Regulating the Internet Through Private International Law

Tobias Lutzi

Thesis for the Degree of
Doctor of Philosophy in Law

supervised by
Andrew Dickinson

UNIVERSITY OF OXFORD
FACULTY OF LAW

Acknowledgements

This thesis is the result of three wonderful years that I had the privilege of spending in Oxford. While its shortcomings and mistakes remain my own, their number would be significantly higher without the generous help and support I received during this time.

At different stages of the degree, the project has been examined by Professors Graeme Dinwoodie, Matthias Lehmann, Alex Mills, and Edwin Peel, to all of whom I am sincerely grateful for the encouragement and feedback they have so generously provided. Moreover, I have benefited from insightful comments on this project by many other scholars, including Professors Christine Budzikiewicz, Pietro Franzina, Peter Mankowski, Heinz-Peter Mansel, and Ansgar Ohly.

While I am indebted to a great number of teachers who have enabled me to write this thesis, two deserve special mention for their contribution to my interest in, and understanding of, private international law: Professor Alex Mills, whose Directed Studies in The Hague were a masterclass in the subject, and Professor Heinz-Peter Mansel, who first taught me the subject during my undergraduate studies in Cologne and who has remained the most helpful and generous mentor anyone could wish for ever since.

Still, I would not have been able to transform these experiences into a thesis without the untiring support of my supervisor, Professor Andrew Dickinson, whom I deeply admire as both a brilliant researcher and a generous teacher, and for whose help and guidance I will be forever grateful. He will remain my role model of an academic.

I am grateful for opportunities to present parts of this work at the University of Cologne, the Max Planck Institute for Comparative and International Private Law in Hamburg, the Society of Legal Scholars, the Swiss Institute of Comparative Law in Lausanne, and the Max Planck Institute for Procedural Law in Luxembourg. The Hamburg Max Planck Institute allowed me to use its impressive library in the summers of 2017 and 2018.

These exceptions aside, the thesis was written in the ever-stimulating environment of the University of Oxford, of which the Law Faculty, Rhodes House, and the Middle and Senior Common Rooms of Somerville College have become places of particular significance to me. While the academic environment I have found there has indubitably contributed to its successful completion, I am confident that the friendships I have made in each of these places will last much longer than any impact this thesis may have.

I am grateful for the funding I have received from the Rhodes Trust, the Oxford Law Faculty, Evangelisches Studienwerk Villigst, and for numerous travel grants from Somerville College.

A work of scholarship of this proportion, even if it benefits from the most generous academic support, would hardly be possible to complete without the emotional support of one's family, which I have received in equally great amounts throughout my life. This includes, above all, the most wonderful and important person in my life, Ruth, without whom I would have been able neither to start nor to finish this work.

Cologne/Oxford, 18 December 2018

Abstract

This thesis discusses how private international law can effectively address challenges raised by the internet for different areas of private law, linking this question to the broader debate about the potential of private international law to resolve conflicts of regulatory authority in a globalised world.

The thesis identifies two core challenges of the internet: its independence from state borders, which drastically increases the number of connections to different countries in internet cases but reduces their usefulness; and the prevalence of private ordering, especially on online platforms that are effectively regulated only by their hosts.

Using EU private international law as an example, it argues that existing approaches to internet cases are often dominated by a deep-rooted fear of leaving claimants underprotected from the perceived dangers of an unregulated internet; thus, instead of reducing the overwhelming number of connections created by internet communication to few, particularly useful ones that allow to effectively allocate adjudicatory and prescriptive jurisdiction, they attach significance to all of them, allowing claimants to chose from a large of number of fora and applicable laws. This creates complex mosaics of jurisdiction and problematic overlaps of national laws, exposing defendants to a risk of worldwide liability.

This thesis proposes an alternative approach that arguably creates a better balance between the parties' interests and expectations, combining a country-of-origin default rule with a targeting-based exception for consumer cases. It shows how such an approach could be implemented within the existing framework of EU private international law but would be difficult to extend beyond the relatively harmonised internal market of the EU. It argues that this approach would not only better exploit the potential of private international law for the horizontal coordination between national courts and legal systems but could also facilitate the vertical coordination between public regulators and private parties.

It thus provides an example for how private international law can accommodate new challenges without abandoning its commitment to 'conflicts' justice and substantive neutrality.

submitted 25 Sept 2018
leave to supplicate granted 18 Dec 2018
89,700 words

Table of Contents

Table of Abbreviations

[ ]	paragraph
AG	Advocate General
ALI Principles	American Law Institute, 'Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes', 2008
BCSC	Supreme Court of British Columbia
BGH	*Bundesgerichtshof* – Federal Court of Justice [Germany]
Brussels Convention	Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
Brussels I	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels Ia	Regulation (EU) No 1215/2012 (…) of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
BVerfG	*Bundesverfassungsgericht* – Federal Constitutional Court [Germany]
CA	Court of Appeal [Canada]
Cass	*Cour de cassation* – Court of Cassation [France]
cf	*confer* – compare
Cir	Circuit [of a US Court of Appeals]
CLIP Principles	European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), 'Principles on Conflict of Laws in Intellectual Property', 1 Dec 2011
Data Protection Directive	Directive 95/46/EC (…) 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
Digital Single Market Strategy	Communication from the Commission (…): A Digital Single Market Strategy for Europe, COM(2015) 192 final
e-Commerce Directive	Directive 2000/31/EC (…) of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice [in the sense of Art 19(1) TEU, Art 251 TFEU]
ECtHR	European Court of Human Rights
eg	*exempli gratia* – for example
EWCA	Court of Appeal of England and Wales
EWHC	High Court of Justice of England and Wales
GDPR	Regulation (EU) No 2016/679 (…) 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 (…)
Geo-Blocking Regulation	Regulation (EU) 2018/302 (…) of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (…)
HCA	High Court of Australia
ibid	*ibidem* – in the same place
ICJ	International Court of Justice
ie	*id est* – that is
Information Society Directive	Directive 2001/29/EC (…) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
KG	*Kammergericht* – Higher Regional Court of Berlin [Germany]
LG	*Landgericht* – Regional Court [Germany]
n	footnote
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958
NICA	Court of Appeal in Northern Ireland
OGH	*Oberster Gerichtshof* – Supreme Court [Austria]
OLG	*Oberlandesgericht* – Higher Regional Court [Germany]
RG	*Reichsgericht* – Imperial Court of Justice [Germany]
Rome Convention	Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

Rome I	Regulation (EC) No 593/2008 (…) of 17 June 2008 on the law applicable to contractual obligations
Rome II	Regulation (EC) No 864/2007 (…) of 11 July 2007 on the law applicable to non-contractual obligations
Rome III	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
Satellite and Cable Directive	Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
SCC	Supreme Court of Canada
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TGI	*Tribunal de Grande Instance* – High Court [France]
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted 15 Apr 1994
UKHL	House of Lords [United Kingdom]
UKSC	Supreme Court of the United Kingdom
WIPO	World Intellectual Property Organization

Table of Cases

International Court of Justice

European Court of Justice

National Courts

Australia

Austria

Canada

England & Wales

France

Germany

The Netherlands

Northern Ireland

United States

Table of Statutes

International Treaties

EU Legislation

Regulations

Directives

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 Jul 2000, 1 [e-Commerce Directive]	[14], [66]–[67], [89], [92]–[94], [121], [141], [195], [210], [220], [230], [239], [245], [325], [328], [343], [354]–[355], [363], [368], [373], [375]–[378], [383]–[384], [387], [436], [468]
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, 10 [Information Society Directive]	[94], [121], [202]–[203], [211], [251], [469]
Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31 July 2002, 37	[89]
Directive 2004/48/EC of the European Parliament and of the Council of 29 Apr 2004 on the enforcement of intellectual property rights, OJ L 157, 30 Apr 2004, 45	[94]
Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27 Dec 2006, 36	[63]
Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18 Dec 2007, 27	[66]
Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299, 8 Nov 2008, 25	[203]
Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15 Apr 2010, 1	[344]

National Legislation

France

Germany

United Kingdom

United States

Table of Other Primary Sources

Federal Communications Commission, 'In the Matter of Restoring Internet Freedom: Declaratory Ruling, Report and Order, and Order', WC Docket No. 17-108, FCC-CIRC1712-04 (21 Nov 2017) <transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1122/DOC-347927A1.pdf> accessed 1 Sep 2018 [77]

Federal Communications Commission, 'Chairman Pai Circulates Draft Order to Restore Internet Freedom and Eliminate Heavy-Handed Internet Regulations' (21 Nov 2017) <www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments> accessed 1 Sep 2018 [77]

Handelsverband Deutschland, 'Geoblockingverbot überfordert mittelständischen Online-Handel' (*einzelhandel.de*, 22 Nov 2017) <www.einzelhandel.de/presse/pressearchiv/1327-pressemitteilungen-2017/10846-geoblockingverbot-ueberfordert-mittelstaendischen-online-handel> accessed 1 Sep 2018 [146]

Hague Conference on Private International Law, Geneva Round Table on Electronic Commerce and Private International Law, Press Release <assets.hcch.net/docs/79714583-dedc-4f43-b4df-eb0a5e921d53.html> accessed 1 Sep 2018 [223], [337]

Hague Conference on Private International Law, 'Principles on Choice of Law in International Commercial Contracts' (approved on 19 March 2015) [36], [73], [167], [413], [415]

Institut de droit international, Resolution II, 1991 Basel session, 'The Autonomy of the parties in international contracts between private persons or Entities', Annuaire, Vol 64-II (Pedone 1992), 383 [165]

International Chamber of Commerce, ICC Rules of Arbitration, 1 Mar 2017 [170]

Internet World Stats, 'Internet Usage Statistics' (*internetworldstats.com*, Jul 2017) <www.internetworldstats.com/stats.htm> accessed 1 Sep 2018 [79]

International Federation of the Phonographic Industry, 'Global Music Report 2017' (*ifpi.org*, April 2017) <www.ifpi.org/downloads/GMR2017.pdf> accessed 1 Sep 2018 [79]

International Telecommunication Union, 'ICT Facts & Figures 2017' (*itu.int*, 31 July 2017) <www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf> accessed 1 Sep 2018 [79]

US Department of Commerce, National Telecommunications & Information Administration, 'Improvement of Technical Management of Internet Names and Addresses; Proposed Rule', 20 Feb 1998, DOCID:fr20fe98-24, (1998) 63 Federal Register (No 34), 8825 [84]

US Department of Commerce/ICANN, 'Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers' (*icann.org*, 30 Sept 2009) <www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> accessed 1 Sep 2018 [84]

Wikimedia Foundation, 'Terms of Use' <foundation.wikimedia.org/wiki/Terms_of_Use/en> accessed 1 Sep 2018 [117]

Wikipedia:Arbitration/Policy <en.wikipedia.org/wiki/Wikipedia:Arbitration/Policy> accessed 1 Sep 2018 [117]

Wikipedia:List of policies and guidelines <en.wikipedia.org/wiki/Wikipedia:List_of_policies_and_guidelines> accessed 1 Sep 2018 [117]

Wikipedia:Non-free content <en.wikipedia.org/wiki/Wikipedia:Non-free_content> accessed 1 Sep 2018 [117]

Wikipedia:Office actions <en.wikipedia.org/wiki/Wikipedia:Office_actions> accessed 1 Sep 2018 [117]

Wikipedia:Policies and guidelines <en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines> accessed 1 Sep 2018 [117]

Wikipedia, 'Freedom of Panorama' <en.wikipedia.org/wiki/Freedom_of_panorama> accessed 1 Sep 2018 [251]

YouTube Help, 'How Content ID works' <support.google.com/youtube/answer/2797370?hl=en> accessed 1 Sep 2018 [120]

YouTube Help, 'Submit a copyright takedown notice' <support.google.com/youtube/answer/2807622?hl=en> accessed 1 Sep 2018 [120]

I. Introduction

1 There are few success stories like the internet. Over little more than two decades, it has permeated, if not revolutionised, almost every aspect of society – from family life to international business, from journalism to academia, from our understanding of privacy to how we form friendships, professional relations, and communities. While many of these changes may be attributed to an even wider trend of 'digitisation', the internet and its ability to connect information, and therefore people, all around the world with ever-increasing seamlessness seems to be the main catalyst for virtually all of them. As Manuel Castells explains,

> *[t]he Internet is the decisive technology of the Information Age, as the electrical engine was the vector of technological transformation of the Industrial Age.*[1]

2 Ever since it became popular, the internet has attracted the attention of legal scholars and practitioners. From early on, they asked questions as to the adequate legal framework for a means of communication that allows for the dissemination of content at unprecedented speed and without any regard for physical borders. While many of the first cases raising questions of private international law involved claims of defamation, other areas quickly became subject to international litigation as well, requiring courts to apply traditional rules and connecting factors relying on physical connections to a virtual medium that does not create any such connections. As internet cases quickly became a more and more regular occurrence, courts were confronted with additional challenges, such as a rapidly growing number of connected devices, a disappearing line between offline and online activities, and the emergence of new private actors who are holding considerable regulatory power over the online platforms and services they offer.

---

1 Castells, 'The Impact of the Internet on Society: A Global Perspective', in Benkler et al (eds), *19 Key Essays on How Internet is Changing our Lives* (BBVA 2013), 127.

3 This thesis will discuss these challenges and the appropriateness of the existing solutions offered by private international law, using the private international law of the EU as its main example and testing ground. It will focus on the central characteristics of online communication that underlie the difficulties encountered in different areas of law and link this discussion to the wider debate about the role of private international law in a globalised world. Do phenomena like the ever-increasing mobility of people, goods, and information or the growing competition between regulators, including between public and private regulators, leave the discipline completely out of its depth, or do they constitute challenges to which private international law holds particularly promising answers? By sketching out how private international law might effectively accommodate many of the challenges encountered in internet cases, this thesis will attempt to make an argument for the latter proposition.

4 This first chapter will quickly introduce the aforementioned debate about the perceived difficulties of private international law to adequately react to the challenges of a globalised world and show why the internet qualifies as one of them (A.). It will introduce some necessary definitions (B.), before providing an overview over the remaining chapters of this thesis (C.).

A. Private International Law, Globalisation, and the Internet

5 For at least a decade, scholars of private international law have deplored the discipline's absence from many debates about law and globalisation[2] and its inability to adequately accommodate the challenges arising in this context:

> *Despite the extent of social, technological, economic, and geo-political changes wrought by globalization, little has been done within the field to think through the issues arising from the decline of territory, the financiarization of the economy, the privatization of adjudication, changing cultures of human rights, or new understandings of the rule of law, nor indeed to link these questions to wider changes in world visions or politics, to current trends in political philosophy or social theory, or to new thinking in economics.*[3]

The perceived silence of private international law *vis-à-vis* these questions has been attributed to its alleged methodological neutrality and self-imposed isolation from politics.[4]

6 While other authors have tried to counter this view,[5] it is undeniable that methods and concepts of private international law do not play a major role in contemporary political debates about how the law might react to the challenges of a globalised world. A rapid growth in international transactions and cross-border contacts and an unprecedented plurality of norms and regulators may implicate mechanisms of private international law – but until recently, their potential for the governance of these phenomena has rarely been brought up in any wider debate.

---

2 See, eg, Muir Watt, 'The Relevance of Private International Law to the Global Governance Debate', in Muir Watt/Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014), 1, 1–4, 16.

3 ibid, 2.

4 See ibid, 2–3. See also Paul, 'The Isolation of Private International Law' (1988–89) 7 Wisconsin IntLJ 149, 164–73, and below, [25].

5 See, eg, Mayer, 'Le phénomène de la coordination des ordres juridiques étatiques en droit privé' (2007) 327 Recueil des cours 1, [174]–[175]; see also below, n 35.

7 The internet seems to provide a particularly fitting example for such a challenge of globalisation, facilitating the exchange of information, goods, and services across geographical borders and promoting new forms of communities and private, decentralised governance.[6] In its early days, it was argued that the internet could not be captured by traditional legal techniques, including those of private international law and that the vacuum left by them would be filled by a new 'common law of cyberspace':

> *[A]s this cyber common law of cyberspace develops, and earns the respect of other jurisdictions, it will be easier for […] other jurisdictions simply to defer to this law. The alternative is a revival of conflicts of law; but conflicts of law is dead – killed by a realism intended to save it. And without a usable body of law to deploy against it, a law of cyberspace will emerge as the simpler way to resolve the inevitable, and repeated, conflicts that cyberspace will raise.*[7]

8 But states were not happy to let such a 'cyberlaw' evolve and, instead, were quick to reimpose their regulatory authority on cyberspace,[8] creating a patchwork of national and supranational legislation addressing countless aspects of online life. The aforementioned conflicts have not disappeared; indeed, with the emergence of increasingly pervasive online platforms hosted by private companies who exercise many of the regulatory functions that traditionally belonged to the state, they have, if anything, multiplied. As far as they affect cross-borders relationships between private parties, private international law provides the tools to resolve them.

9 Although this thesis will show that rules and mechanisms of private international law have thus far – at least partially – failed adequately to resolve these conflicts, it will argue that they are capable of doing so. It will try to identify ways in which traditional, technical rules of private international law can effectively coordinate the different claims

---

6 See Berman, 'The Globalization of Jurisdiction' (2002) 151 U of Pennsylvania LRev 311, 314–18; Slane, 'Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet' (2008) 71 L&ContempProb 129, 129–31.

7 Lessig, 'The Zones of Cyberspace' (1996) 48 Stanford LRev 1403, 1409.

8 See Berman (n 6), 315–17.

to regulatory authority involved in internet cases and bridge the gap between the global internet and local laws. If private international law is indeed 'dead',[9] or 'on its deathbed',[10] then this thesis will make an argument for its reanimation.

B. Definitions

10 All three elements of the title of this thesis – Regulating the Internet through Private International Law – require some definition.

11 **Regulation** means 'to change or maintain something by law'.[11] In this thesis, the term will be used to describe the promotion of political aims through law and legislation, independently of whether these aims are promoted directly, through specific legal norms, or indirectly, through the coordination of systems of direct regulation ('meta-regulation').[12] As this thesis will discuss how such political aims can be promoted by private international law, the emphasis will inevitably be on the latter dimension.[13]

12 **Private international law** – or the conflict of laws, as the discipline is regularly referred to in the common-law world[14] – will be understood in a broad sense, encompassing questions of both international jurisdiction and choice of law. While the English rules on private international law are, in many areas, dominated by the former,[15]

---

9 Lessig (n 7), 1409.

10 Kohl, 'Eggs, Jurisdiction, and the Internet' (2002) 51 ICLQ 555, 557.

11 Beale/Bateman/McAdam, *Dictionary of Law* (5th edn, A&C Black 2007), 'regulate'. See also Lange, 'Regulation', in Cane/Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008), 996: 'Regulation refers to legal rules which seek to steer the behaviour of mainly private citizens and companies […].'

12 On which see Lobel, 'New Governance as Regulatory Governance', in Levi-Faur (ed), *Oxford Handbook of Governance* (OUP 2012), 68–71.

13 See also Bomhoff/Meuwese, 'The Meta-regulation of Transnational Private Regulation' (2011) 38 JL&Soc 138, 141–42, 153–55.

14 As to the terminology see Briggs, *Private International Law in English Courts* (OUP 2014) [1.39]–[1.41].

15 See Lord Collins et al, *Dicey, Morris & Collins. The Conflict of Laws* (15th edn, Sweet & Maxwell 2012), [1-004].

other legal systems put a stronger emphasis on the latter. Both areas have also been subject to important EU Regulations.[16]

13 The **internet**, finally, refers to a network of different smaller computer networks and services that all use the Internet Protocol Suite (TCP/IP).[17] This thesis will focus on those services that use the Hypertext Transfer Protocol (HTTP) and form the so-called World Wide Web, which was instrumental in the internet's rapid growth over the last two decades[18] and seems to raise most of the practically relevant legal problems. This is not to say that the arguments made therein cannot be extended to other protocols and technologies where they raise similar challenges.

14 In discussing how the challenges raised by this technology can be addressed, an emphasis will be put on the position of those who use the internet to disseminate information and offer goods and services. The European Union, which has become increasingly active in harmonising the regulatory environment for these activities across the single market, defines them as **information society services**.[19] According to Directive 98/48/EC,[20] which first introduced the term and maintained it through its numerous modifications,[21] an 'information society service' is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient

16 Most importantly in the context of this thesis, Rome I, Rome II, and Brussels Ia.

17 Ince, *A Dictionary of the Internet* (3rd edn, OUP 2013), 'Internet'.

18 See Greenstein, 'Internet Infrastructure', in Peitz/Waldfogel (eds), *The Oxford Handbook of the Digital Economy* (OUP 2012), 3, 8; O'Hara/Hall, 'Web Science', in Dutton (ed), *The Oxford Handbook of Internet Studies* (OUP 2013), 48, 50–51.

19 See, most recently, Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, Art 2(2)(a).

20 Directive 98/48/EC amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, Art 1(2).

21 See Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, Art 1(1)(b).

of services.' The term is most prominently being used in the e-Commerce Directive,[22] which specifies that

> *[i]nformation society services span a wide range of economic activities which take place on-line; […]; [they] are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; [they] also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.*[23]

Unless otherwise specified, this broad definition will be used to designate the different kinds of online activities discussed in this thesis, and those who engage in them. As the thesis focuses on the different legal relationship that form through these services, its scope will not be limited to the providers who offer them[24] but will focus just as much on those who use these services.[25]

C. Overview

15 This thesis will proceed in three steps.

16 **Part II** will introduce the concept of private international law as regulation. It will retrace the debate about its apolitical nature and methodological neutrality, introducing a distinction between 'conflicts' considerations (which add a political dimension to the otherwise apolitical 'Savignyan' private international law but do not compromise its neutrality with regard to substantive results) and 'substantive' considerations (which openly contradict this neutrality). Against this backdrop, it will introduce some more recent arguments that have been formulated in light of the perceived inability of private

22 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Art 2(a).

23 ibid, recital (18).

24 ibid, Art 2(b).

25 The Directive speaks of 'recipients': ibid, Art 2(d).

international law adequately to address new challenges arising in the context of globalisation.

17 In a second step, **Part III** will define the internet as one of those challenges. While governments had originally been happy to leave the question of internet governance in the hands of private parties, they quickly started to recognize the medium's unprecedented economic and societal potential and tried to take a more active role in its regulation. These efforts have generally taken the shape of substantive public-law regulation (and, occasionally, international harmonisation) but paid rather little attention to private international law; if anything, they have increased the amount of conflicts that need to be addressed by the latter discipline. Against this backdrop, this part of the thesis will identify the two key challenges for private international law in this context: the internet's independence from state borders, which drastically increases the number of connections to different countries and, at the same time, noticeably reduces their usefulness; and the prevalence of private ordering, especially on online platforms that are effectively regulated only by their hosts. The chapter will illustrate how both challenges affect many areas of private law.

18 **Part IV** of this thesis will then bring the threads of the first two parts together in assessing the potential of private international law to contribute to the adequate regulation of these challenges. It consists of three chapters.

19 **Section A** will make a case for private international law as a tool for regulation and the coordination of regulatory authority. It will argue that private international law is capable of providing both *horizontal* coordination between national courts and between different domestic laws and *vertical* coordination between public regulators and private parties.

20 In **Section B**, it will be shown that EU private international law has so far not lived up to its potential. Instead of reducing the overwhelming number of connections created by internet communication to few, particularly useful ones that allow to effectively allocate adjudicatory and prescriptive jurisdiction, they often attach significance to all of them, allowing claimants to chose from a large of number of fora and applicable laws and aggravating the problem of coordination. It will be argued that this approach may be seen as the reaction to a deep-rooted fear of exposing claimants to an unregulated cyberspace (a fear that seems to transcend the EU).

21 In **Section C**, a proposition will be made as to how private international law might better use its potential for coordination to create a fair balance between the protection of claimants and the legitimate expectations of defendant internet users. It will argue that this can be achieved without abolishing the paradigm of substantive neutrality, by relying on what were earlier described as ‘conflicts’ considerations. It will use one of these considerations, the need to give effect to reasonable party expectations, as a starting point for the development of a set of new rules for internet cases that combine a ‘country of origin’ default rule with a targeting-based exception for cases involving structurally weaker parties. It will show how such rules could be implemented within the existing framework of EU private international law through a new instrument on jurisdiction and choice of law for claims involving information society services. This proposition will also serve as a starting point for a discussion of how one might bridge the gap between the state-centred rules of private international law and the effective private ordering exercised on online platforms. The proposition will then be tested against the specific private-law problems identified earlier.

