken place in Moscow, it was moreover written in Russian language and in Cyrillic letters, thus being hardly accessible to average German readers. The BGH hence denied jurisdiction. As the defendant was not domiciled in a member state of the EU, section 32 of the German Code of Civil Procedure applied which requires a sufficient connection with Germany [26, para. 8]. The BGH explicitly pointed out that accepting jurisdiction would also lead to an improper application of German law [article 40 (1) of the German introductory law to the Civil Code (EGBGB)] [26, para. 10].

5.2 Empirical convergence

The national rules on choice of law in cases on the violation of privacy differ considerably: the "German" approach gives the plaintiff the possibility to choose between the law of the place of acting and the law of the place of damage [cf. article 40 (1) EGBGB] and thus seems to favour the plaintiff. By contrast, the English "double rule" seems to favour the defendant by guaranteeing the national limit even when foreign law is applicable. Yet the practical implementation of both approaches typically leads to an application of the *lex fori*: the favour accorded with the plaintiff by German law is curbed by a restrictive definition of the place of injury,[8] whereas the strictness of the "double rule" is softened by English courts focusing on the publication in England even in cases where infringing content was simultaneously published abroad [14, para. 35–108] and by traditional pleading standards (no ex officio application of foreign law [14, para. 35–121]). The practical result is that the applicable tort law is typically the *lex fori* which has several advantages. It reduces the time and costs of the litigation because there is no need for pleading and proving foreign law. As the court applies its well-known national law, the judgment will usually be of a better quality. There is no threat of a result conflicting with public policy because the forum's tort law on personality rights, privacy and data protection is rooted in national constitutional values. The main disadvantage is that applying the *lex fori* provides an incentive for *forum shopping* ([2,29,38,39], [40, pp. 2–7]): by bringing a suit before a certain court, the plaintiff may indirectly choose the applicable law and thus influence the outcome to the detriment of the defendant. This disadvantage will persist as long as Rome II does not cover personality rights, a gap which should be filled by amending this regulation (e.g. [13, para. 66], [38], [40, pp. 282–284]).

5.3 Towards a synthesis

This leads to the final question as to how jurisdiction and choice of law should be geared to each other. While general jurisdiction is "neutral" from a choice-of-law perspective because it is based on the residence of the defendant irrespective of the occasion for the claim, special jurisdiction (place of acting, place of damage, centre of main interest) at least indicates that there is already some kind of significant connection between the *forum* and the legal question to decide (cf. recital 16 Brussels I*bis*). Consequently, one could argue that the connection that justifies a special jurisdiction should be reason enough to allow the court to simply apply its own law. Thus, the general choice-of-law rule could be: if a case falls within the courts special jurisdiction, the *lex fori* is the tort law applicable. Furthermore, the threat of *forum shopping* may be reduced by limiting the number of available *fora* (see also [1], [40, p. 279]). This desirable parallelism of jurisdiction and choice of law presupposes that special jurisdiction is applied in a restrictive way to avoid an excessive

[7] Jurisdiction: article 3 (2) legge 218/1995 in conjunction with article 5 (3) Brussels Convention (1968); choice of law: article 62 legge 218/1995.

[8] See, Sect. 5.1.

application of the *lex fori* to cases that are merely connected to the state of the *forum*.

However, for certain fact patterns, infringements of privacy, personality rights, etc., committed via social media may be more closely connected to a different legal order. Applying the law of the common habitual residence of plaintiff and defendant [cf. article 4(2) Rome II] will usually be more appropriate than applying the *lex fori*. An undifferentiated parallelism between a special jurisdiction and the applicable law also may be doubtful concerning the contract that both parties have concluded as users with the same social media provider. Since the same law is applicable to the provider's relation with both the plaintiff and the defendant, it may be appropriate to apply this law to any kind of litigation arising between these two users as well, at least if they do not share a common habitual residence. The thought of determining the applicable tort law by an accessory connection can already be found in article 4 (3) Rome II. This approach might increase the importance of Californian defamation law. However, it offers a law neutral to both claimant and defendant (except for the cases when a Californian user is party to the case) and is based on a voluntary connection. Furthermore, when using the accessory connection, consumer protection according to Art. 6 Rome I still needs to be taken into account. If the parties share a common habitual residence [Art. 4 (2) Rome II], this connecting factor would have priority. As the law stands, however, the possibility of an accessory connection seems to be limited to cases where the contract exists between the parties of the tort claim [32, para. 66].

6 Conclusion and outlook

Existing European law only partially covers the specific questions concerning PIL issues arising in the context of social media. It is to be welcomed that the CJEU interprets the exclusion of privacy and personality rights from the scope of Rome II in a restrictive manner so that it does not hinder the application of the regulation to claims relating to unfair competition. As social media are characterized by their worldwide accessibility, it is reasonable to face these challenges by creating uniform rules on jurisdiction and choice of law. In particular, the Rome II Regulation should be amended by a choice-of-law rule determining the law applicable to violations of privacy and personality rights, including data protection. Finally, the EU should develop comprehensive common rules on jurisdiction concerning third-state defendants.

Compliance with ethical standards

Conflict of interest On behalf of all authors, the corresponding author states that there is no conflict of interest.

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