22 **Part V** of this thesis will link all of these observations back to the wider debate about the present and future shape of private international law. It will summarise how private international law can contribute to a better legal framework for internet cases and, on this basis, formulate a more general argument for using private international law as a regulatory tool to address the challenges of globalisation.

II. Private International Law as Regulation

23 Private international law[26] is a reaction to the pluralism and diversity of national laws.[27] Courts hear cases involving elements from more than one jurisdiction and apply substantive laws other than their own in order to give effect to the reasonable and legitimate expectations of the parties to a transaction or occurrence[28] and to reach a 'just' outcome[29] in a world of differing, unharmonised laws. According to Lord Nicholls,

> *[c]onflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no "conflict" of laws.*[30]

24 The approach that is nowadays widely regarded as the traditional way to address this conflict is the so-called 'Savignyan' one – a technique to determine the applicable

---

26 As defined above, at [12].

27 See Kegel, 'Introduction', in Lipstein (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 1 (1985), [22]; Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple' (2001) 49 AmJCompL 407; Lequette, 'De la "proximité" au "fait accompli"', in Heuzé et al (eds), *Mélanges en l'honneur du Professeur Pierre Mayer* (LGDJ 2015), 481, [1]; Mayer (n 5), [64], [66]. See also Neuner, 'Policy Considerations in the Conflict of Laws' (1942) 20 Canadian Bar Review 479, 501: 'As long as men live under different laws private international law has a vital function.'

28 Lord Collins (n 15), [1-005], referring to the illustrations given by Rheinstein, 'The Place of the Wrong: A Study in the Method of Case Law' (1944) 19 Tulane LRev 4, 17–24; see also Neuner (n 27), 482–86; Lequette (n 27), [1]–[2]; Mayer (n 5), [103], [204], [365].

29 McClean/Ruiz Abou-Nigm, *Morris. The Conflict of Laws* (9th edn, Sweet & Maxwell 2016) [1-006]; Neuner (n 27), 486–89; in more detail Kegel, 'The Crisis of Conflict of Laws' (1964) 112 Recueil des cours 95, 182–84.

30 *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19, [15].

law[31] by identifying the legal system to which it is most closely connected. This approach is famously apolitical in two ways. First, because it was devised as a mere technique to attach every category of cases to the most closely connected legal system, with little regard to other considerations; second, because it intentionally ignores the content of the law to be applied. The approach was supposed to give effect to national regulation, be it domestic or foreign, but not to regulate itself.

25 In recent years, this 'foundational myth of methodological neutrality'[32] has been blamed for the discipline's incapacity to address contemporary issues such as the many regulatory challenges created by globalisation.[33] According to Horatia Muir Watt, private international law appears 'strangely disempowered'[34] and 'paradoxically unequipped to deal with the most significant cross-border legal difficulties which might have been expected to fall within its remit.'[35] One would expect this argument to include new technological challenges such as those posed by the emergence of the internet.[36]

26 Of course, the apparent neutrality of the Savignyan approach has been challenged long before anyone was discussing regulatory competition or global governance. Thus,

---

31 Civil law countries traditionally follow a similar approach (which has also been adopted by the European Union) to decide questions of international jurisdiction; in common law countries, on the other hand, jurisdiction is based on service and involves a much larger degree of judicial discretion, which may include analysis of substantive questions.

32 Muir Watt (n 2), 2.

33 See, eg, Michaels, 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization', in Stolleis/Streeck (eds), *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung* (Nomos 2007), 119, 123–26. For further examples see below, II.C.

34 Muir Watt (n 2), 3. See also Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 Transnational Legal Theory 347, 350–54.

35 Muir Watt (n 2), 1. For more positive accounts, see Basedow, 'The Law of Open Societies. Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des cours 9, [1], [355]–[590]; Thomale, 'Private International Law sans frontières' (2012) 92 Hague YbIntL 3; Mayer (n 5), [174]–[175].

36 This seems to be acknowledged, at least tentatively, by Muir Watt, 'La globalisation et le droit international privé', in Heuzé et al (n 27), 591, [1]–[2], [20]. See also Kohl, 'Conflict of Laws and the Internet', in Brownsword/Scotford/Yeung (eds), *The Oxford Handbook of Law, Regulation, and Technology* (OUP 2017), 269, 273–74.

after the Savignyan approach and its alleged neutrality have been presented in more detail (A.), the historic struggle over its political dimension will be retraced (B.). This will provide a framework in light of which more recent calls for regulation through private international law can then be assessed (C.).

A. Savigny and the Apolitical Paradigm of the Closest Connection

27 The traditional aversion of private international to any consideration of politics and regulation is widely ascribed to the German jurist Friedrich Carl von Savigny,[37] whose approach to private international law has been labelled the 'Savignyan' method.[38] It tries to identify the 'seat' of a legal relation, ie the legal system to which a given category of cases is most closely connected, independently of its effect on the substantive result of the case at hand (1.). While this technique is widely used as a point of reference for those who are advocating a more political approach,[39] it is itself not entirely free from politics (2.).

1. The Search for the Closest Connection

28 Savigny's approach to private international law has been referred to as a 'copernican revolution' for conflict of laws.[40] It shifted the focus from the nature of the laws 'in conflict' and their territorial scope of application towards the legal relation that gave rise

37 See Michaels (n 33), 125; Symeonides, 'Material Justice and Conflicts Justice in Choice of Law', in Borchers/Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers 2001), 125, 126; Bucher, 'La dimension sociale du droit international privé' (2009) 330 Recueil des cours 1, [21]–[22]; Gaudemet-Tallon, 'Le pluralisme en droit international privé' (2005) 312 Recueil des cours 1, [160], [166]; Rühl, *Statut und Effizienz* (Mohr Siebeck 2011), 178–82; von Bar/Mankowksi, *Internationales Privatrecht* (2nd edn, Beck 2003), § 6 [67], § 7 [249].

38 A label used in particular by French authors (see Ancel/d'Avout, *Droit international privé* (6th edn, Economica 2010), [92]–[94]; Bucher (n 37), [16], [20]–[21]; Gaudemet-Tallon (n 37), [160], [163], [166]).

39 See, eg, Michaels (n 33), 125–26; Muir Watt (n 2), 1–2.

40 Most famously by Neuhaus, 'Savigny und die Rechtsfindung aus der Natur der Sache' RabelsZ 15 (1949/50) 364, 366; see also Juenger, 'General Course on Private International Law' (1983) 193 Recueil des cours 119, 162; Michaels (n 33), 132; Ancel/d'Avout (n 45), [94]; vBar/Mankowksi (n 38), § 6 [23].

to this conflict.[41] Whereas the statutists inquired about the spatial reach of local law,[42] 'the whole problem', according to SAVIGNY, 'comes to be […] [t]o discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).'[43] Every case should be governed by the law of the country to which it was most closely connected.

29 Of course, SAVIGNY considered both approaches to be two sides of the same coin:[44]

> *[T]he connection which exists between rules of law and legal relations […] appears, from one side, as the dominion of these rules over the legal relations; from the other, as the subordination of the legal relations to them. […] The two modes of procedure differ only in the points from which they start. The question itself is the same, and the solution cannot turn out differently in the two cases.*[45]

To the extent that he was trying to identify an international, universal system to allocate regulatory authority[46] within a 'community of law among independent states'[47], SAVIGNY pursued a similar goal to the statutists.[48]

30 But the change of perspective – from the nature of the statute towards the seat of the legal relation – redefined the political problem of conflicting regulatory authority as a technical problem of finding the seat of a legal relation.[49] It laid the groundwork for the

---

41 Symeonides, 'General Report', in Symeonides (ed), *Private International Law at the End of the Century: Progress or Regress?* (Kluwer 2000), 3, 12.

42 Juenger (n 40), 141.

43 Savigny, *Private International Law. A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (Guthrie translat, T & T Clark 1869), 89 (§ 360).

44 Michaels (n 33), 132; Schurig, 'Das Fundament trägt noch', in Mansel (ed), *Internationales Privatrecht im 20. Jahrhundert* (Mohr Siebeck 2014), 5, 7.

45 Savigny (n 43), 5–6 (§ 344).

46 Mills, 'The Identities of Private International Law: Lessons from the US and EU Revolutions' (2013) 23 Duke JCompIntL 445, 448–49;

47 Savigny (n 43), 29 (§ 348). See also Juenger (n 40), 157, 160; Battifol/Lagarde, *Traité de droit international privé, Tome 1* (8th edn, LGDJ 1993), [237].

48 See Schurig (n 44), 7; vBar/Mankowksi (n 38), § 6 [29].

49 Michaels (n 33), 132–33; Gutmann, *Droit international privé* (5th edn, Dalloz 2007), [31].

development of multilateral conflict rules,[50] which designate the applicable law – be it domestic or foreign – through ostensibly neutral connecting factors. This multilaterist approach was reflected in many national systems of private international law that emerged at the end of the 19th century, where it replaced the formerly dominant unilateral rules that would only define the territorial scope of domestic law but be silent about the application of foreign law.[51] It also inspired influential American scholars such as Joseph Story and Joseph Henry Beale.[52]

31 The Savignyan approach to private international law has rightly been described as 'the paradigm of conflict of laws thinking'.[53] It has allowed for the development of a technique that identifies the applicable law without regard for its content and independently of whether it is local or foreign.

2. Political Implications

32 For Savigny, private law in general was technical rather than political, a product of the people's spirit (*Volksgeist*) rather than of state policy.[54] Thus, it is no surprise that his approach to private international law appears intrinsically neutral as well. The judge should apply 'that local law to which the case (legal relation) pertains, whether it is the law of his own country or the law of a foreign state'[55] – and, even more importantly,

---

50 Juenger (n 40), 163; Symeonides (n 41), 12; Ancel/d'Avout (n 45), [94]; Schurig (n 44), 9–11.

51 See, eg, Art 3(3) French Code civil.

52 Symeonides (n 41), 12; Shreve, 'Choice of Law and the Forgiving Constitution' (1996) 71 Indiana LJ 271, 283. Of course, each of them still rationalised conflict of laws differently from Savigny, with Story focusing on the 'comity of nations' and Beale seeing the recognition of 'vested rights' as the discipline's *raison d'être* (see also below, at [56]).

53 Michaels (n 33), 126; see also Juenger (n 40), 163 ('the conventional wisdom for generations of conflicts scholars'); Bucher (n 38), [16] ('[un] pilier de la pensée en droit international privé'); Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism', (2017) 384 Recueil des cours 1, 336 ('the classical PIL model').

54 Michaels (n 33), 129–30; Rühl (n 37), 179, 181–82.

55 Savigny (n 43), 33 (§ 349).

independently of the substantive result.[56] The consequence is a 'blindfold' application of the rules of private international law,[57] a 'leap into the dark'.[58]

33 Still, it would go too far to describe this approach as free from any political consideration.

34 First, because submitting every legal relation to the law that it is most closely connected to it (to which it 'pertains') is itself a political decision. For SAVIGNY, it was 'dictated by the common interest of nations and individuals [in] reciprocity in dealing with cases […] and the consequent equality in judging between natives and foreigners'.[59] But the search for uniform results that are independent of the place of adjudication is itself a policy choice[60] (which could also be achieved by other means, such as always applying the law chosen by the claimant).

35 Second, because SAVIGNY himself excluded a large number of laws from the principle he advocated because their 'peculiar nature does not admit of so free an application of the community of law obtaining between different states'.[61] These were, on the one hand, all 'laws of a strictly positive, imperative nature, which are consequently inconsistent with that freedom of application which pays no regard to the limits of particular states'[62] and, on the other hand, 'legal institutions of a foreign state, of which the existence is not at all recognised in ours, and which, therefore, have no claim to the

56 Vischer, 'General course on private international law' (1992) 232 Recueil des cours 1, 92.

57 ibid.

58 Raape, *Internationales Privatrecht* (Franz Vahlen, 5th edn 1961), 90 (own translation).

59 Savigny (n 43), 27 (§ 348). One may consider the fact that there are other justifications for searching for the closest connection as further evidence of the relativity of the Savignyan approach; in the Rome II Regulation, where the rule has taken the form of an 'escape clause' (Art 4(3)), it has been justified as enabling the court seised 'to treat individual cases in an appropriate manner' (recital (14)).

60 Bomhoff/Meuwese (n 13), 153–54; Symeonides (n 41), 12. For some alternatives, see below, II.B.2.

61 Savigny (n 43), 34 (§ 349).

62 ibid.

protection of our courts'[63]. Both of these exceptions are undeniably concerned with the content of the potentially applicable law and the substantive result of its application.[64] And interestingly, both have equivalents in modern instruments of private international law in the form of 'mandatory laws' (*lois de police*)[65] and 'public policy' (*ordre public*)[66].[67]

36 However, neither of these exceptions is generally considered to undermine the apolitical character of the Savignyan approach.[68] First, because they are only applied exceptionally, in cases of a particularly severe discrepancy between foreign and local law;[69] and second, because the consequences of their application are largely mechanical:[70] the mandatory law replaces the otherwise applicable rule,[71] public policy prevents the application of a foreign rule that is deemed unacceptable by the court.[72] Rather than undermining the neutrality of private international law, mandatory laws and public policy

63 ibid.

64 See Martinek, 'Look back before you leap? Fateful tendencies of materialization and of parallelism in modern private international law theory' [2007] JSAfrL 277, 280–81, 283–86.

65 See, eg, Art 9 Rome I; Art 16 Rome II. Though Savigny considered the group to be much larger (see Schurig (n 44), 8).

66 See, eg, Art 21 Rome I; Art 26 Rome II; for similar considerations arising in the context of characterisation, see *Phrantzes v Argenti* [1960] 2 QB 19 (EWHC), 31–35.

67 See Michaels (n 33), 133; Symeonides (n 41), 16 fn 43; Martinek (n 64), 280–81, 283–86; Lehmann, 'Auf der Suche nach dem Sitz des Rechtsverhältnisses: Savigny und die Rom I-Verordnung', in *Festschrift Spellenberg* (sellier 2010), 245, 256–59.

68 See Martinek (n 64), 281, 284. *Contra* Roth, 'Savigny, Eingriffsnormen und die Rom I-Verordnung', in Baur/Sandrock/Scholtka/Shapira (eds), *Festschrift für Gunther Kühne zum 70. Geburtstag* (Recht und Wirtschaft 2009), 859, 860–63.

69 See Case C-184/12 *Unamar* ECLI:EU:C:2013:663, [49] ('must be interpreted strictly'); *Kuwait Airways* (n 30), [18] ('a residual power, to be exercised exceptionally and with the greatest circumspection'). See also, with a more nuanced analysis, Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 JPIL 201, 218–34.

70 See De Nova, 'Glancing at the Content of Substantive Rules under the Jurisdiction-Selecting Approach' (1977) 41 L&ContempP 1, 8–9.

71 Vischer, 'Connecting Factors', in Lipstein (n 27), ch 4 (1998), [9]; but see Vischer (n 56), 163–64 for some limited exceptions.

72 The resulting gap may be filled by the *lex fori*, by other, more general provisions of the applicable (foreign) law, or by provisions of a law identified through a subsidiary connecting factor, see Lagarde, 'Public Policy', in Lipstein (n 27), ch 11 (1991), [60]–[61]; Mills (n 69), 208–09; Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) 50 Netherlands IntLRev, 373, 375–77.

might better be characterised as 'an essential "safety valve" without which national lawmakers might be reluctant to allow the application of the chosen [or otherwise applicable] law.'[73]

37 Despite the existence of such safety valves, the Savignyan method is thus rightly considered as neutral – in the sense that, with the said two exceptions, it is indeed blind to substantive results and treats all laws equally, whether they are domestic or foreign.[74] Although it may be a political decision to submit every legal relation to the law of the country to which it is most closely connected, it is a straightforward approach that has long become the dominant approach in private international law, against which other approaches – and the policies that underlie them – can be judged.

73 Hague Conference on Private International Law, 'Principles on Choice of Law in International Commercial Contracts' (approved on 19 March 2015), Commentary, [11.8], referring to ICJ 28 Nov 1958, *Guardianship of an Infant (Netherlands v Sweden)*, [1958] ICJ Reports 55, Separate Opinion of Hersch Lauterpacht, 95: 'It is that residuum of discretion, it is that safety valve, which has made private international law possible at all […].'

74 Gaudemet-Tallon (n 37), [160]; Juenger (n 40), 163; Martinek (n 64), 279, 281.

B. Challenges to the Savignyan Paradigm of Neutrality

38 Still, the neutrality that is arguably inherent in the Savignyan approach has been questioned ever since it was first conceived in the middle of the 19th century.

39 Its first dimension, the mechanic adherence to the legal system most closely connected to the case at hand, has been challenged by a growing recognition that it has itself significant political implications. What is more, the identification of the closest connection is influenced by regulatory considerations, which – arguably – can be distinguished from the considerations influencing substantive law (1.).

40 The second dimension of the Savignyan paradigm, its blindness towards the substantive result, has been challenged in particular during the American 'conflicts revolution', whose authors put forward a myriad of openly substantive approaches; but it has also been put into question – at least temporarily – by some more recent developments in the European Union (2.).

1. Politicising Savigny Through 'Conflicts' Considerations

41 Although Savigny himself did most certainly not understand his approach as anything other than a legal technique to identify the 'naturally' applicable law,[75] considerations of politics and regulation have found their way into it beyond the limited gateways of *ordre public* and *lois de police*. Without challenging the blindness towards substantive results, this 'politicisation' has taken two forms: an acknowledgement of the factors influencing the identification of the most closely connected law (a.) and a debate about whether private international law should limit itself to identifying this law (b.).

75 See above, [34].

a. Conflicts Considerations

42 It has long been established that the search for the closest connection is inevitably influenced by political choices, both when defining the relevant categories of legal relations[76] (which, today, is largely agreed to depend on the *lex fori* or applicable international instrument)[77] and when deciding to which legal system they are most closely connected.[78] As Robert Neuner observed already in 1942:

> *Almost all rules of conflict of laws have a core which expresses an understandable principle of policy.*[79]

43 One of the first authors to study this political dimension of the Savignyan technique in detail was Gerhard Kegel. According to him,

> *when foreign law is applied, then conflicts justice (application of the* spatially *better law) takes precedence over material justice (application of a state's own law, which it considers as* substantively *better). Of course, there ultimately is just one justice. Yet, as international cases require consideration of particular aspects, it is possible to distinguish substantive and conflicts justice […].*[80]

By establishing a strict distinction between 'material' (substantive) and 'conflicts' justice,[81] Kegel was able to acknowledge the existence of such political factors (interests)

---

76 See *Raiffeisen Zentralbank Österreich v Five Star General Trading (The Mount I)* [2001] EWCA Civ 68, [2001] QB 825, 840 (Mance LJ); Lord Collins et al (n 15), [2–039]–[2–047]; Schurig, *Kollisionsnorm und Sachrecht* (1981), 102–04, 210–13; Siehr, 'Wechselwirkungen zwischen Kollisionsrecht und Sachrecht' (1973) 37 RabelsZ 466, 472–73. Well-known examples for a clash of different regulatory concepts at the stage of characterisation are the distinction between substance and procedure (as to which see Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 ICLQ 691, 697–711 with references) and the distinction between contract and tort law (as to which see Case C-26/91 *Jakob Handte* ECLI:EU:C:1992:268 and below, [260]).

77 See, eg, *Macmillan v Bishopsgate (No 3)* [1996] 1 WLR 387 (EWCA), 407; Lord Collins et al (n 15), [2–038].

78 Mills (n 46), 449; Lequette (n 27), [3]; Ancel/d'Avout (n 45), [94].

79 Neuner (n 27), 490.

80 Kegel, 'Begriffs- und Interessenjurisprudenz im internationalen Privatrecht', in: Gerwig et al (eds), *Festschrift Lewald* (Helbing & Lichtenhahn 1953), 259, 279 (own translation).

81 On which see also Kegel (n 29), 185; and earlier Neuner (n 27), 500–01.

without sacrificing the neutrality of the Savignyan method. For him, it was a direct consequence of this distinction

> *that it is fundamentally wrong to select the applicable law in view of the substantively better result[.] […] Private international law does not care about substantive justice, it is not responsible for it, or, as one could also put it, it treats all substantive laws equally.*[82]

Instead, private international law should be seen as a neutral, 'referring' law (*Verweisungsrecht*).[83]

44 Building on this distinction, KEGEL then identified three groups of 'conflicts' interests, which would influence the designation of the applicable substantive law: the interests of the parties to the relationship in question (*Parteiinteressen*), the interests of other, undetermined parties (*Verkehrsinteressen*), and the interests of legal order in general (*Ordnungsinteressen*).[84] This categorisation has been subject to debate ever since,[85] and so has the approach as a whole. While some argue that it has played a rather limited role in private-international-law scholarship and almost no impact on the practice of the (German) courts and lawmakers,[86] others have called it 'the undisputed point of reference for the future development of private international law'.[87]

---

82 Kegel (n 80), 270–71 (own translation).

83 Martinek (n 64), 279.

84 Kegel (n 80), 274–79; see also Kegel (n 29), 186–89. For a similar classification, see Battifol/Lagarde (n 47), [266].

85 See, eg, Schinkels, 'Das internationalprivatrechtliche Interesse – Gedanken zur Zweckmäßigkeit eines Begriffs', in Kronke/Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann* (Gieseking 2011), 390, 391–401; Flessner, *Interessenjurisprudenz im internationalen Privatrecht* (Mohr Siebeck 1990), 44–46, 54–56.

86 Flessner (n 85), 44.

87 Kühne, 'Internationales Privatrecht im Ausgang des 20. Jahrhunderts' (1979) 43 RabelsZ 290, 310 (own translation). For an approach that builds on Kegel's work and refines it, see Flessner (n 85), 52–66.

45 Be that as it may, the isolation of 'conflicts' considerations that are separate and largely independent from substantive interests in a certain result, has been widely adopted[88] and has rightly been called a 'cornerstone of modern private international law'.[89] This rationalisation makes it possible to identify and discuss the factors – political and otherwise – that influence the selection of the law most closely connected to a certain case,[90] as opposed to the factors influencing its substantive outcome. 'Conflicts considerations' in this sense are concerned with the selection process, rather than the result of the selection. As a consequence, they remain valid independently of whether the aims they pursue are actually achieved in a given case.

46 Political factors of that kind can be identified for virtually every rule in the area of private international law. Jurisdiction over immovable property and the applicable law to title are almost universally acknowledged to depend on the *situs* of the property,[91] which is regularly justified by considerations of predictability, ease of adjudication and proper administration of justice[92] as well as considerations of national sovereignty.[93] In civil-law countries, questions of capacity are usually governed by the law of a person's domicile or nationality,[94] which is believed to respect the person's expectation that such questions will be governed by their home law.[95] The wide-spread acceptance of the parties' autonomy to

88 See, eg, Symeonidis (n 37), 126–127; *The American Choice-of-Law Revolution: Past, Present and Future* (Nijhoff 2006), [349]–[357]; Gaudemet-Tallon (n 37), [159]–[320]. See also Symeonides (n 53), 197.

89 Schurig (n 44), 13 (own translation).

90 See, eg, van den Eeckhout, 'Choice and regulatory competition: rules on choice of law and forum' in Cauffman/Smits (ed), *The citizen in European private law: norm-setting, enforcement and choice* (Intersentia 2016), 9, 16–18.

91 See, eg, Art 24 Brussels Ia for jurisdiction and Briggs (n 14), [9.30]; Venturini, 'Property', in Lipstein (n 27), ch 21 (1974), [3], for the applicable law.

92 See, eg, Case 73/77 *Sanders* ECLI:EU:C:1977:208, [13]; Venturini (n 91), [3].

93 Lehmann, in Dickinson/Lein (eds), *The Brussels I Regulation recast* (OUP 2015), [8.11].

94 Von Overbeck, 'Persons', in Lipstein (n 27), ch 15 (1970), [23].

95 See already Kegel (n 80), 274.

select the competent court and applicable law[96] is often justified by the parties' reasonable expectations,[97] their interest in an appropriate solution of their dispute,[98] and the states' interest in facilitating and enhancing international transactions.[99]

47 As explained above,[100] what distinguishes these 'conflicts' considerations from substantive considerations, is their independence from the content of the law thus selected and the outcome of the individual case.[101] For instance, where a person's capacity is governed by the law of their domicile, it does not matter if, in a particular case, the content of another law would actually be more in line with his or her substantive expectations (even where this expectation might be entirely justified); similarly, the identification of the applicable law does not depend on whether that law adopts a broad or narrow definition of personal capacity.[102] By the same token, the ECJ has held that even a provision that aims to guarantee 'adequate protection of the employee', 'must not automatically result in the application, in all cases, of the law most favourable to the worker.'[103]

48 This does not mean that rules of private international law cannot reflect substantive concerns – in fact, many of them do. The different connecting factors used to determine the applicable tort law, for instance, can be seen as a reflection of the different conceptualisations of tort law as conduct regulation (*lex loci delicti commissi*), loss

96 See, eg, Art 25 Brussels Ia; Art 3 Rome I; Art 14 Rome II.

97 Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 NYU LawRev 267, 283.

98 Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt JTransnatL 381, 413–17.

99 See *The Bremen v Zapata Off-Shore* Co 407 US 1 (1972), [9] (Burger CJ).

100 At [45].

101 See Symeonidis (n 37), 126; Symeonidis (n 41), 44.

102 But see Art 13 Rome I, discussed below at [50].

103 Case C-64/12 *Schlecker* ECLI:EU:C:2013:551, [34].

distribution (*lex loci damni*), or public law (*lex fori*);[104] the conflict between the German 'seat principle' and the Anglo-American 'incorporation principle' regarding the governance of corporations (which resulted in the ECJ's well-known decisions in *Centros*[105] and *Überseering*[106]) can be understood as a conflict between tight and restrained state regulation;[107] and the principle of party autonomy can be seen as an extension of freedom to contract.[108] Still, the fact that the selection process of private international law can be influenced by such substantive policies does not mean that it cannot remain blind towards the content of the rules thus selected and the substantive results of their application to a given case.[109]

b. Questioning the Paradigm of the Closest Connection

49 In addition, based on the distinction just established, it is possible to move beyond the paradigm of the closest connection. Rules of private international law may just as well pursue other aims without losing their blindness towards the substantive result. Over the decades, many such aims have influenced both individual rules and whole instruments of private international law, which openly refer to a law that is not the most closely connected but the application of which nevertheless appears desirable. The private international law of the EU provides examples for both.[110]

---

104 See Symeonidis (n 88), [105]–[123]; Martinek (n 64), 288. See also Commission Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations ('Rome II'), COM(2003) 427 final, Explanatory Memorandum, 3., Art 3(1): 'Article 3(1) [Rome II], which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates […].'

105 Case C-212/97 *Centros* ECLI:EU:C:1999:126.

106 Case C-208/00 *Überseering* ECLI:EU:C:2002:632.

107 Michaels (n 33), 140–41.

108 See *Unamar* (n 69), [49]; Muir Watt, 'Party Autonomy in International Contracts' (2010) 6 ERCL 250, 257.

109 Schurig (n 44), 12.

110 For further examples, see Symeonidis (n 37), 128–38.

50 Regarding individual rules, Art 6(1) Rome II, for instance, modifies the *lex loci damni* principle in order 'to protect competitors, consumers and the general public and ensure that the market economy functions properly'.[111] Art 7 Rome II gives the victim of an environmental tort an alternative to the *lex loci delicti commissi*, in an attempt to protect the claimant and increase the risk of liability for environmental tortfeasors.[112] Similarly, Regulations Brussels Ia and Rome I establish exceptions for consumers,[113] insurance takers,[114] and employees[115] that protect them via far-reaching exceptions to the courts and laws identified as most closely connected through their general rules.[116] Art 11 and 13 Rome I, finally, contain alternative rules on formal validity and capacity, which digress from the paradigm of proximity to further additional policies such as legal certainty[117] and the protection of a party who acts in good faith[118] – admittedly with some interplay with the substantive content of the applicable law.

51 In addition, (some of) the aforementioned European instruments may also be seen as more general deviations from the paradigm of the closest connection. It has long been argued, for instance, that European instruments of private international law fulfil first and

111 Recital (21) Rome II. In Case C-191/15 *Verein für Konsumenteninformation (VKI)* ECLI:EU:C:2016:612, this rule was not only interpreted in light of these underlying policies (ibid, [43]; see also below, [219]), but the ECJ also emphasised that the (quite Savignyan) exception of Art 4(3) Rome II (which refers to the law that is manifestly more closely connected) has no role to play in this context (ibid, [44]–[45]; see also below, [261]).

112 See recital (25) Rome II; Dickinson, *The Rome II Regulation* (OUP 2008), [7.18]; Bright-Staath/Wray, 'Corporations and Social Environmental Justice: The Role of Private International Law' EUI LAW Working Paper No 2012/02 [via SSRN], 13–14.

113 Art 17–19 Brussels Ia; Art 6 Rome I.

114 Art 10–16 Brussels Ia; Art 7 Rome I.

115 Art 20–23 Brussels Ia; Art 8 Rome I; but see Art 8(4) Rome I as interpreted in *Schlecker* (n 103).

116 See Case C-419/11 *Česká spořitelna* ECLI:EU:C:2013:165, [33]; Case C-464/01 *Gruber* ECLI:EU:C:2005:32, [34]. See also Rühl, 'The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy' (2014) 10 JPIL 335, 346–56.

117 See McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP 2015), [16.28].

118 Queirolo, in Magnus/Mankowski (eds), *Rome I Regulation* (otto schmidt 2017), Art 13 [3].

foremost a federalist, coordinating function.[119] This is particularly obvious for the Brussels Convention and its successor Regulations, the central aim of which is to further the internal market by facilitating the free movement of judgments within the EU.[120]

52 Again, it is important to note that many alternative paradigms to the closest connection do not put into question the substantive blindness of private international law.[121] Even alternative choice-of-law rules (such as Art 7 Rome II)[122] favour a certain result only indirectly, without having regard at the actual content of the selected law.[123]

2. Abolishing Savigny Through Substantive Considerations

53 On the European continent, authors started to question this substantive blindness in the 1960s. Vischer, for instance, described it as 'the source of malaise'[124] and a 'paramount problem in conflicts theory',[125] while Zweigert criticised it for creating a 'dearth of social values in conflict of laws'.[126] Instead, both authors argued in favour of a 'materialisation' of private international law, which should be more open to taking into account the

---

119 See Mills, 'Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law' in Muir Watt/Fernández Arroyo (n 2), 245, 250–51; Mills (n 46), 464; Muir Watt, 'The role of the conflict of laws in European private law' in Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010), 44, 46–48; van den Eeckhout, 'The Instrumentalisation of Private International Law: quo vadis?', 1 July 2014 [via SSRN], 3–4. For a further step away from neutral conflicts methodology, see below, II.B.2.b.

120 See recital (6) Brussels Ia; Briggs (n 14), [4.23]. See also recital (6) Rome I and II.

121 *Contra* Juenger, *Choice of Law and Multistate Justice* (Nijhoff 1993), 179–90.

122 For instance, nothing in Art 7 Rome II prevents the claimant from selecting a law that leads to a lower standard of environmental protection, eg because it gives them easier access to compensation. Other examples for alternative choice-of-law rules include Art 11(1) Rome I, Art 6(3) Rome II. These have to be distinguished from rules that guarantee the application of certain substantive standards such as Art 6(2) Rome I, which may indeed be qualified as openly substance-oriented.

123 Kegel (n 80), 271–72; Martinek (n 64), 277, 279. Although Symeonidis (n 37), 135–38, qualifies (some of) these exceptions as 'par excellence result-oriented' (ibid, 135), he does not deny that they only further a certain result indirectly, by providing one of the parties with a choice, which they will usually (but not necessarily) exercise to achieve said substantive result.

124 Vischer (n 56), 92.

125 ibid, 94.

126 Zweigert, 'Zur Armut des Internationalen Privatrechts an sozialen Werten' (1973) 37 RabelsZ 435. See also Siehr (n 76), 474–81.

substantive result of the application of a certain law, beyond the limited gateways of *ordre public* and *lois de police*.

54 Indeed, considerations of constitutional law[127] and human rights[128] have started to play an increasingly important role in continental systems of private international law – mainly as an additional substantive safeguard – and have, more recently, even made their way into a European instrument.[129]

55 Other developments have however gone much further in questioning the distinction between 'conflicts' and 'substantive' considerations. While the American 'conflicts revolution' aimed to replace the traditional Savignyan approach with a substantive case-by-case analysis (a.), more recent developments in the EU seemed to indicate its substitution by a system of mutual recognition (b.).

a. The US 'Revolution'

56 Just like European scholarship, American conflicts thinking of the late 19th century was both technical and multilateral, with Joseph Beale's vested-rights approach[130] being the most influential theory (which was enshrined in the first Restatement[131]).[132] Even though it focused on the rights 'vested' in private parties (under foreign law), it was equally 'neutral' as the Savignyan approach in that it provided for the recognition of such rights independently of their content.[133]

---

127 See Martinek (n 64), 281–83.

128 See, eg, BVerfG 4 May 1971, BVerfGE 31, 58, according to which the application of Spanish law violates a person's right to marry where it prevents them from re-marrying after divorce.

129 See Art 10 Rome III, which rules out the application of a national law if it does not fulfil certain substantive requirements.

130 Summarised in JH Beale, *A Treatise on the Conflict of Laws or Private International Law. Vol 1.1* (Harvard University Press 1916), § 73.

131 American Law Institute, 'Restatement of the Law of Conflict of Laws', 1934.

132 Shreve (n 52), 283; Mills (n 46), 450–53.

133 See Symeonides (n 53), 62–63.

57 With the emergence of the American legal realist movement in the first half of the 20th century, this approach came under sustained criticism from authors like Walter W Cook[134] and David F Cavers[135], who criticised the artificiality and limited social usefulness of this approach,[136] with Cavers famously formulating:

> *The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect the controversy?*[137]

To their minds, private international law, like all law, was indeed 'responsible'[138] for substantive justice.[139]

58 Building upon this criticism, a range of alternative approaches were put forward. Brainerd Currie, arguably the most influential 'revolutionist',[140] put forward his infamous 'governmental interests analysis', under which a 'true' conflict only existed where more than one state was genuinely interested in having its law applied to a given case; such conflicts should be resolved by applying the *lex fori* (provided that it had an interest in its application).[141] Others such as David F Cavers,[142] Robert Leflar,[143] Arthur Taylor von Mehren,[144] and, a bit later, Friedrich Juenger[145] proposed different versions of a

134 See, eg, Cook, 'The Logical and Legal Bases of the Conflict of Law' (1924) 33 Yale LJ 457.

135 See, eg, Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 Harvard LRev 137.

136 See generally Shreve/Buxbaum, *A Conflict-of-Laws Anthology* (LexisNexis, 2nd edn 2012), 58–60.

137 ibid, 189.

138 Cf Kegel's *dictum* quoted at [43].

139 Symeonidis (n 88), [351].

140 On his reception see Shreve/Buxbaum (n 136), 93–141.

141 See, eg, Currie, 'Notes on Methods and Objectives in the Conflict of Laws' [1959] Duke Law Journal 171.

142 See Cavers (n 135), 192–97.

143 Leflar (n 97); 'More on Choice-Influencing Considerations' (1966) 54 California LRev 1584.

144 von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 Harvard LRev 347.

145 Juenger (n 121), 191–232.

substantive-law method that asked courts to search for – or even to develop – the rule (not the law) that would yield the best substantive result in a given cross-border case.

59 What these approaches have in common is their clear renunciation of a technical private international law that only cares about 'conflicts' justice; instead, substantive results have to be taken into account, or must even guide the choice-of-law process.[146] But although many of them seem to have found judicial approval in *Babcock v Jackson*,[147] none of them has clearly emerged as the new leading approach. Instead, the Restatement (Second)[148] and subsequent scholarship have given rise to an amalgam of methods,[149] some of which are clearly substantive while others openly argue in favour of a (partial) return to 'conflicts justice'.[150] Still, scholars occasionally tap into the wealth of substantive methods developed by authors of the US 'revolution' to find solutions for new challenges,[151] including those created by internet communication.[152]

b. The European 'Method of Recognition'

60 Methodologically, the private international law of the EU is undeniably inspired by the Savignyan approach.[153] It relies on a system of connecting factors to designate both the

146 Mills (n 46), 458–59. Interestingly, in 1953, Kegel expressed the hope that Cavers was only referring to what he understood as 'conflicts' interests (as to which see above, II.B.1.).

147 *Babcock v Jackson* 12 NY2d 473 (NY 1963). See the discussion by several of the aforementioned authors in 'Comments on *Babcock v. Jackson*, A Recent Development in Conflict of Laws' (1963) 63 Columbia LRev 1212.

148 American Law Institute, 'Restatement (Second) of Conflict of Laws', 1971.

149 Peterson, 'United States Report', in Symeonides (n 41), 413, 430–31; Mills (n 46), 460–61; Symeonidis (n 88), [368]. See, in more detail, Shreve/Buxbaum (n 136), 241–306.

150 See, in particular, Symeonidis (n 37), 138–40; Symeonidis (n 88), [356]–[357], [380], sub (g).

151 See, eg, Muir Watt, 'Globalisation des marchés et économie politique du droit international privé' (2003) 47 Archives de philosophie du droit, 243, 243–45.

152 See, eg, Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 U of Pennsylvania LRev 469, 543–45; Geller, 'Conflicts of Laws in Cyberspace: Rethinking International Copyright' (1996–97) 44 J CopyrightSocUSA 103, 107; see also below, under IV.C.1.a.

153 See Michaels, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006) 2 JPIL 195, 197; Michaels (n 33), 126.

competent court(s) and the applicable law. It may do so in view of certain policies,[154] but it remains largely neutral towards the content of national law or the substantive outcome of a given case.[155]

61 For a short moment in time, though, EU private international law seemed to be on the brink of being at least partially substituted by an alternative, substance-focused approach,[156] the so-called 'method of recognition' (or, with a different emphasis, the 'country-of-origin principle').[157] Starting with its three seminal decisions in *Centros*,[158] *Überseering*,[159] and *Inspire Art*[160] the ECJ required national authorities to 'recognise' legal situations that had been created in other member states so as not to impede the four freedoms under the Treaty. Thus, the subsidiary of a company incorporated in England had to be registered in Denmark even if the English mother company's only purpose was to enable it to carry out its business in Denmark without the need to form a company there (and avoid the application of Danish law);[161] the Dutch legislator was not allowed to impose certain conditions of its domestic company law on such subsidiaries of companies established in another member state;[162] and the Belgian authorities could not refuse the

154 See above, II.B.2.

155 See also above, [47].

156 See See also Heymann, 'Importing Proportionality to the Conflict of Laws', in Muir Watt/Fernández Arroyo (n 2), 277: 'the European Court of Justice defends "justice of substantive law" against the "justice of conflict of law".'

157 See generally Lehmann, 'Recognition as a Substitute for Conflict of Laws?', in Leible (ed), *General Principles of European Private International Law* (Kluwer 2016), 11; Dickinson (n 112), [16.04]–[16.31]; Mansel, 'Anerkennung als Grundprinzip des Europäischen Rechtsraums' (2006) 70 RabelsZ 651.

158 Above, n 105.

159 Above, n 106.

160 Case C-167/01 *Inspire Art* ECLI:EU:C:2003:512.

161 *Centros* (n 105).

child of a Belgo-Spanish couple to register a surname to which it would be entitled under Spanish law.[163]

62 The significance of this jurisprudence consists in the fact that it sidestepped mechanisms of private international law, which traditionally designated the applicable law to both the *creation* and the *effect* of a legal situation[164] and which would often have referred to laws different from the one that was to be given effect under the method of recognition.[165] Consequently, some authors openly inquired whether this new approach could be 'a substitute for Conflict of Laws'[166] and replace traditional methods of private international law.[167]

63 Yet, with the public backlash over its potential codification in the planned Services Directive[168] and a rapidly decreasing enthusiasm for further federalism,[169] the Commission seemed to quickly turn its back on the project of establishing the 'method of recognition' as a general rule within the single market.[170] Instead, the approach seems to have eventually taken the form of a limited substantive corrective to the application of

---

162 *Inspire Art* (n 160).

163 Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539; for a similar case, see Case C-353/06 *Grunkin Paul* ECLI:EU:C:2008:559; for a similar trend in the jurisprudence of the ECtHR, see the decisions in *Negrepontis-Giannisis v Greece* App no 56759/08 (ECtHR, 5 Dec 2013); *Wagner and JMWL v Luxembourg* App no 76240/01 (ECtHR, 28 Jun 2007).

164 Lequette (n 27), [8]; Battifol/Lagarde (n 47), [318-1].

165 See Michaels (n 33), 121–23.

166 Lehmann (n 157).

167 Michaels (n 153), 207–11; see also Joerges, 'On the Legitimacy of Europeanising Private Law' (2003) 7.3 EJCL art 3, sub II.1, speaking of 'the obsolescence of traditional private international law'. *Contra*, eg, Dickinson (n 112), [16.08]–[16.10]; Lequette (n 27), [17].

168 Commission Proposal for a Directive on services in the internal market, COM(2004) 2 final.

169 See Dickinson (n 112), [16.18]–[16.22].

170 For instance, the approach did neither make it into the Services Directive (Directive 2006/123/EC) nor into the Rome II Regulation, where it had been discussed as a potential rule for violations of privacy and rights of personality (see Dickinson (n 112), [16.23]–[16.25]).

conventional choice-of-law rules, similar to national constitutional law, to which the member states can give effect in different ways.[171]

64 As a consequence, the 'method of recognition' has played a rather limited role outside of academic scholarship in recent years. It has persisted, however, in the form of specific 'country of origin' rules in a small number of EU instruments. These rule address the problems created by the seamless dissemination of information across borders, but do so in different ways. They provide a first glimpse into how the problems of the wide, transnational reach of internet communication may be addressed.

65 A first example can be found in the *Satellite and Cable Directive*,[172] which contains a country-of-origin rule in its Art 1(2)(b). According to this provision, an act of of communication is considered to happen exclusively in the country in which the satellite transmission was initiated. Within the Directive's (limited)[173] scope of application, the provision posits a fiction that courts have to respect when applying national and European law (including rules of private international law)[174] but does not prescribe any particular substantive outcome.

66 A second, somewhat more prominent example can be found in Art 3(2) of the *e-Commerce Directive*,[175] which is closely linked to the fundamental freedoms of primary EU law[176] – in particular, freedom of establishment (now Art 49 TFEU) and freedom to

171 Lehmann (n 157), 28–30; Mansel (n 157), 677–79.

172 Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

173 See Case C-192/04 *Lagardère* ECLI:EU:C:2005:475, [43]–[44].

174 See Fawcett/Torremans, *Intellectual property and private international law* (OUP, 2nd edn 2011), [10.242], [15.145]; Van Eechoud, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis* (Kluwer 2003), 82.

175 Above, n 22.

176 See Kohl, *Jurisdiction and the Internet* (CUP 2007), 185–86; Hörnle, 'Country of Origin Regulation in Cross-Border Media: One Step Beyond the Freedom to Provide Services?' (2005) 54 ICLQ 89, 110–13.

provide services within the EU (now Art 56 TFEU) – but still takes a different approach from the original 'method of recognition'. It requires member states not to 'restrict the freedom to provide information society services from another member state'.[177] This had originally been understood by some[178] as a genuine choice-of-law rule, referring all questions falling within the Directive's scope[179] to the service provider's country of origin. The ECJ has however taken the opposite view, according to which Art 3(2) 'does not require transposition in the form of a specific conflict-of-laws rule.'[180] Still, the member states 'must ensure that […] the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.'[181] Art 3(2) thus acts as an overriding mandatory provision of the forum,[182] imposing limits on the substantive law that applies pursuant to regular choice-of-law rules.[183]

67 While both provisions try to address the problem of technology allowing information to seamlessly cross borders by concentrating prescriptive (legislative)

177 It is a corollary of the Directive's Art 3(1), according to which '[e]ach member state shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within [the scope of the Directive]'. For a similar pair of rules, see Art 2(1), 2a(1) of Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities as amended by Directives 97/36/EC and 2007/65/EC.

178 See Thünken, 'Multi-State Advertising over the Internet and the Private International Law of Unfair Competition' (2002) 51 ICLQ 909, 940–41; Mankowski, 'Herkunftslandprinzip und deutsches Umsetzungsgesetz zur e-commerce Richtlinie' IPRax 2002, 258. See also OGH 9 May 2012, MR 2012, 207, [1.2] (interpreting the Austrian transposition as a conflict-of-laws rule) and OGH 19 Mar 2013, GRUR Int 2013, 1163, 1166 (giving up this interpretation in light of *eDate*).

179 As to which see below, [92]–[94].

180 Joined Cases C-509/09 and C-161/10 *eDate Advertising* and *Martinez* ECLI:EU:C:2011:685, [63].

181 ibid, [68].

182 In the sense of Art 9(2) Rome I, Art 16 Rome II. See *eDate* (n 180), [65], referring to Case C-381/98 *Ingmar* [2000] ECLI:EU:C:2000:605, [25].

183 Lord Collins et al (n 15), [35-159].

jurisdiction in a single member state,[184] they do so in two different ways. The Satellite and Cable Directive indirectly manipulates certain connecting factors by creating the fiction of a single place of communication but remains blind towards the content of the law thus rendered applicable. The e-Commerce Directive, on the other hand, abandons this blindness and prescribes a particular regulatory burden based on a comparison of the *substance* of national laws with a view to removing restrictions on the cross-border movement of information society services. This country-of-origin rule can hardly be reconciled with the Savignyan paradigm of neutrality; it is, at the very least, a noticeable step towards a genuinely substantive approach.

184 See Hörnle (n 176), 108–13; Savin, *EU Internet Law* (Edward Elgar 2013), 48.

C. Reviving the Regulatory Dimension of Private International Law

68 The previous account has revealed three different approaches to private international law: first, Savigny's mechanical search for the closest connection, which is completely neutral and (alleged to be) free from political considerations; second, an approach that is transparently influenced by these considerations but remains indifferent towards the content of the law so selected and the result of its application to a specific case; and third, an openly substantive approach that subordinates questions of private international law to achieving a specific substantive result.

69 Where, then, do the more recent calls for 'a revival of the role of private international law in creatively attending to the regulation of transnational business conduct'[185] fit into this picture?

70 A number of propositions – some of which have been made specifically in view of the difficulties associated with new technology that will be explored below – seem to fall into the third category, stepping into the footsteps of the American 'revolutionists' and arguing in favour of a far-reaching change of methodology.[186]

71 The majority of authors engaging with the relevance and paradigms of private international law in light of contemporary debates about global governance, on the other hand, seem to explore avenues that rather fall into the second group. Even though they challenge the 'foundational myth of methodological neutrality',[187] they accept the Savignyan paradigm of substantive neutrality and search for ways in which it can be modified or complemented to provide better answers to contemporary problems.

---

185 Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia JTransnatL 209, 273.

186 See, eg, Dinwoodie (n 152), 542–79; Geller (n 152), 107–12; both discussed below under IV.C.1.

187 Muir Watt (n 2), 2.

72 Horatia Muir Watt and Alex Mills, for instance, see (one of) the reason(s) for the discipline's impotence to address the challenges raised by globalisation in its conceptualisation as a part of *private* law, which followed its emancipation from public international law at the beginning of the 20th century.[188]

> *[P]rivate international law became 'domesticated' and cut off from the politics inherent in international relations, at the time when public international law emerged as a discipline. The 'public law taboo'; circumscribing the focus of the conflict of laws to the regulation of cross-border 'private interests' through national 'private law,' also signaled [sic] the avoidance of the political.*[189]

They argue that the discipline's focus on private rights has obscured its traditional function of allocating regulatory authority between states,[190] lying at the bottom of both private and public international law,[191] and leaves it unequipped for the challenges of globalisation and legal pluralism.[192] But they also see the increased use of international instruments to govern questions of private international law[193] and the trend to use private international law as a technique of legal coordination in federal states (like Canada and Australia) and

188 See Mills (n 119), 245; 'Rethinking Jurisdiction in International Law' (2004) 84 BrYbIntL, 187, 200–09; 'Rediscovering the Public Dimension of Private International Law' (2011) 24 Hague YbIntL 11; *The Confluence of Public and Private International Law* (CUP 2009), 211–97; Muir Watt (n 2), 2–3; Mills (n 34), 356–74; *Private International Law and Public Law. Vol I* (Edward Elgar 2015), xiii–xix. See also Bomhoff, 'The Constitution of the Conflict of Laws', in Muir Watt/Fernández Arroyo (n 2), 262; Heymann (n 156); Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des cours 49, *passim*; Michaels, 'Globalization and Law: Law Beyond the State', in Banakar/Travers (eds), *Law and Social Theory* (2nd edn, Hart 2013), 289, 300–02; Raul (n 4), 153–73; L Reed, 'Mixed Private and Public Law Solutions to International Cases' (2003) 306 Recueil des cours 177; Strauss, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts' (1995) 36 Harvard International Law Journal 373.

189 Muir Watt (n 37), 2.

190 Mills, *The Confluence of Public and Private International Law* (n 188), 213–14; 'Rediscovering the Public Dimension' (n 188), 15; 'Rethinking Jurisdiction' (n 188), 200; Muir Watt (n 34), 358–59.

191 Mills, *The Confluence of Public and Private International Law* (n 188), 213–24; 'Rediscovering the Public Dimension' (n 188), 12, 21; 'Rethinking Jurisdiction' (n 188), 201–09.

192 Muir Watt (n 34), 382–95.

193 L Reed (n 188), 203–22; Strauss (n 188), 376–78, 422–23.

systems (like the EU)[194] as proof of the connection between the two fields and an opportunity to 'revive' the global-governance dimension of private international law.[195]

73 Others, such as Ralph Michaels, criticize the discipline's unfettered focus on *state law*:[196]

> *Choice of law as a discipline has largely defined itself as choice between laws of states. As a discipline, it considers issues regarding the applicability of non-state normative orders as peripheral at best. Yet the question of whether non-state norms can be the applicable law moves from the periphery to the center once we view conflict of laws through the lens of globalization.*[197]

They argue that this narrow understanding of private international law has made it difficult for the discipline to apprehend phenomena like non-state[198] and supranational[199] law, private ordering[200] and legal pluralism[201]. To their mind, private international law can stay relevant in the context of globalisation only if it finds a way to broaden its scope and engage with these phenomena.[202]

---

194 Mills, *The Confluence of Public and Private International Law* (n 188), 224–64; 'Rediscovering the Public Dimension' (n 188), 20–21; Muir Watt, 'Integration and Diversity: The Conflict of Laws as a Regulatory Tool', in Cafaggi (ed), *The Institutional Framework of European Private Law* (OUP 2006), 107, 147–48; Heymann (n 188), 288–89.

195 See also Strauss (n 188), 416–22.

196 Michaels (n 33), 138–39, 142–43; Michaels (n 188), 300–02; 'The Re-state-ment of Non-State-Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 Wayne LRev 1209. See also Berman, 'Non-State Law Making Through the Lens of Global Legal Pluralism', in Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (CUP 2015), 15, 31–39; Muir Watt (n 36), [12]–[22]; Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Discipline' (2004) 14 Duke JCompIntL 149, in particular 164–66; Juenger, 'American Conflicts Scholarship and the New Law Merchant', (1995) 28 Vanderbilt JTransnatL 487; Saumier, 'PILAGG in Practice: Two Examples of Concrete Steps', PILAGG e-series GG/1, 15–16. For a provision that appears to react to these concerns, see Hague Principles on Choice of Law in International Commercial Contracts (n 73), Art 3.

197 Michaels (n 196), 1210–11.

198 Michaels (n 188), 291, 297–99; Michaels (n 196), 1228–37.

199 On EU law see Michaels (n 33), 140–44; Joerges (n 196) 167–89.

200 Michaels (n 188), 291.

201 Michaels (n 196), 1221–24.

202 Michaels (n 196), 1250–59; Joerges (n 196) 189–96. See also Michaels/Jansen, 'Private Law Beyond the State?: Europeanization, Globalization, Privatization' (2006) 54 AmJCompL 843, 884–85.

74 Other propositions aim to supplement private international law methodology by the insights gained from other (existing) fields, such as law and economics[203] or social theory,[204] or to complement it by entirely new disciplines like 'law and globalisation'[205].

75 These different propositions converge in two ways. First, they are testimony to a belief that private international law can contribute to contemporary debates about globalisation, regulatory competition, and private ordering – but that it needs to evolve in order to effectively address these challenges.[206] Second, they imply that such an evolution is possible without completely abandoning the discipline's orthodox paradigms and foundations. Their proponents, it seems, are more interested in widening the scope of the 'conflicts' considerations that influence the allocation of adjudicatory and prescriptive jurisdiction by private international law than in the selection of specific norms; they are more interested in its potential for meta-regulation[207] than in its (in)ability to create certain substantive outcomes in specific situations.

76 In the following parts of this thesis, the proposition that private international law can serve as a potent tool for regulation in a globalised world will be tested against one such challenge: the emergence of the internet as a means of communication that transcends national borders and often appears to escape the regulatory authority of national courts and legislators. The challenge of regulating the internet will first be defined (III.), before the potential of private international law to address it will be discussed (IV.).

---

203 See Rühl (n 38), 80–177.

204 Berman (n 6), 423–90; Fischer-Lescano/Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003–04) 25 Michigan JIntL 999, 1004–17.

205 Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia JTransnatL 485.

206 See also Bright/Staath-Wray (n 112), *passim*; Muir Watt, 'Reshaping Private International Law in a Changing World' (conflictoflaws.net, 2 Apr 2008); Saumier (n 196), 1–3; van den Eeckhout (n 158), 16–18; Wai (n 185), 250–73. For the potential dangers of such an evolution see van den Eeckhout (n 119), 4–6, 7–8, 10–11.

207 See also Bomhoff/Meuwese (n 13), 149–55.

III. The Regulatory Challenge of the Internet

77 When the US Federal Communications Commission classified broadband technology as a telecommunications service and enacted rules to implement a concept widely known as 'net neutrality',[208] under which internet service providers are required to treat all data on their networks equally and without discriminating between different types of content,[209] the Commission's then-chairman Tom Wheeler explained:

> *The Internet is the most powerful and pervasive platform on the planet. It is simply too important to be left without rules and without a referee on the field. […] The Internet has replaced the functions of the telephone and the post office. The Internet has redefined commerce, and […] is the ultimate vehicle for free expression. The Internet is simply too important to allow broadband providers to be the ones making the rules.*[210]

Following the Republican party's success in the 2016 US presidential election and a corresponding change in the Commission's composition, its new chairman Ajit Pai put forward a proposal to repeal these rules,[211] arguing that they 'depressed investment in building and expanding broadband networks and deterred innovation'.[212] The announcement, which came after more than 22 million comments had been submitted to the Commission (many of which are suspected to be fake),[213] was met with broad public opposition, including from many politicians, pioneers of the internet, and globally active

---

208 The term was coined by Tim Wu, 'Network Neutrality, Broadband Discrimination' (2003) 2 JTelecom&HighTechL 141. Generally on 'net neutrality' see DeNardis, *The Global War for Internet Governance* (Yale University Press 2014), 131–52.

209 See ibid, 145–46. As a consequence, Internet Service Providers may neither artificially slow down or even block the connection to particular services (such as peer-to-peer file sharing applications) nor create 'fast lanes' for certain applications (such as their own music-streaming services).

210 See Brodkin, 'FCC votes for net neutrality, a ban on paid fast lanes, and Title II' (*arstechnica.com*, 26 Feb 2015).

211 Federal Communications Commission, 'In the Matter of Restoring Internet Freedom: Declaratory Ruling, Report and Order, and Order', WC Docket No. 17-108, FCC-CIRC1712-04 (21 Nov 2017).

212 Federal Communications Commission, 'Chairman Pai Circulates Draft Order to Restore Internet Freedom and Eliminate Heavy-Handed Internet Regulations' (21 Nov 2017).

213 Naylor, 'As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments' (*npr.org*, 14 Dec 2017).

tech companies.[214] Still, on 14 December 2017, the Commission decided to repeal the rules.[215] A subsequent Senate resolution (based on the Congressional Review Act 1996) failed to gather sufficient support in the House of Representatives to stop the repeal from becoming effective in June 2018.[216] While the House could still reverse the decision, it has also been challenged in numerous lawsuits.[217]

78 This clash between two different approaches to regulating some of the most basic parts of the internet's infrastructure, which continues to be fought in many parts of the world,[218] supports two more general observations: that the internet has become, over the last decade, the single most important means of communication in the world, playing an ever-increasing role in the lives of millions of private individuals and businesses (A.); and that legislators and governments still struggle to answer the question of how to regulate it (B.). The consequences of this struggle can be observed in many areas of private law (C.).

A. The Economic and Societal Importance of the Internet

79 Every minute, more than 3.9 billion internet users[219] like 4.2 million posts on *Facebook*, upload 46,740 photos to *Instagram*, 400 hours of new video to *youtube*, and 833,333 files to their *Dropboxes*, publish 74,220 posts on *tumblr*, write 456,000 tweets, and make 600

214 See the three open letters signed by 39 senators (United States Senate, letter to the FCC of 12 Dec 2017), more than a hundred congressmen and -women (United States Congress, letter to the FCC of 13 Dec 2017), and 20 'internet pioneers' (Internet Pioneers and Leaders Tell the FCC: You Don't Understand How the Internet Works), respectively, and the campaign's website *battleforthenet.com*.

215 Kang, 'F.C.C. Repeals Net Neutrality Rules' (*nytimes.com*, 14 Dec 2017).

216 Finley, 'The FCC's Net Neutrality Rules are Dead, but the Fight isn't' (*wired.com*, 11 Jun 2018).

217 ibid; Brodkin, 'FCC must defend net neutrality repeal in court against dozens of litigants' (*arstechnica.com*, 12 Mar 2018).

218 In the EU, the principle of net neutrality is enshrined in Art 3 of Regulation (EU) 2015/2120 of 25 Nov 2015 laying down measures concerning open internet access (…), which has however been criticised for containing a number of potential loopholes, such as the lack of clear rules regarding the offer of services that do not count against a consumer's data limit ('zero rating').

219 Internet World Stats, 'Internet Usage Statistics' (*internetworldstats.com*, July 2017).

edits to *Wikipedia*.[220] In the same time span, *Google* receives 3.8 million search queries.[221] In Western countries, more than 84% of the population (and more than 90% of the young people aged 15–24) use the internet.[222] It has become the most important means of distribution for music,[223] films,[224] and video games.[225] In the United Kingdom, online sales constitute 17.8% of the retail market,[226] a percentage share that has been consistently growing by more than 10% per year.[227]

80 As the internet[228] continues to permeate more and more aspects of everyday live, its economic importance keeps growing. In 2015, the *Boston Consulting Group* estimated the internet to contribute already more than 10% of GDP to the UK's economy.[229] In its Digital Single Market Strategy, the EU Commission expressed its hope that the reduction of barriers between member states would contribute an additional € 415 billion to the member states' combined GDP each year,[230] also pointing to the potential of creating 'hundreds of thousands of new jobs, notably for younger job-seekers'.[231] Meanwhile, the

220 James, 'Data Never Sleeps 5.0' (*domo.com*, 25 July 2017); James, 'Data Never Sleeps 4.0' (*domo.com*, 28 June 2016); 'Data Never Sleeps 3.0' (*domo.com*, 13 Aug 2015).

221 Allen, 'What happens online in 60 seconds?' (*smartinsights.com*, 6 Feb 2017); see also internetlivestats.com/google-search-statistics/ for real time figures.

222 International Telecommunication Union, 'ICT Facts & Figures 2017' (*itu.int*, 31 July 2017).

223 See International Federation of the Phonographic Industry, 'Global Music Report 2017' (*ifpi.org*, April 2017), 10–13.

224 See Sweney, 'Film and TV streaming and downloads overtake DVD sales for first time' (*guardian.com*, 5 Jan 2017).

225 See entertainment software association, 'Essential Facts About the Computer and Video Game Industry' (*theesa.com*, 2018), 14.

226 Centre for Retail Research, 'Online Retailing: Britain, Europe, US and Canada 2017' (*retailresearch.org*, 2016).

227 ibid.

228 As to the particular aspects of the internet as a network of networks using TCP/IP covered in this thesis, see above, [13].

229 Boston Consulting Group, 'The Internet Now Contributes 10 Percent of GDP to the UK Economy, Surpassing the Manufacturing and Retail Sectors' (*bcg.com*, 1 May 2015).

230 Communication from the Commission: A Digital Single Market Strategy for Europe, COM(2015) 192 final, 3.

231 ibid, 2.

list of the world's most valuable companies includes many that offer services that are inextricably linked to the internet.[232]

81 This considerable economic potential goes hand in hand with an ever-growing societal importance.[233] The internet has allowed for projects and business models to thrive that would have been inconceivable just 20 years ago, ranging from worldwide social networks and streaming platforms over free encyclopediae and databases to car-sharing models, crowdfunding platforms, smart homes, and cryptocurrencies. The internet is believed to have played a vital role in many political events, including the 'Arab Spring' in 2011,[234] the Brexit vote,[235] and the 2016 US Presidential Election.[236] It has completely changed the way in which we think about concepts such as privacy, community, and free time.

B. The Challenge of Regulating the Internet

82 In light of the ever-growing importance of the internet, it is hardly surprising that states have become increasingly active in its regulation. Their approach has gone from a deliberately lenient stance under which internet users were allowed to self-regulate (1.) to a wide range of attempts at more restrictive regulation (2.), though most of them are yet to address the more fundamental problems of internet regulation (3.).

---

232 See PricewaterhouseCoopers, 'Global Top 100 Companies by market capitalisation' (*pwc.com*, 31 March 2017), including *Apple*, *Alphabet*, *Microsoft*, *Amazon*, *Facebook* in the Top 10.

233 See Taubman, 'International Governance and the Internet', in Edwards/Waelde (eds), *Law and the Internet* (3rd edn, Hart 2009), 8–11.

234 See, eg, Stepanova, 'The Role of Information Communication Technologies in the "Arab Spring"', PONARS Eurasia Policy Memo No 159 (*pircenter.org*, May 2011).

235 See, eg, Bell, 'The truth about Brexit didn't stand a chance in the online bubble' (*theguardian.com*, 3 July 2016).

236 See, eg, Lapowsky, 'Here's how Facebook actually won Trump the presidency' (*wired.com*, 15 Nov 2016).

1. The Utopia of an Unregulated Cyberspace

83 In 1990, Tim Berners-Lee created the HyperText Markup Language (HTML), the Hypertext Transfer Protocol (HTTP), and the first web Browser, *WorldWideWeb*, making it possible to link all resources on a network via unidirectional links. It is widely believed that this possibility, which was made more easily accessible through the emergence of graphical web browsers like *Mosaic* and *Netscape Navigator*, played a key role in popularising the internet.[237] The underlying technology, though, is much older than that and can be traced back at least as far as to the 1960s,[238] when a range of universities and research institutions started to work on decentralised, interconnected networks, with the start of the ARPANET project in 1967[239] and the adoption of the Internet Protocol Suite in 1982[240] being two particularly significant mile stones.

84 In these early days of the internet, states were generally happy to leave it to the private sector to regulate the internet.[241] In many cases, this may not have been so much of a well-informed decision as a mere lack of awareness of its potential impact; but in some cases, it was indeed a deliberate decision to abstain from regulating.[242] The National Telecommunications & Information Administration of the US Department of Commerce, for instance, stated with regard to the internet's domain name system (which the US government was effectively overseeing at the time) that

---

237 See Bing, 'Building Cyberspace: a brief history of Internet', in Bygrave/Bing (eds), *Internet Governance: Infrastructure and Institutions* (OUP 2009), 8, 39–42; Greenstein (n 18), 8.

238 See, in more detail, Bing (n 237), 8–38; Greenstein (n 18), 4–6.

239 Bing (n 237), 21–25; Hafner/Lyon, *Where Wizards Stay Up Late* (Pocket Books 2003), 40–42.

240 Bing (n 237), 27, 32–35; Greenstein (n 18), 5.

241 See Taubman (n 233), 6–7; Svantesson, *Private International Law and the Internet* (3rd edn, Kluwer 2016), 2–3.

242 See Bygrave, *Internet Governance by Contract* (OUP 2015), 28–30, 44–46; Savin (n 184), 9, 20–21; Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017), 92. See also Clinton, 'A Framework for Global Electronic Commerce', reprinted in Fitzgerald (ed), *Cyberlaw* (Ashgate/Dartmouth 2006), Vol I, 133.

> *[t]he Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the technical management of the Internet because they will promote innovation, preserve diversity, and enhance user choice and satisfaction. […]*
>
> *[R]esponsible, private-sector action is preferable to government control. A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users. The private process should, as far as possible, reflect the bottom-up governance that has characterized development of the Internet to date.*[243]

Based on this position, the Domain Name System was put into the hands of the Internet Corporation for Assigned Names and Numbers (ICANN), a private non-profit organisation that relies on a 'multi-stakeholder, private sector led, bottom-up policy development model'.[244]

85 This restrained approach to internet regulation went hand in hand with a belief held by many of the early actors involved in the internet that the net *had* to be self-regulated.[245] This 'cyberlibertarianism'[246] culminated in the infamous 'Declaration of the Independence of Cyberspace' published by JP Barlow in 1996:

> *Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask*

---

243 US Department of Commerce, National Telecommunications & Information Administration, 'Improvement of Technical Management of Internet Names and Addresses; Proposed Rule', 20 Feb 1998, DOCID:fr20fe98-24, (1998) 63 Federal Register (No 34), 8825, 8827.

244 See US Department of Commerce/ICANN, 'Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers' (*icann.org*, 30 Sept 2009); see also Feld, 'Structured to Fail: ICANN and the ''Privatization'' Experiment', in Thierer/Crews (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003), 333; Bygrave (n 242), 50–84; DeNardis (n 208), 47–51. Until 2016, ICANN still operated on the basis of a contract with, and thus under the effective control of, the US Department of Commerce; this contract has meanwhile been replaced by a more decentralised mechanism of international oversight.

245 See Hayakawa, 'Private Law in the Era of the Internet', in Basedow/Kono (eds), *Legal Aspects of Globalization* (Kluwer 2000), 27, 30; C Reed, *Making Laws for Cyberspace* (OUP 2012), 5–8; Taubman (n 233), 11; Tsagourias, 'The Legal Status of Cyberspace', in Tsagourias/Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015), 13, 22–23.

246 Murray, 'Nodes and Gravity in Virtual Space' (2011) 5 Legisprudence 195, 197–98.

> *you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. […]*
>
> *Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.*[247]

This optimism also echoed in some of the early scholarship engaging with the legal implications of cyberspace.[248] While some authors argued that cyberspace should be allowed to evolve within the existing legal framework 'as it will',[249] others were proposing the development of a completely new legal regime.[250]

86 Interestingly (from a conflict-of-laws perspective), the argument that cyberspace should be governed by different laws than the 'real'[251] world took its most prominent form in a paper by David R Johnson and David Post,[252] who argued that cyberspace should not

247 Barlow, 'Declaration of the Independence of Cyberspace' (*eff.org*, 8 Feb 1996), reprinted in Fitzgerald (n 242), Vol I, 129.

248 See Berman (n 6), 371–77; Michaels (n 196), 1215–18; Svantesson (n 242), 95–96; Tsagourias (n 245), 16 (all with further references).

249 Easterbrook, 'Cyberspace and the Law of the Horse' [1996] U of Chicago Legal Forum 207, 215–16: 'Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly. Let us instead do what is essential to permit participants in this evolving world to make their own decisions. […] Then let the world of cyberspace evolve as it will, and enjoy the benefits.'

250 See, eg, Byassee, 'Jurisdiction of cyberspace: Applying real world precedent to the virtual community' (1995) 30 Wake Forest LRev 197, 219–20; Lessig, 'The Path of Cyberlaw' (1995) 104 Yale LJ 1743, 1744–46; Lessig (n 7), 1407–11; see also Hardy, 'The Proper Legal Regime for "Cyberspace"' (1994) 55 U Pittsburgh LRev 993, 1053–55. For the corresponding debate about whether legal scholarship should embrace 'the law of cyberspace' as a new discipline or rather stick to more abstract considerations and then apply them to internet cases, see Easterbrook (n 249), 207–08, for arguments against such a new discipline, and Lessig, 'The Law of the Horse: What Cyberlaw May Teach' (1999) 113 Harvard LRev 501 for arguments in favour. And see Wright/De Filippi, 'Decentralized Blockchain Technology and the Rise of *Lex Cryptographia*' [via SSRN], 48–51, extending the argument to the allegedly emerging *lex cryptographia*, a form of decentralised regulation relying on blockchain technology and self-executing contracts.

251 It should be noted that according to some internet activists, the internet, too, is part of the 'real' world (which is why they prefer the acronym AFK (away from keyboard) over the more common IRL (in real life): see Enigmax, 'Pirate Bay Trial Day 5: Peter's "Political Trial"' (*torrentfreak.com*, 20 Feb 2009). See also below, under IV.C.2.e.(1).

252 Johnson/Post, 'Law And Borders – The Rise of Law in Cyberspace' (1995–96) 48 Stanford LRev 1367.

only be governed by a different law, but by its own law;[253] the applicable law should be the 'law of cyberspace', rather than any particular national legal system. According to Johnson and Post,

> *[m]any of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'*[254]

Perhaps inevitably, this proposition was readily challenged by other authors, who argued that despite their reliance on geographical criteria, traditional rules and techniques of private international law would be able to solve the different problems that started to emerge in the context of the internet[255] – with Jack L Goldsmith famously claiming that

> *[t]here is no general normative argument that supports the immunization of cyberspace activities from territorial regulation. And there is every reason to believe that nations can exercise territorial authority to achieve significant regulatory control over cyberspace transactions.*[256]

253 For similar propositions, see Post, 'Governing Cyberspace' (1996) 43 Wayne LRev 155, 166–67; 'Against "Against Cyberanarchy"' (2002) 17 Berkeley TechLJ 1365, 1373–87; Kulesza/Balleste, 'Signs and Portents in Cyberspace: The Rise of *Jus Internet* as a New Order in International Law' (2003) 23 Fordham IPMedia&EntLJ 1311, 1333–46.

254 ibid, 1378.

255 See, eg, Davis, 'The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier' (2001/02) 54 FedCommLJ 339, 359–62 (claiming that there is nothing different or unique about cyberspace which warrants the modification or abandonment of traditional choice-of-law regimes: ibid, 342); Dogauchi, 'Law Applicable to Torts and Copyright Infringement through the Internet' in Basedow/Kono (n 245), 49, 50; Stein, 'The Unexceptional Problem of Jurisdiction in Cyberspace' (1998) 32 IntLawyer 1167, 1170–91. The number of authors subscribing to this belief has not stopped growing since: see, eg, Bigos, 'Jurisdiction over cross-border wrongs on the internet' (2005) 54 ICLQ 585, 602–03; Kohl (n 176), 11–13; Velásquez Posada, 'Jurisdictional Problems in Cyberspace Defamation' (2005) IntL RevColombDerInt 247, 293–94; Gössl, *Internetspezifisches Kollisionsrecht?* (Nomos 2014), 288–90.

256 Goldsmith, 'Against Cyberanarchy' (1998) 65 U Chicago LRev 1199, 1250.

2. Attempts at Regulation

87 The uncertainty as to the appropriate approach to regulating online communication is reflected in some of the early decisions by national courts, which had to adjudicate the first internet cases based on the existing legal framework. One of the problems they had to address was the question of personal jurisdiction over the defendants whose relevant activities had been conducted through a website. One of the first decisions in this regard, the infamous *Zippo* case,[257] in which a US District Court developed a 'sliding scale' test that looked at the website's interactivity, has been lauded for its cautious consideration of the legitimacy of jurisdictional claims over online activities.[258] But it was soon followed by other decisions that made much more far-reaching claims to jurisdiction, extending it 'to any Internet conduct that impacted, or had the potential to impact, on their territory or citizens.'[259] Well-known examples include the decisions in *Gutnick*,[260] where the High Court of Australia based its jurisdiction over defamatory online material on the fact that it had been accessed by Australian subscribers of the website in question, and *Yahoo*,[261] in which a local French court asserted personal jurisdiction over a US-based auction platform that contained offers which violated the French Penal Code.

88 In light of the rapidly growing number of such cases and the rapidly increasing importance of the internet in general, states were finding it increasingly difficult to leave

257 *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa 1997).

258 See Svantesson (n 242), 94–95. See also *Braintech v Kostiuk* [1999] BCCA 169, [63]: 'It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.'

259 ibid, 97. See also Bone, 'Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.' (2005) 62 Washington & Lee LRev 279, 307–10; Kohl (n 36), 274–78, 285–88; Slane (n 6), 139–40.

260 *Dow Jones v Gutnick* [2002] HCA 56.

261 TGI Paris 20/21 Nov 2000 *LICRA v Yahoo!*.

the internet unregulated.[262] Accordingly, legislators around the world began to adopt a variety of measures to regulate many aspects of the internet, including (but not limited to) many questions of private law. Their geographic scope ranges from domestic legislation (a.) over European harmonisation (b.) to international treaties and conventions (c.).

a. Domestic Legislation

89 Unsurprisingly, states initially relied on substantive legislation to address the different problems raised by the internet. In the EU, many private-law problems had been addressed rather proactively by the European legislator, allowing member states to protect their citizens from the risks of electronic commerce[263] and misuse of personal data[264] by simply transposing European instruments. But member states also enacted their own statutes, eg to preserve a fair balance between freedom of speech and right to reputation in the light of electronic communication.[265] Outside the EU, national legislators were equally active, especially in the field of criminal law, adopting laws to address new forms of undesirable behaviour such as copyright infringements,[266] email spam,[267] identity theft,[268] and the dissemination of pornographic material.[269]

---

262 See Taubman (n 233), 6–7, 14–44.

263 See, eg, the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045 (transposing Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees) and the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 (transposing the e-Commerce Directive).

264 See, eg, the UK Data Protection Act 1998 (transposing the EU Data Protection Directive) and the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 (transposing Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (…)).

265 See, eg, the UK Defamation Act 1996.

266 See, eg, the US Digital Millennium Copyright Act (DMCA) 1998.

267 See, eg, the US Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act 2003.

268 See, eg, the US Identity Theft Penalty Enhancement Act 2004.

269 See, eg, the US Communications Decency Act 1996.

90 Many regulatory measures aimed at the internet still seem to take the form of domestic legislation with bespoke laws against hate speech and 'fake news'[270] being a particularly topical example. Noticeably, none of the abovementioned examples aims at providing a general regulatory framework, eg for electronic transactions or online torts; instead, they address specific problems that are arising as a result.

b. European Instruments

91 This is different at the level of the European Union, which has not only enacted an equally wide range of specific legislation that regulates individual aspects of the internet,[271] but has also been more ambitious in its attempts to draft instruments that aim to regulate some areas of particular relevance to the single market more comprehensively. Still, until at least 2010, it was rather difficult to tell whether the EU pursued a coherent strategy with regard to the internet because even these broader instruments seemed inspired by policies relevant mostly to the particular field at which they were aimed.[272]

92 The first and most significant instrument of this kind is the e-Commerce Directive of 8 June 2000, which aimed 'to establish a real area without internal borders for information society services' in order 'to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce'.[273] For this purpose, it harmonised the laws of the member states 'relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct,

270 See, eg, the German Netzwerkdurchsetzungsgesetz from 1 Sept 2017.

271 For an overview, see Spindler 'EU Internet policy' in Savin (ed), *Research Handbook on EU Internet Law* (Edward Elgar 2015), 3, 5–35.

272 See Savin (n 184), 20.

273 Recital (3) e-Commerce Directive.

out-of-court dispute settlements, court actions and cooperation between Member States.'[274] More particularly, it facilitated the establishment of information society service providers (Art 4–5), introduced new rules on 'commercial communications' (Art 6–8) and the conclusion of contracts by electronic means (9–11), and limited the liability of 'intermediary service providers' (Art 12–15).[275]

93 The Directive's aims were closely linked to the guarantees of primary EU law.[276] Its 'coordinated field' thus addressed the requirements that service providers have to comply with in respect of the taking up and pursuit of information society services, including requirements concerning their liability.[277] Concerning these requirements, the aforementioned country-of-origin rule in Art 3(2) of the Directive[278] made sure, in principle,[279] that no member state could subject an information society service provider to a stricter regulatory standard than the one that would apply in their country of establishment.

94 The e-Commerce Directive expressly excluded a number of areas from its 'coordinated field'[280] and some others from the country-of-origin rule[281] because they were already governed (or were supposed to soon be governed) by more specific instruments.[282] One exclusion of particular practical significance concerned the law of intellectual

274 Art 1(2) e-Commerce Directive.

275 See Savin (n 184), 47–45 for a more detailed overview.

276 See above, [66].

277 Art 2(h)(i) e-Commerce Directive.

278 See above, [66].

279 For possible derogations, see Savin (n 184), 46–47; Hörnle (n 176), 99–107.

280 Art 2(h)(ii) e-Commerce Directive.

281 See Art 3(3) together with the Annex.

282 Savin (n 184), 46.

property.[283] A few areas of IP law had been addressed by the EU before,[284] but the rapidly changing technological environment seemed to trigger a growing activity of the European legislator, who started to create an increasingly comprehensive network of IP law instruments.[285] The EU became particularly active in the field of copyright harmonisation,[286] which was first addressed in the Information Society Directive of 22 May 2001, which aimed 'to respond adequately to economic realities such as new forms of exploitation.'[287] In 2004, the different instruments were supplemented by the IP Rights Enforcement Directive,[288] 'to ensure that the substantive law on intellectual property […] is applied effectively in the Community.'[289]

95 Although the EU had thus more or less comprehensively regulated two very important areas and also continued to address other challenges raised by the internet through specific instruments,[290] it was only in 2010 that it presented a broader vision for the challenge of internet regulation in its 'Digital Agenda for Europe'.[291] In 2015, the strategy was put into a more concrete shape when the Commission adopted its 'Digital Single Market Strategy',[292] a package of 16 initiatives aiming to ensure 'that Europe

283 Art 3(3) and Annex, first indent.

284 See, in particular, Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, and Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

285 See Savin (n 184), 123.

286 See Synodinou, 'Copyright law: an ancient history, a contemporary challenge', in Savin (n 271), 81, 96–109.

287 Recital (6) Information Society Directive.

288 Directive 2004/48/EC of 29 Apr 2004 on the enforcement of intellectual property rights.

289 ibid, recital (3).

290 See above, n 271.

291 Communication from the Commission. A Digital Agenda for Europe, COM(2010) 245 final.

292 EU Digital Single Market Strategy (n 230).

maintains its position as a world leader in the digital economy'. This was to be achieved, in the Commission's aspiration, by creating a Digital Single Market

> *in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.*[293]

96 The strategy rests on three pillars: improving access for consumers and businesses to digital goods and services ('access'); creating favourable conditions and a level playing field for digital networks and innovative services to flourish ('environment'); maximising the growth potential of the digital economy ('economy & society'). Each of these pillars has meanwhile been addressed in a number of proposals, some of which even have entered into force already. Thus, the EU has adopted regulations to ensure cross-border portability of online content[294] and to prevent 'unjustified' geo-blocking[295] as well as the new General Data Protection Regulation (GDPR),[296] while also setting up a new platform for the online resolution of consumer disputes.[297] In addition, the Commission has put forward more than 30 proposals, including for a regulation on ePrivacy,[298] for new directives on the online

293 ibid, 3.

294 Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market.

295 Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (…) (Geo-Blocking Regulation).

296 Regulation (EU) 2016/679 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 (…).

297 Based on Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (…).

298 Commission Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications (…), COM(2017) 10.

sale of goods[299] and the supply of digital content,[300] and for two new instruments on copyright.[301]

97 In light of the many pending projects, the Commission recently noted that 'there is no more time to lose to turn political commitments into reality'[302] and called for

> *swift agreements by the European Parliament and the Council on the proposals under the Digital Single Market Strategy and for all parties to ensure that the measures proposed are rapidly adopted and implemented to allow people and businesses in the EU to fully benefit from a functional Digital Single Market.*[303]

At the same time, the Commission acknowledged that '[t]he digital world is by definition a fast-moving environment where policy needs to adapt to changing circumstances'[304] and consequently extended the Strategy to three new challenges: promoting online platforms as responsible players of a fair internet ecosystem; developing the European Data Economy; tackling cybersecurity challenges.[305]

c. International Treaties

98 Occasionally, states have also come together on a broader basis to enter into international treaties on certain questions of internet regulation. These treaties usually pursue two objectives: first, to codify what appears to be a growing international consensus on a

299 Commission Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final.

300 Commission Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final.

301 Commission Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final, with amendments adopted by the European Parliament on 12 Sep 2018, and Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final.

302 Communication from the Commission on the Mid-Term Review on the implementation of the Digital Single Market Strategy – A Connected Digital Single Market for All, COM(2017) 228 final, 24.

303 ibid, 7.

304 ibid.

305 ibid, 7–13.

certain question and second, to establish an institutional framework through which this consensus can be preserved and build upon.[306]

99 The area in which this form of regulation has enjoyed by far its greatest success in relation to the internet is the protection of intellectual property.[307] The first international agreement on copyright protection, the Berne Convention, dates back to 1886.[308] Starting with the introduction of intellectual property into the institutional framework of the World Trade Organisation with the TRIPS Agreement in 1995, a number of international agreements have aimed to introduce minimum standards for the protection of IP rights,[309] many of which were direct reactions to the emergence of the internet. Thus, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty of 20 December 1996 were both agreed on in recognition of 'the profound impact of the development and convergence of information and communication technologies'. In 2001, the General Assembly of WIPO adopted a 'Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet'.[310]

---

306 See Dinwoodie (n 152), 472–74, 490–501. See also Hatzimihail, 'Concluding Remarks: Territoriality, International Governance and Cross-Border Litigation of Intellectual Property Claims', in Nuyts (ed), *International Litigation in Intellectual Property and Information Technology* (Kluwer 2008), 303, 305–06.

307 International lawmaking of this kind has been much less relevant in most other areas affected by the internet (Kohl (n 176), 261–63). But see the UN Convention on the Use of Electronic Communications in International Contracts of 2005 (ratified by 10 states as of September 2018). See also the proposals on international conventions on defamation (Svantesson (n 241), 569–91; Bone (n 259), 319–35) and on cross-border contracts (Svantesson (n 241), 593–615).

308 See Hatzimihail (n 306), 304: 'probably the oldest system of international legislation on private-law matters'.

309 See Dinwoodie, 'International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought' (2001) 49 AmJCompL 429, 436–37; Fischer-Lescano/Teubner (n 204), 1020.

310 Assembly of the Paris Union for the Protection of Industrial Property and General Assembly of the World Intellectual Property Organization, 'Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet' (*wipo.int*, 3 Oct 2001).

3. Two Fundamental Challenges

100 Notably, all of these forms of regulation address challenges raised by the internet through substantive law. Even instruments of the EU and international treaties often limit themselves to create international minimum standards, eg for the protection of IP rights, but leave the question of the coordination between their different national implementations unaddressed.[311] Instead, the onus of resolving the palpable tension between a global internet and local law[312] is delegated to the general rules of private international law.[313]

101 It is questionable though, if these rules are sufficiently well-equipped to cope with this significant challenge. While private international law has been able to answer many of the questions that the internet raises,[314] some of the internet's characteristics pose fundamental challenges to the way in which private international law complements substantive private law and determines its territorial reach.[315] This is true, in particular, for two characteristics: first, the fact that internet communication is largely independent from national borders and, second, the fact that since the internet's inception, private actors have been providing, and effectively controlling, most aspects of it.

102 These two challenges directly affect the ability of (rules of) private international law to coordinate between different laws and legislators. While the internet's independence from state borders impedes the ability of private international law to coordinate *horizontally* between national courts and legislators (a.), the unprecedented prevalence of

311 See, eg, Directive 96/9/EC on the legal protection of databases and the problems regarding its territorial scope underlying Case C-173/11 *Football Dataco* ECLI:EU:C:2012:115. See also Savin (n 184), 11–12. The e-Commerce Directive and its rather peculiar country-of-origin provision in Art 3(2) are an obvious exception (see, in more detail, above, [66] and [92]–[93]).

312 Zittrain, 'Be Careful What You Ask For: Reconciling a Global Internet and Local Law', in Thierer/Crews (n 244), 13, 13–14; Kohl (n 176), 3.

313 Savin (n 184), 53–54. See also the insightful analysis by Slane (n 6), 140–44.

314 For this view, see, eg Stein (n 255), 1179–91.

315 As to which, see below, IV.A.1.

private ordering at all levels of online communication undermines its potential for *vertical* coordination between public regulators (including courts) and private actors (b.).

a. Independence from State Borders

103 Ever since lawyers started to engage with the internet, they have identified its 'borderless' nature as one of its major challenges.[316] In his well-known speech in *Gutnick*, Kirby J explained:

> *The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term 'cyberspace". This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge. The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.*[317]

104 This complete independence from geographic borders has two dimensions. First, it allows for legal relationships that are completely virtual and have no other physical element than the parties involved (and some negligible changes to the magnetisation of a number of hard drives).[318] A defamatory post on *Facebook*, an illegally copied e-book, or a

316 See Johnson/Post (n 252), 1370–76; McGregor, 'Law on a Boundless Frontier: The Internet and International Law', (2000) 88 Kentucky LJ 967, 967–69; Kulesza/Balleste (n 253), 1319–33; Maier, 'How Has the Law Attempted to Tackle the Borderless Nature of the Internet?' (2010) 18 IntJLInfoTech 142, 143–44; Slane (n 6), 131–44; Svantesson (n 241), 56–57. See also *Google Inc v Equustek Solutions Inc et al* [2017] SCC 34, [41]: 'The Internet has no borders – its natural habitat is global.' (Abella J for the majority). *Contra* Davis (n 255), 350–56; Schultz, 'Carving up the internet: jurisdiction, legal orders, and the private/public international law interface' (2008) 19(4) EJIL 799, 802–06.

317 *Gutnick* (n 261), [80] (Kirby J). See also *Reno v American Civil Liberties Union (ACLU)* 521 US 844 (1997), 851: 'Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. […] Taken together, these tools constitute a unique medium-known to its users as "cyberspace" – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.'

318 See Byassee (n 250), 209–10; Faucher, 'Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases' (1992/93) 26 UC Davis LRev 1045, 1067; Johnson/Post (n 252), 1371; Márton, *Violations of Personality Rights through the Internet: Jurisdictional Issues under European Law* (Nomos 2016), 56–57; Svantesson (n 241), 58; Taubman (n 233), 12–13; Gössl

music file sold on *iTunes* do not physically exist and thus cannot easily be tied to any particular physical place.

105 Second, the internet allows for an unprecedented degree of almost literal ubiquity.[319] The technical architecture of the internet makes it possible to transmit information to virtually any place on the globe with a single mouse-click.[320] An article that is published on a website or blog can immediately be accessed from almost anywhere in the world; a video that is uploaded to a streaming platform can be watched by everyone who has a working internet connection; a product offered in an online store can be ordered in every country to which the seller is willing to ship it. In short, the internet allows for one action to have immediate effects all over the world that are very difficult to compartmentalise.

106 The fact that online communication has immediate, worldwide effects that do not necessarily have any physical dimension creates a significant challenge for national legislators whose regulatory authority necessarily is territorially limited.[321] At the same time, it reduces the ability of private international law to overcome this difficulty by raising two antithetic challenges for the system of (usually geographically defined) connecting factors on which the discipline traditionally relies.[322] While the ubiquitous effects of internet communication create a problematically large amount of connections, its virtuality renders these connections less and less useful. Where an online publication can be read, and has instantaneous effects, all over the globe, the 'place of the damage'

(n 255), 27–29, 266–67.

319 See *Gutnick* (n 261), [83], [89] (Kirby J).

320 See Bogdan, 'Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation' (2011) 5 Masaryk U JLTech 1, 3, 6–7; Davis (n 255), 356; Kohl (n 36), 271; Johnson/Post (n 252), 1375–76; Velásquez Posada (n 255), 266.

321 See Tsagourias (n 245), 16–18.

322 See Dinwoodie (n 152), 535; Faucher (n 318), 1056–66; Taubman (n 233), 12; Wang, *Internet Jurisdiction and Choice of Law* (CUP 2010), 6.

becomes very hard to identify; where a contract is performed entirely online, the 'place of contract performance' has very little meaning. In internet cases, private international law is confronted with an overwhelming amount of increasingly tenuous connections to a multitude of legal systems.

107 In *Gutnick*, for example, the High Court of Australia held that jurisdiction of a Victorian court for a damage claim over an allegedly defamatory article published online could be based on the fact that about 1,700 subscribers to the website in question had paid their subscription fees by credit cards whose holders had Australian addresses.[323] In the English case *Bin Mahfouz v Ehrenfeld*,[324] 23 copies that were sold in the UK and the availability of the first chapter on the internet were considered a sufficient basis for a damage award in the amount of £115,000. These rather shaky bases for jurisdiction appear to be in stark contrast with the important, often fundamental rights and policies in conflict.[325] They also create the obvious risk of multiple courts and legislators claiming regulatory authority over the same case on a similar basis.[326]

108 Just as in *Gutnick*, national courts that were confronted with the question of whether to apply domestic law to an internet case with cross-border implications regularly replied in the positive. While not always relying on private-international-law reasoning,[327] their general instinct seemed to be to award protection to the claimant under the national law they invoked – implicitly making far-reaching assertions of international jurisdiction and

323 See *Gutnick* (n 261), [169] (Callinan J).

324 [2005] EWHC 1156 (QB).

325 See Mills, 'The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' [2015] JMediaL 1, 24–26; Muir Watt, 'Yahoo! Cyber-Collision of Cultures: Who Regulates?' 24 Mich JIntL 673, 676–77.

326 Muir Watt (n 325), 677.

327 Slane (n 6), 130.

regulatory competence in the process.[328] These claims may not always have been unjustified; but they often show little self-restraint even where they have far-reaching consequences,[329] raise questions as to their theoretical foundation,[330] and stimulate a regulatory competition that increases the potential for overlaps and conflicts of adjudicatory and prescriptive jurisdiction.[331]

109 As it became clear that legislators would continue to struggle with the internet's borderlessness, it was proposed that the best way to address it may not be a different form of regulation but a technological solution. Some scholars pointed out that geo-blocking and similar technologies could effectively break up the internet into national networks that would sit more easily with the territorially limited scopes of national laws and the traditional rules of private international law.[332] The last decade indeed saw a rapid increase in internet segmentation;[333] but only some of it was the consequence of active regulatory choices. While a number of states – such as, most notoriously, China – are restricting the data flow at the recipients' end and prevent their citizens from accessing certain information (creating new, heavily censored national versions of the internet in the process),[334] much of this segmentation actually takes place at the senders' end with private

328 See in more detail below, IV.B.1.b. and c. But see also *Haaretz.com v Goldhar* [2018] SCC 28, [79] (Côté, Brown, Rowe JJ).

329 See, eg, the recent decision by the Canadian Supreme Court in *Equustek* (n 316).

330 Tsagourias (n 245), 22: 'When the State exercises its jurisdiction with regard to cyber activities extraterritorially, its locus of jurisdiction is not the sovereign territory.' But see Kohl, 'Jurisdiction in Cyberspace', in Tsagourias/Buchan (n 245), 30, 47–49.

331 Kohl (n 176), 3–4, 7–11; Kohl (n 330), 48, 54; Muir Watt (n 325), 675–77.

332 See Svantesson (n 241), 557–64. See also Muir Watt (n 325), 678–80.

333 Kohl (n 176), 283–87; Tsagourias (n 245), 21; Zittrain (n 312), 24–25.

334 Zittrain (n 312), 27–28.

actors employing geo-blocking and other technological means to offer goods and services or exploit IP rights on different national markets.[335]

110 Still, saying that the problem of borderlessness is bound to disappear would be quite an overstatement.[336] First, because the present move towards a segmentation of the internet is neither universal (as it is limited to certain platforms and products) nor does it necessarily align to national borders and territories (as it is inspired by different markets, not jurisdictions). And second, because it is in tension with two other trends. The segmentation of the internet by private actors directly contradicts the stated aim of the EU to create a digital single market, 'where individuals and businesses can seamlessly access and exercise online activities […] irrespective of their nationality or place of residence',[337] which has recently been enshrined in the Geo-Blocking Regulation.[338] But this segmentation also runs counter to the emergence of online communities that form on privately operated platforms and regularly run across national borders and markets.[339]

b. Private Ordering

111 The existence and growing importance of these communities, which are effectively self-governed,[340] point to the second central regulatory challenge of the internet: the prevalence of private ordering.

112 As mentioned earlier,[341] most parts of the internet's infrastructure have always been controlled by private actors. From the physical wires that connect the individual users to

335 Kohl (n 176), 278–83. See also Ohly, 'Geoblocking zwischen Wirtschafts-, Kultur- und Verbraucher- und Europapolitik' ZUM 2015, 942, 943.

336 See also Kulesza/Balleste (n 253), 1320.

337 See above, [95]–[96].

338 Above, n 295.

339 See Kulesza/Balleste (n 253), 1326; C Reed (n 245), 121.

340 Regarding different forms of self-governance see below, [116]–[119].

341 Above, under III.B.1.

the internet,[342] over the Domain Name System[343] and other routing services that direct them to the content they are looking for,[344] to the devices, browsers and apps they are using to actually access this content, every element of the internet's infrastructure is provided, and, in many cases, consequently controlled, by private actors. The hands-off approach to internet regulation taken by most states during the 1990s (and, occasionally, beyond)[345] has done little to reduce the considerable influence of these private actors, who continue to assume many functions that one might instinctively assume to be fulfilled by states.[346] ICANN, for instance, does not only administer the internet's Domain Name System but also provides a mechanism to resolve disputes over domain names that are claimed to infringe existing trademarks.[347]

113 Up until the mid-2000s, most of these private actors were what Laura DeNardis qualifies as 'infrastructure intermediaries',[348] which control the technical means by which a user connect to the internet but do not play a role in the curation and selection of the content they want to access. As a consequence, the regulatory function fulfilled by these actors was a concern only for the limited number of companies and professionals who intended to offer goods or services through the internet. The average internet user, on the

342 On which see Blum, *Tubes. Behind the Scenes at the Internet* (Penguin 2012).

343 On which see DeNardis (n 208), 46–55, and above, [84].

344 On which see DeNardis (n 208), 66–76, 108–30.

345 See, eg, the ongoing 'battle' for net neutrality in the US (above, [77]).

346 Tsagourias (n 245), 21–22.

347 See Katsh/Rabinovich-Einy, *Digital Justice* (OUP 2017), 62–65. Since its inception in 1999, the so-called 'Uniform Domain Name Dispute Resolution Policy (UDRP)' has processed over 37,000 disputes.

348 DeNardis (n 208), 154–55, drawing a distinction between 'infrastructure intermediaries' and 'information intermediaries'.

other hand, who just passively consumed the content offered online, remained largely unaffected.[349]

114 This changed with the emergence of interactive websites that allowed users to create and share their own content and engage with each other in a rapidly growing number of ways – a phenomenon often labelled as *web 2.0*. Although the novelty of this trend has been disputed (with some authors arguing that the internet has always been about collaboration and exchange),[350] it has undeniably furthered the creation of a new kind of online platforms (social networks, virtual environments, auction platforms), which allow for a much higher degree of interaction and have completely changed the shape of the internet.[351] Instead of a giant network of interlinked resources that can be passively accessed through a web browser, the internet now appears to many users primarily as a gateway to a series of different platforms and communities. As Lee A Bygrave puts it,

> *[w]e have gone from a phase in which the Internet was exclusively reserved for the scientific and academic community of the Western world, along with US military institutions, to become a global medium for electronic transactions, and then to morph into a complex congeries of intranets, many of which operate with their own rules, procedures, and cultures. Facebook is one such intranet. Indeed, for many people, Facebook has become, in practice, well nigh the Internet.*[352]

115 This evidently gives the hosts of these networks and communities, which one may classify as 'information intermediaries', an unprecedented amount of influence over their users. They can track their users' online behaviour, direct their attention to certain content,

---

349 Search engines, which quickly became essential tools to navigate through the exponentially growing number of websites, may be an exception.

350 See Tim Berners-Lee in an interview with Laningham (*ibm.com*, 22 Aug 2006): 'Web 1.0 was all about connecting people. It was an interactive space, and I think Web 2.0 is, of course, a piece of jargon, nobody even knows what it means. If Web 2.0 for you is blogs and wikis, then that is people to people. But that was what the Web was supposed to be all along.' See also Byassee (n 250), 200–03; Lessig, 'The Path of Cyberlaw' (n 250), 1745–46.

351 See Staltz, 'The Web Began Dying in 2014, Here's How' (*staltz.com*, 30 Oct 2017).

352 Bygrave (n 242), 87.

make it easier for them to use certain products and services – and block others.[353] The creation of increasingly extensive, but also increasingly closed ecosystems ('walled gardens') not only raises pertinent questions of competition law[354] but also much more fundamental issues. Having complete control over the data streams on these platforms (sometimes labelled 'net states'),[355] the hosts of many online platforms effectively assume a growing number of the regulatory functions that have traditionally been fulfilled by governments and public authorities.[356] As Andrew D Murray explains,

> *internet gatekeepers are uniquely powerful regulators of all online activity. Arguably they are more powerful than any single state or state-based regulator as they uniquely have full regulatory control over that part of the network which they manage.*[357]

116 For instance, many platforms not only exercise strict control over their users and the content they post and share, but also provide their own systems to resolve disputes between them, offering much more effective remedies than any national regulator or court.[358] The host of a platform can penalise or ban users, delete undesirable posts, remove content that is claimed to infringe IP rights, de-list products that violate the rules of an online marketplace, and enforce bargains between users. State courts, meanwhile, can often provide only an indirect remedy in the form of injunctions against the host, which

353 See Staltz (n 351); DeNardis (n 208), 153–54; Dash, 'Tech and the Fake Market tactic' (*medium.com*, 10 Feb 2017).

354 As to which see below, [136].

355 See Muggah, 'Countries are so last-century. Enter the "net state"' (*weforum.org*, 9 Nov 2017); Wichowski, 'Net States Rule the World: We Need to Recognize Their Power' (*wired.com*, 11 Apr 2017).

356 See Hayakawa (n 245), 31; Mills (n 325), 29–34; C Reed (n 245), 100–01, 121–28; Ryngaert/Zoetekouw, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era' in Kohl (ed), *The Net and the Nation State. Multidisciplinary Perspectives on Internet Governance* (CUP 2017), 185, 193–95.

357 Murray (n 246), 220.

358 See Katsh/Rabinovich-Einy (n 347), 3, 15; Van Loo, 'The Corporation as Courthouse' (2018) 33 Yale JReg 547, 566–68, 573.

also require much more time and effort[359] and come at a significantly higher price.[360] For many platform hosts, providing effective means to resolve disputes between users is an important contribution to the integrity (and thus attractiveness) of their platform.[361] One of the earliest, and by now best known, examples is *eBay's* dispute-resolution mechanism.[362] After having originally relied on the user-rating system's ability to avoid disputes,[363] the company contracted a start-up, *SquareTrade*, to design a dispute-resolution mechanism that eventually took the form of a two-step process, composed of technology-assisted negotiation and, if the negotiation proves unsuccessful, human mediation.[364] Today, this mechanism resolves more than 60 million disputes per year,[365] with similar mechanisms being used for equally high numbers of cases on many other platforms.[366] While none of these mechanisms actively seeks to restrain the parties' recourse to the court system,[367] and although it is impossible to tell how many of the disputes resolved this way would otherwise have been litigated,[368] it seems safe to assume that the dispute resolution provided by *eBay* and other online platforms keeps a significant number of cases out of

359 Katsh/Rabinovich-Einy (n 347), 37–38; Van Loo (n 358), 572.

360 Katsh/Rabinovich-Einy (n 347), 46–51; Van Loo (n 358), 572–73.

361 See Van Loo (n 358), 556.

362 See Katsh/Rabinovich-Einy (n 347), 10–11, 34–35.

363 As to which see Katsh/Rabinovich-Einy (n 347), 68; Van Loo (n 358), 569–71.

364 See ebay, 'Dispute Resolution Overview' (*ebay.com*, last accessed 1 Sep 2018). See also Del Duca, 'Ebay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers' (2014) 6 Yb Arb&Med 204, 204–09; Katsh/Rabinovich-Einy (n 347), 34–35.

365 This number, which seems to come from a 2006 interview with Colin Rule, eBay's then-Director of Online Dispute Resolution, is widely referred to in the ODR literature: see Katsh/Rabinovich-Einy (n 347), 4; Van Loo (n 358), 549, 567. The vast majority of these disputes is resolved at the first stage, without any intervention of an eBay employee: Van Loo (n 358), 559–60.

366 Katsh/Rabinovich-Einy (n 347), 65–66.

367 See Del Duca (n 364), 206, 216 (for *eBay*).

368 See Van Loo (n 358), 553: 'For small-value contractual disputes, consumers and corporations rarely bargain in the shadow of the law in the first place. Instead, they largely bargain in the shadow of norms.'

the court system.[369] But the implications of these mechanisms for the reach of public regulation, the transparency of proceedings, and the development of the law have only recently become the subject of academic discussion.[370]

117 Like all other kinds of governance exercised on online platforms, these dispute-resolution mechanisms are not exclusively based on state law. Instead, they primarily rely on the rules and community standards that the host considers to govern the platform in question.[371] In some cases (such as *Wikipedia*)[372] these rules and standards are discussed and agree upon by the community as a whole (sometimes with a separate layer of rules drafted by the host)[373];[374] in many others (such as *Facebook*),[375] these rules and standards are unilaterally imposed by the platform host.[376] They do not, however, purport to displace all state law.[377] Rather, these rules are referred to in the terms and conditions of the contract concluded between the hosts and individual platform users,[378] which also contain clauses designating the otherwise competent courts and the otherwise applicable law.[379]

---

369 See Katsh/Rabinovich-Einy (n 347), 4.

370 See, eg, Van Loo (n 358), 578–84.

371 *eBay's* dispute-resolution mechanism, for instance, aims to help the parties to find 'a fair, agreeable settlement' (see eBay, 'Dispute Resolution Overview' (n 364)) but does not refer to any rule or provision taken from state law. Similarly, *Wikipedia's* internal arbitration procedure only refers to 'community policies and guidelines': see Wikipedia:Arbitration/Policy (*en.wikipedia.org*, last accessed 1 Sep 2018), Policy and precedent.

372 Wikipedia:Policies and guidelines (*en.wikipedia.org*, last accessed 1 Sep 2018); Wikipedia:List of policies and guidelines (*en.wikipedia.org*, last accessed 1 Sep 2018).

373 Wikipedia:Office actions (*en.wikipedia.org*, last accessed 1 Sep 2018).

374 For another (very topical) example, see the 'consensus rules' governing the *Bitcoin* network (as discussed by Dickinson, 'Cryptocurrencies and the Conflict of Laws', in Fox/Green (eds), *Private Law Implications of Cryptocurrencies* (OUP 2019) [forthcoming]).

375 Facebook, 'Community Standards' (*facebook.com*, last accessed 1 Sep 2018).

376 See also Bygrave (n 242), 97.

377 Ryngaert/Zoetekouw (n 356), 194.

378 See, eg, Facebook, 'Terms of Service' (*facebook.com*, last accessed 1 Sep 2018), s 5; Wikimedia Foundation, 'Terms of Use' (*wikimediafoundation.com*, last accessed 1 Sep 2018), s 10, 11.

379 See, eg, Facebook, 'Terms of Service' (n 378), s 4.4; Wikimedia Foundation, 'Terms of Use' (n 378), s 13.

Still, the platform hosts understandable aim to create a uniform regulatory framework across the platform often seems to take precedence over their (or their users') compliance with individual national laws.[380] Accordingly, and despite recent efforts to increase transparency,[381] it often remains unclear to what degree these sets of rules take state law into account – and which particular state law this is. The general consensus among commentators seems to be that where these rules give effect to state law, this is usually based on specific enforcement risks (such as liability risks for the US-based *Wikimedia Foundation* resulting from the violations of US copyright law)[382] but not on any principled attempt to solve the complex conflict-of-laws problems mentioned earlier.[383]

118 From the individual users' perspective, any interaction on the platform will often appear to be governed exclusively by the rules set and enforced by the platform host.[384] The expectation that the host will take responsibility for regulating all legal relationships involving the platform can be observed in a growing number of cases involving big internet players. All of these cases grew out of 'horizontal' relationships between private parties involving behaviour on a certain social network or online platform but were litigated 'vertically', between the aggrieved party and the platform host. In a recent ECJ case, *Concurrence*,[385] the claimant sought an injunction against *Amazon* to have the latter remove certain offers from its websites that were violating a selective distribution

380 Facebook, 'Statement of Rights and Responsibilities' (*facebook.com*, last accessed 1 Sep 2018) stated – until they were replaced by the 'Terms of Service' (n 378) in April 2018 – in s16: 'We strive to create a global community with consistent standards for everyone, but we also strive to respect local laws.'

381 See Bickert, 'Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process' (*newsroom.fb.com*, 24 April 2018).

382 For Wikipedia's focus on US law, see Wikipedia:Non-free content (*en.wikipedia.org*, last accessed 7 June 2018), Explanation of policy and guidelines.

383 See Bygrave (n 242), 102–03; DeNardis (n 208), 158–59; Kohl (n 36), 290–91; Wright/De Filippi (n 250), 45–46. See also C Reed (n 245), 13–14, 122–23; Ryngaert/Zoetekouw (n 356), 195.

384 Mills (n 325), 32; C Reed (n 245), 122; Ryngaert/Zoetekouw (n 356), 195–96.

385 Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:976, discussed in more detail below, at [215].

agreement between the claimant and a third party. The ECJ's infamous decision in *Google Spain*[386] (establishing the 'right to be forgotten') arose of the claimant's request for private information to be removed from *Google's* search results, rather than to be deleted by the original publisher.[387] Similarly, in two recent UK cases, *Richardson v Facebook*[388] and *CG v Facebook*,[389] private persons were suing *Facebook* for its failure to remove defamatory or otherwise objectionable information that had been posted by third parties. In *Tamiz v Google*,[390] the claimant sued *Google* for hosting a platform which a blogger had used to publish defamatory statements about the claimant. Finally, in the widely reported Canadian case *Google v Equustek*,[391] a small company sued *Google* for its failure to de-list offers by a third party for products that allegedly infringed the claimant's IP rights from its search engine. The disputes underlying all of these decisions were 'horizontal' private-law conflicts between two private parties; but instead of seeking protection from the competent courts and suing the 'actual' defendant, the party alleging an infringement of their right(s) turned to the host of the platform through which the infringement was committed and, when the latter refused to solve the dispute to their satisfaction, sued the host.[392]

119 The practical importance of privately drafted platform rules increases further where these rules are not just applied retroactively, to solve a dispute that has already arisen, but proactively, eg through algorithms in the platform's code that automatically prevent the

386 Case C-131/12 *Google Spain* ECLI:EU:C:2014:317.

387 For a similar set of facts, see BGH 27 Feb 2018, NJW 2018, 2324.

388 *Camille Saskia Richardson v Facebook, Google (UK) Limited* [2015] EWHC 3154 (QB).

389 *CG v Facebook Ireland* [2016] NICA 54.

390 *Tamiz v Google Inc* [2012] EWHC 449 (QB).

391 *Google v Equustek* (n 316).

392 In other cases, the hosts were required to reveal the identity of individual platform users to prepare a lawsuit against them: see, eg, *Sabados v Facebook Ireland* EWHC (QB) 12 Jun 2018; OLG Wien, 26 Apr 2017, ecolex 2017, 774.

violation of certain rules and sanction infringers.[393] *YouTube*, for instance, not only allows copyright holders to file takedown requests[394] but also to use a system called 'Content ID' to pre-emptively flag their own content and instruct *YouTube* to either block any upload of it or to run ads against it that benefit the copyright holder.[395]

120 In many cases, information intermediaries thus fulfil functions that have traditionally fallen within the competence of states. With regard to social media, Alex Mills notes:

> *The stark reality is that the regulation of free speech on social media, in practical terms, is likely to be controlled much more by the private terms and conditions and internal complaints resolution procedures of social media organisations than it is by courts or national law.*[396]

This phenomenon has made academics and other observers voice concerns about treating privately-drafted platform rules as a potential substitute for state law without adequate public oversight. Thus, Mills goes on to warn that

> *[i]t is not self-evident that the benefits of recognising non-state community standards (such as avoiding apparently arbitrary or multiple territorial laws) outweigh the seemingly alarming consequences of the fact that this would empower corporations such as Facebook or Twitter to determine the limits of free speech on their platforms (or rather enhance the extent to which they already do so in reality), displacing norms which may be generated through more participatory and democratic processes. It is not just the population of Facebookistan that is comparable to China, but its autocratic governance as well.*[397]

In a similar vein, Dan JB Svantesson points out that

> *Internet intermediaries become the censors and gate keepers of speech. This is a role for which Internet intermediaries typically are unsuitable. Indeed, we may legitimately question whether society should assign such a crucial*

---

393 See Lessig, *Code: And Other Laws of Cyberspace* (2nd edn, Basic Books 2006), 24, 83–120.

394 See YouTube Help, 'Submit a copyright takedown notice' (*support.google.com*, last accessed 4 June 2018).

395 See YouTube Help, 'How Content ID works' (*support.google.com*, last accessed 4 June 2018).

396 Mills (n 325), 31.

397 ibid, 33.

> *role to private entities with the types of agendas normally held by private entities.*[398]

121 Accordingly, it is unsurprising that national courts and legislators have started to change their position vis-à-vis the hosts of online platforms.[399] While much of the legislation enacted in the 1990s and early 2000s[400] (as well as some of the first cases applying it)[401] was aimed at limiting the rapidly growing liability risks for intermediaries, more recent decisions[402] and pieces of legislation[403] have introduced new obligations and sanctions for them.[404] In a similar vein, the EU Commission has recently described the emergence of online platforms that 'organise the internet "ecosystem"' as 'a profound transformation of the World Wide Web, bringing new opportunities, but also challenges',[405] which the Commission vowed to address as part of its Digital Single Market Strategy.[406] Accordingly, the Commission recently published a proposal for a Regulation on 'online intermediation services',[407] which aims to establish '[a] uniform and

398 Svantesson (n 439), 348–49.

399 See generally Edwards, 'The Fall and Rise of Intermediary Liability Online', in Edwards/Waelde (n 233), 47, in particular 84–88; see also Kohl (n 330), 30–31.

400 See generally 104–22. The UK Defamation Act 1996, DMCA, e-Commerce, and Information Society Directive all introduced privileges for internet intermediaries.

401 See Joined Cases C-236/08 to C-238/08 *Google France* ECLI:EU:C:2010:159, [106]–[120] (on the privilege for search engines); Case C-324/09 *L'Oréal* ECLI:EU:C:2011:474, [107]–[117] (on the privilege for online market places). See also Case C-466/12 *Svensson* ECLI:EU:C:2014:76 (on compilations of weblinks).

402 See Case C-160/15 *GS Media* ECLI:EU:C:2016:644; Case C-527/15 *Filmspeler* ECLI:EU:C:2017:300; Case C-610/15 *The Pirate Bay* ECLI:EU:C:2017:456, all of which apply a wide interpretation to Art 3(1) Information Society Directive, which creates new obligations for intermediaries.

403 See, eg, the German Netzwerkdurchsetzungsgesetz from 1 Sept 2017.

404 See also Smith, 'The Electronic Commerce Directive – a phantom demon?' (*cyberleagle.com*, 30 April 2018); and see the recent amendment of s 230 of the US Communications Decency Act 1996, which increase liability risks for internet intermediaries who distribute certain types of third-party content.

405 Mid-Term Review on the implementation of the Digital Single Market Strategy (n 302), 7.

406 ibid, 7–9.

407 Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services (n 19).

targeted set of mandatory rules'[408] that ensure 'that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities'.[409] While these mandatory rules would even include specific provisions on dispute-resolution mechanisms offered by internet intermediaries,[410] the scope of the instrument will be limited to corporate users who are established in the EU and use particular online services to offer goods or services to European consumers.[411]

122 In other areas, the European legislator seeks to go a step further. Instead of imposing new mandatory rules, it acknowledges and tries to harness the *de-facto* powers held by the platform hosts. The recently accepted proposal for a new copyright directive,[412] for instance, contains a provision that will require certain intermediaries to proactively prevent copyright infringements.[413] This will likely be achieved through 'upload filters' similar, if not identical, to *YouTube's* 'Content ID' system.[414]

123 From the perspective of private (international) law, the prominent role played by the hosts of online platforms can be seen as creating a new problem of coordination: states must not only take into account the claims to regulatory authority of other states but also have to decide to what extent their own laws and mechanisms of adjudication can be substituted, or at least supplemented, by regulation and dispute resolution on online platforms that applies community rules.

---

408 ibid, recital (6).

409 ibid, Art 1(1).

410 ibid, Art 9–11.

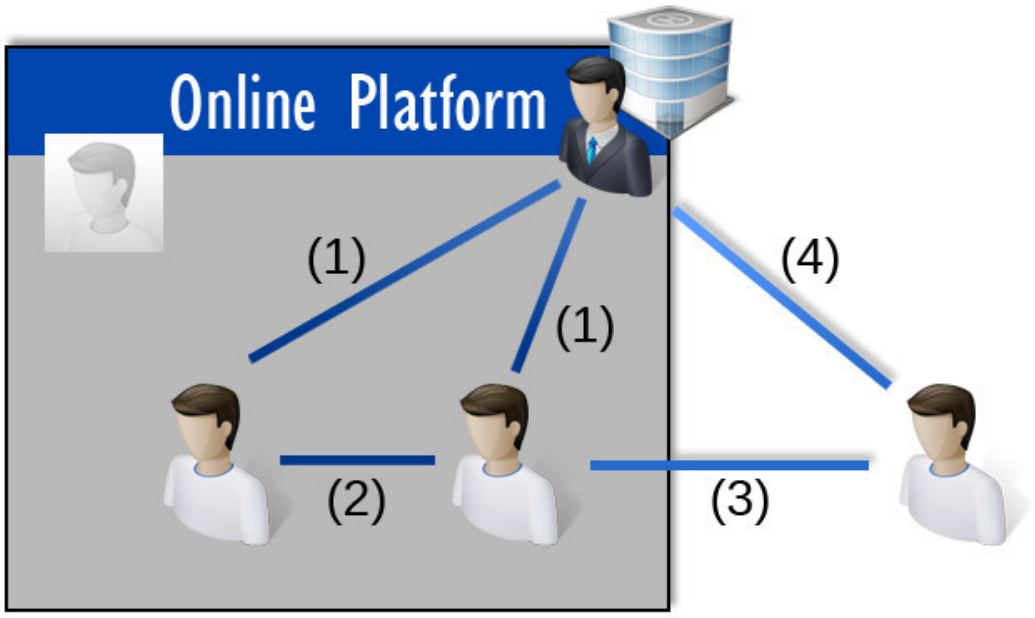
411 ibid, Art 1(2).

412 Commission Proposal for a Directive on copyright in the Digital Single Market (n 301), with amendments adopted by the European Parliament on 12 Sep 2018.

413 ibid, Art 13(2a).

414 See above, [119].

124 The daunting complexity of this issue is reduced, though, if one remembers that most forms of private ordering in this context are based on bilateral contracts between the host of a given platform and its individual users.[415] The terms of this contract contain both references to the specific (substantive and dispute-resolution) rules of the platform and clauses that designate the otherwise competent courts and the otherwise applicable law.[416] Accordingly, the interplay between these different sets of norms can be analysed for each kind of relationship that may form on a given platform individually. Those are: (1) the *vertical* relationship between the host and the individual users of a given platform; (2) the *horizontal* relationship between different users of a platform; (3) the *horizontal* relationship between those who use a certain platform and those who do not; and (4) the *vertical* relationship between the host of a platform and other private parties who do not use it.



415 See Bygrave (n 242), 95, 102; DeNardis (n 208), 156. Some others, such as the Bitcoin network, are more decentralised, though (see above, n 374).

416 See above, [117].

125 The *first* of these relationships (between host and users) ultimately is little more than a normal contract for an online service. Considering the wide range of platform uses and interactions that this contract purports to govern, the question which courts are competent to adjudicate disputes about it, and the laws of which country apply to it, are however of huge importance from a regulatory point of view. In fact, the control of standard terms in platform contracts seems to provide a national courts with a welcome opportunity to enforce policies that would be difficult to implement through public-law regulation; a German court, for instance, has recently struck out a term in *Facebook's* terms and conditions that required users to register with their real name.[417] Platform hosts, of course, have long been trying to escape this type of control through choice-of-court and choice-of-law clauses – which have themselves become subject to the scrutiny of national courts.[418]

126 Equally interesting questions arise with regard to the *second* type of relationship (between different users of a platform). It has been shown above[419] that many users seem to expect their relationship with other users to be governed by the rules and standards of the platform, as applied and enforced by the platform host. Although these rules are supposed to govern, primarily, the *vertical* relationship between host and user, the fact each platform user will at one point have agreed to them lends support to the claim that they should also play a role within the *horizontal* relationship between individual users. Of course, this role can take numerous forms, from the potential extension of a choice-of-law clause, to taking specific substantive rules into account as facts, to treating platform rules as the applicable law.

---

417 For a recent example, see LG Berlin 12 Feb 2018, 16 O 341/15, striking out a term of *Facebook's* terms and conditions by which users were required to register with their real name.

418 See *VKI* (n 111), [49]–[59].

419 At [118].

127 Users may have a similar expectation with regard to the *third* kind of relationship (between users and non-users). When using an online platform, they may expect their behaviour to be governed by the platform rules regardless of whether it affects other platform users or third parties. Yet, any argument to give effect to this expectation would have to overcome the evident objection that in the relationship between user and non-user, only one of the two parties has agreed to the platform terms and may have formed any such expectation.

128 Still, the only relationship for which it seems safe to say that privately drafted platform rules do not have any role to play appears to be the *fourth* relationship (between platform hosts and non-users).

129 Breaking down the 'platform economy' into these different relationships shows that the ongoing struggle between states and private actors for regulatory authority over online behaviour should not only be understood as a threat to the effectiveness of private law; it also reveals new opportunities to use private law, and private international law, as tools of governance, to strike a viable balance between public regulation and private ordering.

C. Exemplary Private-Law Problems

130 The challenges identified above can be observed in many areas of private law. In this section, their practical implications will be illustrated through five problems, all of which are much older than the internet. For each of them, it will be shown that the internet has made it more difficult to address them not only for substantive law but also for private international law, which faces the challenges of both borderlessness and private ordering. The five problems selected here will also be used later in this thesis to demonstrate how the present approach of EU private international law fails to make full use of the discipline's regulatory potential and to test how a different approach might be more effective in addressing the underlying difficulties of internet cases.

131 Three of these five problems fall into the area of tort law: the protection of personality rights (1.), the protection of IP rights (2.), and the prevention of unfair competition (3.); the two others are part of contract law: the regulation of agreements (4.) and the protection of structurally weaker contract parties (5.).

1. Protecting Reputation and Privacy

132 Violations of what continental lawyers would qualify as 'personality rights', in particular the rights to reputation and privacy, have always been among the most common torts committed online. The internet has not only made it very easy to publish information to a large variety of audiences at unprecedented speeds,[420] it has also reduced the inhibition to do so by offering (the perception of) total anonymity.[421] The activity of national legislators who have made significant changes to their substantive defamation laws[422] is testimony to the new challenges that the internet has created in this area.

---

420 See M Collins, *The Law of Defamation and the Internet* (2nd ed, OUP 2005), [3.02].

421 See Edwards (n 399), 51; Mills (n 325), 26–29.

422 See, eg, the UK Defamation Act 2013.

133 At the same time, the internet has made it much easier – and, in some cases, practically unavoidable – to disseminate potentially defamatory information across national borders,[423] creating a significant practical risk of violating at least one of the several laws that might be applied to content published online.[424] What may be considered free speech in one country can easily violate the laws of another. Consequently, the more likely it is that the laws of both countries may actually be enforced, the greater the potential 'chilling effect' on free speech and freedom of expression.[425]

134 Beyond their effects on individuals, these potential overlaps of national law inevitably create conflicts of regulatory authority. These conflicts do not only raise technical questions regarding the coordination and territorial repartition of competence between states but also regularly concern fundamental questions of policy as to the balance between the rights to privacy and reputation on the one hand and freedom of speech on the other.[426] The different answers given to these questions may be among the most striking differences even between otherwise very similar legal systems.[427] For instance, English libel law was at one point (before the Defamation Act 2013) labelled 'the most claimant-friendly in the world'[428] while US law is notoriously protective of free speech.[429] Consequently, it might not be too surprising that the problem of online

423 Berman (n 6), 337; Bone (n 259), 282; Edwards (n 399), 52.

424 See Bone (n 259), 298; Krotoszynski, 'Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village' (2005) 62 Washington & Lee LRev 339, 341–43. This risk goes hand in hand with a growing number of potential claimants who (purport to) hold a reputation in several countries: see Carrascosa González, 'The Internet – Privacy and Rights Relating to Personality' (2016) 378 Recueil des cours 263, [2].

425 Bone (n 259), 307–10; Krotoszynski (n 424), 342.

426 See Mills (n 325), 24–26; Muir Watt (n 325), 676–77.

427 See Carrascosa (n 424), [8]; Krotoszynski (n 424), 343–50.

428 Hartley, 'Libel Tourism and Conflict of Laws' (2010) 59 ICLQ 25, 26. See also Carrascosa (n 424), [6]–[10], defending the same analysis post-2013. But see Lord Hoffmann, 'The Libel Tourism Myth' (*indexoncensorship.org*, 6 Feb 2010).

429 Krotoszynski (n 424), 344–48.

defamation has not only created an (almost unparalleled) wealth of academic literature[430] and a number of high-profile court decisions,[431] some of which were seen as abetting a new form of forum shopping, labelled 'libel tourism'. The phenomenon triggered various legislative interventions, some of which aimed to reform what started to be seen as increasingly outdated grounds for jurisdiction[432] while others simply blocked the enforcement of seemingly overreaching foreign decisions.[433] In the EU, the differences between the laws of the member states[434] – and the fear of some influential parts of the British press that they might be unduly undermined by the removal of the requirement of actionability under the *lex fori*[435] – lead to the exclusion of personality rights from the Rome II Regulation.[436]

135 At the same time, the vast majority of online communication is at least disseminated by private actors, if it does not take place entirely on private platforms. Private actors play a central role both in spreading and keeping available content that allegedly violates personality rights and in policing and, if necessary, deleting said content.[437] To reiterate a quote by Alex Mills:

---

430 It would be impossible to draw up a comprehensive list of these publications here. Instead, see the list of references in Mariottini, 'Freedom of Speech and Foreign Defamation Judgments' in Hess/Mariottini (eds), *Protecting Privacy in Private International and Procedural Law by Data Protection* (Nomos 2015), 115, fn 4. From the publications that have been cited in other parts of this thesis, see Hartley (n 428); Hess, 'The Protection of Privacy in the Case Law of the CJEU' in Hess/Mariottini, ibid, 81; Mills (n 325); Oster, 'Rethinking Shevill. Conceptualising the EU private international law of Internet torts against personality rights' (2012) 26 IntRevLCompTech, 113.

431 See below, IV.B.1.a. and 2.c.

432 See s 9(2) of the UK Defamation Act 2013.

433 See the US Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010.

434 As to which see Brüggemeier/Colombi Ciacchi/O'Callaghan, *Personality Rights in European Tort Law* (CUP 2010).

435 See Mills (n 325), 12; Knöfel, in Hüßtege/Mansel (eds), *NomosKommentar BGB. Rom-Verordnungen* (2nd edn, Nomos 2016), Artikel 1 Rom II, [53].

436 In Art 1(2)(g) Rome II.

437 DeNardis (n 208), 157–71; Hardy (n 250), 1000–02.

> *The stark reality is that the regulation of free speech on social media, in practical terms, is likely to be controlled much more by the private terms and conditions and internal complaints resolution procedures of social media organisations than it is by courts or national law.*[438]

Courts and legislators have tried to address this phenomenon in different ways, ranging from far-reaching exemptions for internet intermediaries to the creation of new obligations to monitor and delete allegedly infringing content.[439] Considering the uncertainties arising from the potentially worldwide reach of information published online, this tends to put intermediaries into an unfortunate position, in which they need to work out for themselves which of the (potentially contradicting) national laws to enforce and how to reconcile them with their privately drafted platform rules.[440]

2. Protecting IP Rights

136 The protection of IP rights has been subject to similar challenges. The internet has significantly increased the potential for infringements (eg by making it much easier to produce and disseminate illegal copies of a wide variety of copyrighted material)[441] while also creating the impression that these infringements will be without repercussions.[442] Just like in the area of personality rights, these difficulties were met by reforms of substantive

438 Mills (n 325), 31.

439 See, eg, the ECJ's decision in *Google Spain* (n 386), according to which the Data Protection Directive requires the providers of search engines 'to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful' (ibid, [88]; see now Art 17 GDPR). See also above, [120].

440 See Svantesson, 'Between a Rock and a Hard Place – An International Law Perspective of the Difficult Position of Globally Active Internet Intermediaries' (2014) 30 CompLSecRev 348, 348–49: 'Internet intermediaries become the censors and gatekeepers of speech.'

441 See MacQueen, '"Appropriate for the Digital Age?" Copyright and the Internet' in Edwards/Waelde (n 233), 183, 183–87; Waelde/MacQueen, 'From entertainment to education: the scope of copyright?' [2004] IPQ 259, 260, 262. At the same time, it should be noted that the internet (and its rapidly growing availability) have allowed for the creation of new business models that reduce the prevalence of copyright infringements, eg through offering lawful and convenient access to music streaming, films, or computer games.

442 See C Reed (n 245), 124–26.

law,[443] which, however, showed a much higher degree of international coordination, ensuring at least a minimum level of harmonisation.[444]

137 The internet has also made it significantly easier (but also practically unavoidable) to exploit intellectual property internationally. While it has always been difficult to restrict the use of protected works to a particular state,[445] the emergence of the internet has made it impossible in many cases. The fact that more and more works are exploited internationally and with little regard to state borders[446] has challenged the traditional understanding that IP rights are protected separately for the territory of each state.[447] It has contributed to a paradigm shift 'away from viewing intellectual property rights as a set of privileges/entitlements granted by the state, and towards a notion of absolute rights to be enforced and protected globally'.[448]

138 From a legislative point of view, this paradigm shift is still very much at its beginning – which is unfortunate given the significant conflicts of regulatory authority that the growing disconnect between local IP laws and global use of protected works inevitably creates. These conflicts concern rights that are registered for a certain territory as well as those that are not. With regard to the first group, problems arise whenever more than person purports to hold a similar IP right (such as a trademark) in different states and one

---

443 See Waelde/MacQueen (n 441), 263–64.

444 See above, [99].

445 See Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886–1986* (Kluwer 1987), 590: 'words, sounds and pictures, like birds, fly over frontiers with the greatest ease.'

446 See Dinwoodie (n 152), 529–31.

447 As to which see, eg, Case C-441/13 *Hejduk* ECLI:EU:C:2015:28, [22]: '[I]t must be observed that, although copyright rights must be automatically protected […] in all Member States, they are subject to the principle of territoriality. Those rights are thus capable of being infringed in each Member State in accordance with the applicable substantive law […].'; see also ibid, [37], [38]; Hugenholtz, 'The Last Frontier: Territoriality', in van Eechoud et al (eds), *Harmonizing European Copyright Law – The Challenge of Better Lawmaking* (Kluwer 2009), 307, 308–14. For a more detailed discussion of the concept, see below, under IV.C.5.b.(1), first indent.

of them wants to exploit it online.[449] With regard to the second group, it should be noted that although international conventions guarantee a certain level of protection more or less across the globe, they usually only require the signatories to implement a minimum protection; national states usually retain a wide margin of discretion, eg with regard to exceptions that balance out the otherwise absolute character of copyright.[450] These exceptions are easily circumvented, though, where claimants are allowed to rely on numerous national copyright laws with regard to the same (online) content.

139 Still, until surprisingly recently, these problems have remained largely unaddressed in private-international-law scholarship.[451] The main reason seems to be that the territoriality principle used to be understood as both a requirement of international law and a rule of private international law.[452] It was believed that the Berne Convention required states to submit each infringement of an IP right to the law of the state for the territory of which the claimant seeks protection (the *'lex loci protectionis'*).[453] While this

448 Hatzimihail (n 306), 304–05.

449 See Bettinger/Thum, 'Territorial Trademark Rights in the Global Village – International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet [Part II]' (2000) 31 IIC 285, 289–91; Kur, 'Trademark Conflicts on the Internet: Territoriality Redefined?', in Basedow/Drexl/Kur/Metzger (eds), *Intellectual Property in the Conflict of Laws* (Mohr Siebeck 2005), 175.

450 Dinwoodie (n 280), 436–37.

451 See Van Eechoud (n 174), 2; Dinwoodie (n 308), 435–36; Austin, 'Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation' (1999–2000) 23 Columbia-VLA JL&Arts 1, 6 fn 15. But see now Torremans, *Intellectual property and private international law* (Edward Elgar 2015); Kono (ed), *Intellectual Property and Private International Law: Comparative Perspectives* (Hart 2012); Fawcett/Torremans (n 174); Leible/Ohly (eds), *Intellectual Property and Private International Law* (Mohr Siebeck 2009); Nuyts (n 308); Basedow/Drexl/Kur/Metzger (n 449); Drexl/Kur (eds), *Intellectual Property and Private International Law* (Hart 2005). See also European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), 'Principles on Conflict of Laws in Intellectual Property', 1 Dec 2011 (CLIP Principles) and American Law Institute, 'Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes', 2008 (ALI Principles), discussed in further detail below at [315] and [444].

452 See, eg, De Miguel Asensio, 'The Private International Law of Intellectual Property and of Unfair Commercial Practices: Convergence or Divergence?', in Leible/Ohly (n 451), 137, 146–48.

453 While the EU Commission did not appear to consider itself as bound by the Berne Convention in this sense, it still adopted the *'lex loci protectionis'* approach as a choice-of-law rule for infringements of IP rights in Art 8(2) Rome II (see Proposal for Rome II (n 104), Explanatory Memorandum, 3., Art 8).

interpretation is challenged by a growing number of scholars,[454] many authors still seem convinced that the best way to overcome the problems of coordination between different legal systems claiming authority over online infringements of IP rights would be further international harmonisation of substantive IP laws.[455]

140 Just like in the area of personality rights, these problems of coordination between national states, legislators, and courts, are further complicated by the fact that their role in the practical enforcement of IP rights is limited by the overwhelming influence private parties exercise over large parts of online communication. Platforms like *YouTube* or *Facebook* actively enforce IP rights both retroactively through complaint procedures and proactively by blocking and removing infringing content.[456] With its latest proposal for a new Copyright Directive,[457] the EU tries to harness this power by requiring certain information society service providers to filter uploads for copyrighted material. Such a requirement (which is rightly criticised from a policy point of view) could be a step towards a better alignment between private enforcement and national law(s); but for now, even though platforms often purport to enforce state law, the mechanism by which said law is identified remain obscure – and it appears doubtful whether they are anchored in rules of private international law.

---

454 See, eg, Dinwoodie, 'Developing a Private International Intellectual Property Law: The Demise of Territoriality?' (2009) 51 William & Mary LRev 711. See also below, IV.C.5.b.(1).

455 See Fentiman, 'Choice of Law and Intellectual Property', in Kur/Drexl (eds), *Intellectual Property and Private International Law* (Hart 2005), 129, 145–46; Fischer-Lescano/Teubner (n 204), 1019–20. See also Dinwoodie (n 309), 450–53 (for thoughts on a comparativist approach).

456 See above, [119].

457 See above, [122].

3. Ensuring Fair Competition

141 Considering the growing importance that the law of unfair competition plays in the enforcement of IP rights,[458] it may not be particularly surprising that it has been affected by similar challenges. But also with regard to its more traditional roles, it has been confronted by the triad of internet challenges described above. Challenges have arisen, first, in the shape of new types of business models and market abuses. The internet has created new markets not only for telecommunication services, hard-, and software but also for all other kinds of products that can be sold, and sometimes even be delivered, online; but their rapidly changing nature has left those markets vulnerable to anti-competitive practices and violations of consumer rights. Just like many national legislators, the EU has tried to address these challenges on a substantive level, eg through its Unfair Commercial Practices Directive,[459] which the Commission has recently clarified with regard to the challenges arising online through a new set of 'guidances'[460] that form part of its broader approach to e-Commerce.[461]

142 The law of unfair competition has also been affected, second, by the borderless nature of online communication.[462] Anticompetitive behaviour on the internet regularly has effects in numerous countries, especially where the relevant goods and services are offered to customers online, with little geographic discrimination. *Prima facie*, one might assume that the private international law of unfair competition may be suited rather well to

458 See De Miguel Asensio (n 452), 137–40; see also generally Dornis, *Trademark and Unfair Competition Conflicts – Historical-Comparative, Doctrinal, and Economic Perspectives* (CUP 2017), 325–48.

459 On which see Savin (n 184), 180–82.

460 Commission Staff Working Document. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final.

461 Communication from the Commission. A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses, COM(2016) 320 final, 10–11.

462 See De Miguel Asensio (n 452), 141; Dornis (n 458), 1–3.

provide adequate solutions for these cases by virtue of its focus on markets,[463] rather than countries. So far, this distinction has however rarely helped reducing the difficulties of borderless online cases as markets continue to be understood as national markets.[464] At the same time, the criterion has the potential of creating further uncertainty by potentially submitting infringements of IP rights to two different laws with regards to its IP-law and unfair-competition-law dimensions.

143 Third and finally, the problem of powerful private platform hosts is of particular importance in the area of unfair-competition law. These days, almost all virtual content (and many other goods and services) are sold through platforms such as *Amazon*, *eBay*, *iTunes*, or *Steam*, many of which operate as closed ecosystems in which the host's own products are promoted while alternatives tend to be discriminated against. For instance, *Microsoft* and *Apple* have both been found to restrict consumer choice and discriminate against its competitors by using their operating systems to create 'walled gardens';[465] similarly, *Google* has been criticised for presenting its own products particularly prominently on its search engine.[466] At the same time, these private actors act as the main regulators on their own platforms, where they regularly enforce (what they understand to be) rules against unfair competition.[467] Thus, it is unsurprising that the EU Commission

---

463 See De Miguel Asensio (n 452), 152–53; Dornis (n 458), 203–14.

464 See recently Case C-27/17 *flyLAL* ECLI:EU:C:2018:533, [39]–[40].

465 See Case T-201/04 *Microsoft Corp v Commission* ECLI:EU:T:2007:289; *United States v Microsoft Corp*, 253 F3d 34 (DC Cir 2001). See also the ongoing litigation in *Apple, Inc v Pepper*, US Supreme Court Docket No 17-204 (regarding *Apple*'s monopoly on selling apps for the iPhone through its App Store).

466 See Commission Decision of 27 June 2017, C(2017) 4444 final (fining *Google* €2.42 billion for abusing its dominant position as a search engine by giving illegal advantage to its own services); Nicas, 'Google Uses Its Search Engine to Hawk Its Products' (*wsj.com*, 19 Jan 2017).

467 In 2017, *Google* removed more than 250,000 apps from its *Play Store* because they pretended to be other, better-known products: see Ahn, 'How we fought bad apps and malicious developers in 2017' (Android Developers Blog, 30 Jan 2018).

has recently identified the promotion of online platforms 'as responsible players of a fair internet ecosystem' as one of its new strategic aims for the Digital Single Market.[468]

4. Regulating Agreements

144 Just like the different areas of tort law that have been discussed so far, contract law has also been challenged by the emergence of the internet. Two types of challenges may be distinguished. The first type comes from new ways of *entering* into contracts, which increasingly take place online and raise questions of information asymmetry, evidence, and the regulation of standard terms.[469] Although not trivial, many of these challenges ultimately seem to be mere extensions of problems that have existed, and been recognised, long before the internet;[470] accordingly, they have by and large been adequately dealt with by national and supranational substantive law.[471]

145 A second type of challenge, on the other hand, concerns the *object* of the contract, ie the performance that one of the parties promises the other. In this regard, some much more novel problems have arisen. The internet has made it possible, for instance, to offer more and more products – from computer software to music and films – in a purely digital form, reducing the actual performance to nothing more than giving the other party access to a file.[472] The fact that many of these files are no longer sold individually (and perpetually) but as a service in exchange for a monthly subscription fee has contributed to the rapid convergence between sales and service contracts (often referred to as

468 Mid-Term Review on the implementation of the Digital Single Market Strategy (n 302), 7.

469 Regarding jurisdiction and choice-of-law clauses, see below, [226]–[229], [232], [237].

470 See Foss/Bygrave, 'International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law' (2000) 8(2) IntJLInfoTech 99, 107–08; Muir Watt (n 325), 674; Wang (n 322), 48.

471 See also De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', in De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016), 1, 11–15.

472 See Foss/Bygrave, 'International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law' (2000) 8(2) IntJLInfoTech 99.

'servitisation'). The internet even makes it possible to enter into self-executing 'smart contracts',[473] for which the distinction between conclusion and performance becomes purely academic.

146 The challenges that these new business models raise seem to be intrinsically linked to the borderless nature of internet communication. Some of them can be addressed through changes to substantive law (such as more appropriate definitions of certain types of transactions,[474] the adoption of new rules for contracts about digital content,[475] or even the prohibition of certain kinds of artificial market segmentation[476]) but many of them will raise pertinent questions as to which courts are competent to resolve a dispute surrounding a completely virtual contract and which law applies to it.[477] It is fair to say that these issues have not yet received anywhere near as much attention – either in academia or in the practice of the courts – as the aforementioned areas of tort law, which may be explained by the prevalence of jurisdiction and choice-of-law clauses in these contracts.[478] Still, they certainly raise similar structural challenges. For instance, even though the parties to a digital contract will often agree on the competent courts and applicable law, this will not

473 On which see, eg, Weber, 'Contractual Duties and Allocation of Liability in Automated Digital Contracts', in Schulze/Staudenmeyer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016), 163.

474 Such as treating 'client-server-software' as goods for copyright purposes: Case C-128/11 *UsedSoft* ECLI:EU:C:2012:407, [47].

475 Above, n 299, 300.

476 Above, n 295.

477 For instance, the proposal for the aforementioned Geo-Blocking Regulation (n 295) had been publicly criticised by only retailers for not addressing the lack of certainty as to the applicable law for cross-border online contracts: see Handelsverband Deutschland, 'Geoblockingverbot überfordert mittelständischen Online-Handel' (*einzelhandel.de*, 22 Nov 2017).

478 See Haibach, 'Cloud computing and European Union private international law' (2015) 11 JPIL 252, 256, 266; Wang (n 322), 19.

always be the case. Besides, the validity of such a choice may in fact depend on the otherwise applicable law.[479]

147 Finally, the area of contract law is affected by the challenge of private ordering in two ways. First, just like the areas discussed above, contract law is confronted with the fact that the practical influence of public norms and institutions is heavily reduced by private actors who set the rules applying to transactions made on an online platform autonomously and enforce them with little regard to national laws. This is particularly true for virtual environments (such as the simulation *Second Life* and a range of multiplayer video games),[480] in which users interact as digital avatars and exchange virtual goods for equally virtual currencies.[481] While it may be highly impractical to submit these transactions to anything other than the rules set by the host of the virtual environment, it would be equally unjustifiable to allow these rules to become an exclusive regulatory regime that completely displaces national law, considering their significant economic importance.

148 In addition, the relationship between the host and users of a platform is itself based on a contract. Given the undeniable practical importance of these platforms and their regulatory frameworks, national courts and legislators have taken a growing interest in regulating these contracts.[482] The questions of which courts are competent to do so and which laws apply to these contracts is therefore of increasing practical importance.

---

479 See Berman (n 6), 332–33. The ECJ recently had a chance to discuss this particular question in *VKI* (n 111), [49]–[59]; see also below, [232].

480 As to which see also Lutzi, 'Aktuelle Rechtsfragen zum Handel mit virtuellen Gegenständen in Computerspielen' NJW 2012, 2070.

481 In many online games, players regularly buy and sell items for the in-game equivalent of dozens, if not hundreds of pounds; in *World of Warcraft*, the most expensive items regularly sell for the in-game equivalent of several hundred pounds.

482 See also above, [125].

5. Protecting Structurally Weaker Contract Parties

149 Over the last decades, there has been a growing consensus that certain classes of persons, especially consumers,[483] merit stronger protections than others.[484] This idea had a particularly strong influence on contract law, which has progressively adopted more and more specialised rules for consumer contracts, which protect them, in particular, against abuses of the freedom to contract in situations where the other party has the power to dictate the terms of the contract. In the European Union, this approach has been extended to questions of international jurisdiction and choice of law, with regard to which consumers have been considered to be in an equally weak bargaining position;[485] hence, consumers do not only benefit from favourable default rules,[486] consumers are also protected against overly unfavourable exercises of party autonomy.[487]

150 This high level of protection is not easily realised in internet cases.[488] Many transactions on the internet happen in relative anonymity, making it hard for professionals to predict which of their customers are consumers[489] – or, depending on the circumstances, even where they are domiciled.[490] What is more, the instantaneousness and frequency of online transactions can make it very burdensome for individual professionals to comply with the different national laws that consumers may potentially invoke under these special

---

483 See Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart 2015), 5. See also Art 169(1) TFEU: 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.'

484 On the underlying reasons, see Rühl (n 116), 342–46.

485 See Tang (n 483), 4–7.

486 See Savin (n 184), 182–88, and below, IV.B.1.e.

487 See Rühl (n 116), 346–56; Tang (n 483), 9.

488 See generally Billen (n 207), 11–13; Savin (n 184), 160–62; Tang (n 483), 18–19.

489 Tang (n 483), 12–13.

490 ibid, 13–14.

provisions;[491] at the same time, their room to alleviate this burden through choice-of-court and choice-of-law clauses is limited.

151 Finally, these special rules also raise the question as to what extent they can be reconciled with privately drafted sets of rules and how they can be enforced on private platforms.

491 ibid (n 483), 162.

IV. The Regulatory Potential of Private International Law in Internet Cases

152 It is clear by now that the vision of an autonomous cyberspace, independent from nation states and governed by its own law has not materialised – nor has any form of universal global governance been established. Instead, we see a picture of highly fragmented regulation, with courts and legislators struggling with the disconnect between the territorially limited scope of their regulatory authority and the borderless nature of online communication. As a consequence, the effectiveness of substantive regulation is often limited by uncertainty as to its geographical reach and by overlaps with other, potentially contradictory norms that purport to govern the same case. At the same time, the regulatory monopoly of public institutions has been put into question by the emergence of online platforms and communities that are effectively regulated only by the private parties that host them.

153 In this chapter, it will be argued that private international law has the potential – if not the vocation – to accommodate these two phenomena (A.). A closer look at the private international law of the EU, which developed alongside these challenges and has, in fact, repeatedly been confronted with them, will however reveal that so far, this potential has largely remained untapped (B.). On this basis, it will be discussed how private international law might react better to the particular challenges of online communication and how the discipline's untapped regulatory potential could be used to give greater effect to substantive law and make a positive contribution to internet regulation (C.).

A. The Case for Regulation Through Private International Law

154 One commentator has argued that the fundamental challenges that have been identified above leave regulators with a choice between two options: 'either […] divide the cyber-world into sovereign territory through the interest of a physical state, or […] leave the cyber-world to regulate itself in the name of freedom of information.'[492] In the following, an argument will be made for a third option. It is submitted that private international law offers an alternative to these two extreme approaches.[493] Its ability to coordinate different claims to regulatory authority allows it to accommodate both of the phenomena identified above: the borderless nature of online communication and the prevalence of private ordering. Private international law has always been concerned with the *horizontal* coordination of the competences of national courts and of the territorial scopes of substantive laws (1.); but it also has a long history of accommodating normative systems that are not derived from states, to which it gives effect by *vertically* coordinating regulatory competence between private actors and public institutions (2.).

1. Coordinating National Courts and Substantive Legislation

155 It is generally agreed that one of the central functions of private international law is the coordination of different potentially competent (national) courts and potentially applicable (national) laws.[494] This function arguably existed already when private international law was still seen as part of public international law and scholars like Savigny tried to formulate universal rules to identify 'for every legal relation (case) that legal territory to

492 Bone (n 259), 290.

493 For similar arguments, see Taubman (n 233), 5; Muir Watt (n 325), 673–75; Trimble, 'Conflict of Laws Has Caught Up With Silicon Valley. Now Silicon Valley Needs to Catch Up on Conflict of Laws' (Technology & Marketing Law Blog, 16 Nov 2016). See also Dinwoodie (n 152), 533; Ginsburg, 'International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?' (2000) 47 J CopyrightSocUSA 265, 280–84.

494 See Mayer (n 5), *passim*, discussed below at [156]; Mills (n 46), 450, 471; Neuhaus, 'Legal Equity Versus Certainty in the Conflict of Laws' (1963) 28 L&ContempP 795, 807.

which, in its proper nature, it belongs'[495] and to allocate regulatory authority within a 'community of law among independent states'.[496]

156 Private international law maintained this coordinating function when it became part of domestic law. According to Pierre Mayer, it was only then that private international became 'a law of coordination', as opposed to 'a law of the repartition of competences'.[497] While the latter is ultimately just a facet of public international law,[498] the 'coordination of legal orders' by private international law is done by the national judge who 'attributes relevance'[499] to the different legal orders implicated in a private-law case.[500] In order to do so, they rely on a variety of techniques, from abstaining to adjudicate to applying foreign law or acknowledging a legal situation created elsewhere to rendering enforceable, and actually enforcing, foreign judgments.[501]

157 In similar style, the Restatement (Second) of Conflict of Laws opens with the following statement:

> *The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.*[502]

---

495 Savigny (n 43), 89 (§ 360).

496 ibid, 29 (§ 348).

497 Mayer (n 5), [360]: *'[Jusque-là, on était] conduit à voir dans le droit international privé un droit de la répartition des compétences, et non un droit de la coordination.'*

498 See further ibid, [90]–[96].

499 A concept first developed by Santi Romano in *L'ordinamento giuridico* (Sansoni 1918): see Mayer (n 5), [33]–[34], [104].

500 ibid, [98]–[117].

501 ibid, [105], and in more detail [207]–[239], [264]–[288].

502 American Law Institute, 'Restatement (Second) of Conflict of Laws' (1971), § 1.

158 Rules of private international law coordinate between different legal systems by telling the domestic judge whether or not to hear an international case,[503] what law to apply, and what effect to give to foreign judgments.[504] In contrast to the top-down perspective of public international law, private international law is thus understood to achieve coordination through the individual legal systems.[505]

159 Besides, a specific form of top-down coordination through private international law seems to have celebrated a comeback in the context of the European Union. '[I]in order to establish progressively an area of freedom, security and justice'[506], the EU was given far-reaching competences to 'develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.'[507] As a consequence, it has enacted instruments that harmonise central areas of private international law in order to coordinate the competences of national courts and legislators within the Union.[508]

160 Although these instruments, which largely rely on traditional techniques of private international law, could hardly be expected to achieve perfect coordination, the way in which they have been applied to internet cases[509] is certainly surprising in light of this aim. In fact, both the European legislator and the ECJ have allowed for large overlaps of jurisdiction and applicable laws – a disconnect that arguably has its roots in the peculiar history and nature of internet communication.[510]

---

503 On the definition of which Mayer (n 5), [66]–[71].

504 Mills (n 46), 450.

505 See also Wai (n 185), 241–44.

506 Art 61 TEC (now Art 67 TFEU, adopting a slightly more neutral wording).

507 Art 81 TFEU.

508 See Mills (n 46), 464; Mills (n 119), 250–51; Muir-Watt (n 119), 46–48; see also above, [51].

509 See below, IV.B.2.a.

510 See below, IV.B.2.b.

2. Accommodating Private Ordering

161 The coordinating function of private international law is not limited to the coordination between *national* legal systems.[511] For more than a century, private international law had to react to private parties trying to escape state adjudication and national law and instead have their international disputes resolved by non-state institutions under regional, religious, or otherwise privately-drafted sets of rules.

162 The possible reasons for such escapes into private ordering are manifold. Private parties do not only opt for private dispute resolution or privately drafted sets of rules to improve their relative position within the contractual relationship or to escape from the regulatory authority of a state they distrust; in many cases, their escape into private ordering is primarily motivated by their wish to reduce transaction costs by submitting a particular contract (and the disputes that may arise from it) to a regulatory framework that is more appropriate for the specific type of relationship, that the parties are more familiar with, and that they control themselves. In all of these cases, private ordering reduces the perceived unpredictability of state law, which is particularly prevalent in international cases – and even more so in online cases.

163 And yet, systems of private international law have generally been cautious not to elevate these different types of private ordering to the level of a 'legal system'; legislators may carve out some limited space for expressions of party autonomy, but they usually make sure that public courts and state law ultimately remain in control of any privately-organised alternative (a.). Against this backdrop, it is hardly surprising that the hosts of private online platforms do not usually purport to replace state law by their platform rules

511 See Mayer (n 5), [38]; Michaels (n 196) 1227–37; Saumier (n 196), 1; more specifically Hayakawa (n 247), 32.

but rather aim to manipulate and adjust it – to the extent that private international law and the applicable substantive law allow (b.).

a. The 'State Paradigm' of Private International Law

164 While it is nowadays widely acknowledged that private international law has a role to play with regard to the coordination between national legal systems and attempts by private parties to escape them, legislators have remained cautious not to carve out too much room for such instances of private ordering.

165 In fact, the orthodox position seems to consist in not giving effect to anything but national legal (and court) systems (the so-called 'state paradigm').[512] Traditionally, even the selection of non-state law as *lex contractus*[513] has been seen as being irreconcilable with the need for a comprehensive body of rules against under which all questions relating to the contract can be resolved and which only state law can provide.[514] Even those authors who acknowledge that there may be legal systems that have not been created by states often find it difficult to identify any system that might actually pass the high threshold of this category.[515]

512 Mayer (n 5), [39]. For the traditional common-law hostility towards arbitration, see *Kulukundis Shipping v Amtorg Trading* 126 F2d 978 (2nd cir 1942), 982: 'The English courts, while giving full effect to agreements to submit controversies to arbitration after they had ripened into arbitrators' awards, would – over a long period beginning at the end of the 17th century-do little or nothing to prevent or make irksome the breach of such agreements when they were still executory.' and 984: 'That English attitude was largely taken over in the 19th century by most courts in this country.'

513 See McParland (n 117), [4.03]; Mills, 'The Principled English Ambivalence to Law and Dispute Resolution Beyond the State', in Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), 341, [31.05]–[31.08]; Vischer (n 56), 136–37; Mankowski, 'Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge' IHR 2008, 133, 136. See also Resolution II of the 1991 Basel session of the Institut de droit international, 'The Autonomy of the parties in international contracts between private persons or Entities', Annuaire, Vol 64-II (Pedone 1992), 383.

514 See *Amin Rasheed Shipping v Kuwait Insurance* [1984] AC 50, 65; McParland (n 117), [4.03].

515 See, eg, Mayer (n 5), [38], [52]–[55], who ultimately refuses to consider virtually any non-state body of law as a *système juridique* (with the notable exception of the so-called *lex sportiva*).

166 In recent years, there has however been a push towards a broader recognition of non-state norms.[516] Under the Commission's initial proposal for the Rome I Regulation,[517] for instance, the parties would have been free to 'choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community'.[518] This progressive[519] provision was seen as enabling a choice of such sets as the Principles of European Contract Law (PECL) or the UNIDROIT Principles (but not the so-called *lex mercatoria*).[520] While it was welcomed by the Economic and Social Committee,[521] it was met with criticism by many scholars[522] who argued that it would create uncertainty as to the available sets of rules[523] and that these rules would lack a sufficient democratic basis.[524] Eventually, the provision disappeared from the Council's compromise package[525] and the final text of the Regulation.[526] Instead, the Regulation now refers to 'the country whose law has been chosen',[527] 'the law of the country where the party required to effect the characteristic performance of the contract has his habitual

516 See also above, [73].

517 Commission Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM(2005), 650 final.

518 ibid, Art 3(2).

519 Mankowski (n 513), 136.

520 Commission Proposal for a Regulation on the law applicable to contractual obligations (n 517), 5.

521 Opinion of the European Economic and Social Committee on the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), CESE 1153/2006, [3.2.3].

522 But see Lando/Nielsen, 'The Rome I Regulation' (2008) 45 CMLR 1687, 1696; Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Green Paper' RabelsZ 68 (2004), 1, 30–33; Roth, 'Zur Wählbarkeit nichtstaatlichen Rechts', in Mansel et al, *Festschrift für Erik Jayme* (Sellier 2004), 757, 764–67.

523 See, eg, Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne' Rev crit DIP 2006, 331, 336. See also Garcimartín Alférez, 'The Rome I Regulation: Much ado about nothing?' [2008] EuLF I-61, [34].

524 See Lando/Nielsen (n 522), 1696; Roth (n 522), 763–64.

525 Commission Proposal for a Regulation on the law applicable to contractual obligations (Rome I), Compromise package by the Presidency, 8022/07.

526 But see recitals (13), (14), discussed below under [171].

527 Art 3(3) Rome I.

residence',[528] and 'the law of the country with which [the contract] is most closely connected',[529] making clear that the applicable law has to be the law of a country.[530]

167 The (non-binding) Hague Principles on Choice of Law in International Commercial Contracts, on the other hand, allow for the selection of 'rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules' unless the *lex fori* contradicts such a choice.[531]

168 But even though non-state law cannot be validly selected as the applicable law in the vast majority of systems of private international law, these systems do not completely ignore it. Instead, they generally give effect to the parties' decision to resort to such mechanisms to the extent that the *content* of their contractual relation is concerned[532] but ensure that national courts and state law remain in control of the *process*. As Frank Vischer puts it:

> *The demand for deregulation, which has increased in the last decennium, could and should lead to a decentralization of the law-generating process, to the restriction of State intervention in the 'self-referential' economic system, and to the State's contentedness with the control of the self-regulation of the economic organizations and the institutions of proceedings securing a fair and effective settlement of disputes. […] But it remains within the discretion*

528 Art 4(2) Rome I.

529 Art 4(4) Rome I.

530 McParland (n 117), [4.02]; Lando/Nielsen (n 522), 1697; Leible, in Hüßtege/Mansel (n 435), Artikel 4 Rom I, [34]. English courts interpreted the limitation of the scope of application of the Rome Convention to situations 'involving a choice between the laws of different countries' as a similar restriction (see *Halpern v Halpern* [2007] EWCA Civ 291, [21]–[29]; *Shamil Bank of Bahrain v Beximco Pharmaceuticals* [2004] EWCA Civ 19, [48]); not all authors agreed (for the opposite view see Leible, 'Außenhandel und Rechtssicherheit' ZvglRWiss 97 (1998), 286, 314). Under Art 14(1) Rome II Regulation, the same limitation seems to apply (see Dickinson (n 112), [13.20]).

531 Hague Principles on Choice of Law in International Commercial Contracts (n 73), Art 3: 'The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.' For commentary see Mankowski, 'Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law' (2017) 22 Uniform LRev 369 and Saumier, 'Article 3 of the Hague Principles: a response to Peter Mankowski' (2017) 22 Uniform LRev 395.

532 On the distinction see *Halpern v Halpern* (n 530), [34]–[35].

> *of the State to decide how far self-regulation of the economic entities have binding force.*[533]

169 Thus, national courts generally give effect to arbitration clauses and refrain from adjudication, unless the agreement to arbitrate itself has been challenged.[534] By the same token, they enforce arbitral awards unless they violate the enforcing state's public policy or have been set aside by the courts of the place of arbitration.[535] On occasion, state courts even actively support arbitration through anti-suit injunctions and asset-freezing orders.[536] Thus, the courts respect the parties' choice to resort to arbitration but make sure – through their monopoly on execution and enforcement – that fundamental legal guarantees are respected with regard to the agreement to arbitrate as well as the arbitral award. This mechanism can be found in the UNCITRAL Model Law,[537] the Brussels Ia Regulation,[538] and the New York Convention.[539] And while it occasionally creates problems at the interface of national court systems and arbitral tribunals,[540] it is widely considered a successful *modus operandi*.[541]

---

533 Vischer (n 56), 136, fn 279.

534 See Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014), 229–35, 1277–83.

535 Born (n 534), 3409–38, 3443–717. Of course, these *caveats* are options left to the enforcing state; thus, awards set aside at the seat of arbitration can still be enforced in other countries – as has famously happened in *Yukos v Rosneft*, where an arbitral award set aside by a Russian court was enforced by the Dutch courts (see Hoge Rad 25 Jun 2010 ECLI:NL:HR:2010:BM1679) but not by the English courts (see [2012] EWCA Civ 855).

536 Born (n 534), 1290–304; Mills (n 513), [31.02]. In return, some courts have also issued 'anti-arbitration' injunctions to prevent improper arbitral proceedings from going forward, against both domestic (see *Republic of Kazakhstan v Istil Group Inc* [2007] EWHC 2729 (Comm)) and, in exceptional cases, foreign-seated arbitration (see *Claxton Engineering Services Ltd v TXM Olaj-És Gázkutató KFT* [2010] EWHC 2567 (Comm), [17]; cf *Weissfisch v Julius & Ors* [2006] EWCA Civ 218, [33]).

537 See Art 5–6, 8–9, 34–36.

538 See recital (12) and Art 73(2).

539 See Art II(1), (3), and III, guaranteeing the enforcement of arbitration clauses and arbitral awards; Art II(3) and V, allowing national courts to refuse recognition and enforcement in certain cases; Art V(1)(e) giving the courts of the country of the seat the power to set the award aside.

540 See, eg, Illmer in Dickinson/Lein (n 93), [2.03]–[2.10], [2.43]–[2.72] on the notoriously difficult relationship between the Brussels I Regulation and the New York Convention.

541 See Born (n 534), 96–97, 102–04; Mayer (n 5), [54]. According to Wai (n 185), 267, 'international commercial arbitration operates very much "in the shadow of the law", and national laws continue to

170 Within the limited scope of these arbitral proceedings, the parties are even allowed to have their disputes adjudicated under non-state law,[542] including the elusive *lex mercatoria*.[543] National courts have enforced arbitral awards which have applied Jewish law,[544] the *lex mercatoria*[545] or even specifically crafted sets of rules,[546] provided that the general requirements of recognition and enforcement are met.[547]

171 Even without resorting to arbitration, private international law regularly allows the parties to incorporate the rules they want to govern their contract as terms of the same.[548] Recital (13) of the Rome I Regulation, for instance, points out that '[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.' The biggest disadvantage of this method (as opposed to arbitration) is that the scope of application of non-state law is more strictly confined as it can only apply to the extent that the applicable state law can be derogated from.[549] English courts have further limited such incorporation to specific terms that have

---

impose important limits.'

542 Mills (n 513), [31.14]; more generally Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014). See also the references to 'rules of law' in Art 28 UNCITRAL Model Law, Art 21(1) ICC Rules of Arbitration (2017), Art 16(4), 22(3) LCIA Arbitration Rules (2014).

543 Lando/Nielsen (n 522), 1697; Leible (n 530), Art 3 Rome I, [32].

544 *Halpern v Halpern* (n 530), [37]–[38].

545 See Dasser, 'Mouse or Monster? Some Facts and Figures on the lex mercatoria', in Zimmermann (ed), *Globalisierung und Entstaatlichung des Rechts* (Mohr Siebeck 2008), 129, 150–53.

546 See *Channel Tunnel Group v Balfour Beatty Construction* [1993] AC 334 (HL), where the parties had submitted their contract to 'the principles common to both English law and French law, and in the absence of such common principles […] such general principles of international trade law as have been applied by national and international tribunals'.

547 Mills (n 513), [31.17]–[31.19].

548 *Halpern v Halpern* (n 530), [31], [34]–[36]; *Shamil Bank v Beximco* (n 530), [49]–[50]; Leible (n 530), Art 3 Rome I, [31], [33]. See also Ferrari, 'Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts"' (1995) 69 Tulane LRev 1225, 1229–30.

549 Lando/Nielsen (n 522), 1698; Lagarde (n 523), 336. See also AG Szpunar, Opinion on Case C-54/16 *Vinyls Italia* ECLI:EU:C:2017:164, [157]–[158], [160].

been explicitly incorporated, as opposed to clauses that simply submit the whole contract to 'the principles of the glorious Sharia'.[550]

172 As a general approach, the question to what extent private parties may sidestep national courts and state law is thus delegated the otherwise applicable law. It depends on national law, applied by national courts, whether an arbitration clause is given effect, under which conditions an arbitral award is enforced, and to what extent privately drafted rules can replace the otherwise applicable law.[551]

173 From a libertarian position according to which private parties should be free to submit their relationship to whatever rules and dispute-resolution mechanism they agree on,[552] this approach may seem disappointing. Yet, it is supported by important considerations.

174 The most fundamental argument seems to be that any contract (as well as any other type of agreement between private parties) has legal effects only because, and only to the degree that, state law recognises and enforces it, in exchange for the private parties' submission to the rule of law;[553] therefore, the legal effects of the contract must ultimately be determined by state law, applied by state courts.[554] It follows, it is argued, that a contract cannot exist without a reference system of state law.[555] In the well-known words

---

550 See *Shamil Bank v Beximco* (n 530), [51]–[55].

551 See also Hess (n 188), [170].

552 In the spirit of Art 1103 Code civil: *'Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.'*

553 See, in a more fundamental context and with qualified reference to the state, Gardner, 'The Twilight of Legality' Oxford Legal Studies Research Paper No 4/2018 [via SSRN], 8, 11–12.

554 ibid, 12.

555 Mills (n 513), [31.07]; Leible (n 530), Art 3 Rome I, [29]. See also Vischer (n 56), 136: 'State courts cannot avoid the application of State law. A contract entirely outside State law would be a "contrat sans loi" and as long as "loi" is understood as an enactment of the State or of the community of States, State courts will not be willing to renounce to recourse to State law.'; Tallon, 'Comparative Law: Expanding Horizon' (1968/69) 10 JSocPubTchrsL 265, 271: '[I]n the absence of any *"jus cogens"* international

of Lord Diplock,

> *contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations […].*[556]

175 Put differently, it is argued that state courts have to apply state law. This is explained, on the one hand, by the fact that national judges are office-holders of a state[557] and, on the other hand, by the fact that they would not be well-equipped to give effect to privately drafted rules. While the latter argument seems somewhat inconsistent with the observation that courts are considered to be perfectly capable of applying foreign law, and of giving effect to even the most complex contract terms, it is true that applying privately drafted rules would require the courts to make a difficult distinction between the content of the contract and the legal system of reference against which the former is to be judged. Besides, even were these rules have been drafted to cover a large variety of cases, there would be no guarantee as to their completeness, raising the question of how to treat cases that fall outside of their scope.

176 This orthodox treatment of privately drafted rules seems to conflict with the observation that courts routinely apply the law of *another state* following rules of private international law. But the difference in treatment can be explained by considerations of international comity,[558] reciprocity, and mutual deference to each other's legal systems by states.[559] The application of privately drafted rules therefore requires merely *a* system of

---

trade would be ruled by jungle law.'

556 *Amin Rasheed* (n 514), 65.

557 Mills (n 513), [31.08]; McParland (n 117), [4.03].

558 As to which see Dornis, 'Comity', in Basedow/Rühl/Ferrari/De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017), 385–86, 389–90.

559 See also Gardner (n 553), 8.

reference, which has to be the legal system of *a* state. It is for private international law to decide *which particular* courts are ultimately competent and *which particular* national law they will apply. Private international law thus maintains a crucial coordinating function in designating the relevant system(s) of reference – and by regulating under which conditions, and to which degree, the parties may change it. It protects the parties' interest in agreeing on the competent (state) courts and the applicable (state) law but also makes sure that these latter ultimately remain in control. As Alex Mills notes,

> *[w]hile this all may appear as legal ambivalence, what is really at play in these contexts is a delicate and principled balance struck in the face of the reality of a world in which, sometimes competing and sometimes cooperating, public and private power, rules and dispute resolution coexist.*[560]

b. The Private Ordering of Online Platforms

177 Against this backdrop, it is hardly surprising that even the largest and most international online platforms do not purport to establish a 'système juridique' in the sense it is understood by Pierre Mayer. They may try to modify the substantive rules of the applicable law through standard terms in the platform contract and they may even attempt to offer (and incentivise) alternatives to litigation to their users, but they do so within the framework created by national legal systems (which they select through choice-of-court and choice-of-law clauses).[561] As John Gardner observes in a broader context,

> *[w]e can imagine a world in which the apron strings are cut and the contracts we make with Facebook and Amazon are purportedly made only under Facebook's or Amazon's own jurisdiction. Then the question will arise of whether Facebook or Amazon has established a legal system of its own. But that world is a long way from our own. At this stage Facebook and Amazon purport to bind us only by contract, and continue to assert that the contract is intended to have its legal effect in a legal system that is not Facebook's or Amazon's own legal system.*[562]

560 Mills (n 513), [31.33].

561 Ryngaert/Zoetekouw (n 356), 194. See also above, [117].

562 Gardner (n 553), 13.

Consequently, propositions to consider platform rules as the applicable law in the context of certain online torts (such as defamation) go beyond what even the platform hosts themselves try to achieve at the moment.[563]

178 Of course, this does in no way reduce the central role played by private international law with regard to the effective regulation of these platforms. If anything, it increases the regulatory potential of traditional rules of private international law. For each legal relationship that forms on an online platform, rules of private international law designate the competent courts and relevant system(s) of reference, which, in turn, determine the degree to which a platform's privately-drafted rules and dispute-resolution processes may modify or substitute substantive state law (and, in so doing, effectively control the regulation of the parties' relationship).

179 It is a central ambition of this thesis to analyse whether the existing rules of private international law are able to fulfil this task – and the extent to which they must be changed to better accommodate online platforms that may not (yet) claim to exist in a complete legal vacuum but are nonetheless taking the effective resolution of disputes and practical enforcement of private rights into their own hands.

563 See in more detail below, [407]–[415].

B. The Unsatisfying Status Quo of EU Private International Law

180 Although legislators around the world seem to have paid rather little attention to the important role that private international could play in the context of internet regulation, legislators and courts alike have inevitably been confronted with many private-international-law problems raised by the internet over the years. From the point of view taken in this thesis, their response has been underwhelming, to say the least. Instead of embracing the potential private international law holds for the coordination of different claims to regulatory authority, they have shied away from using private international law as a tool to solve regulatory problems. The conflict between different claims to regulatory authority is addressed at the level of substantive law – if at all.

181 This is particularly true for the European Union, where the rise of the internet has coincided with important reforms and far-reaching attempts to harmonise the private international law of the member states. But as the European legislator decided against including technology-specific rules in these instruments to react to the challenges of internet communication,[564] national courts and the ECJ were required to apply to internet cases broad, general rules that often rely on geographic connecting factors that have little to no connection to any particular physical place. The ECJ reacted to this multiplication of potentially relevant connections by essentially giving effect to all of them, allowing for large overlaps of jurisdiction and applicable law – which it occasionally remedied through the introduction of new concentrating factors of substantive law.

564 See AG Wathelet, Opinion on Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:843, [33]; Savin (n 184), 53. These challenges were discussed, in particular, with regard to the provisions granting special protection to consumers (see Commission Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 final, Explanatory Memorandum, 4.5, Art 15 (regarding Art 15 Brussels I); Commission Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, Explanatory Memorandum, 4.2, Art 5 (regarding Art 6 Rome I)). They influence the interpretation of these provisions through recital (24) Rome I.

182 This unsatisfying approach will be illustrated by use of the five private-law problems identified above[565] (1.), before its central shortcomings will be conceptualised (2.).

1. The Unsatisfying Approach of EU Private International Law to Exemplary Private-Law Problems

183 The following account of EU private international law will demonstrate how both the European legislator and the ECJ have failed to provide convincing answers to the fundamental questions the internet has raised in the areas of jurisdiction and choice of law.

a. Protecting Reputation and Privacy

184 Assuring adequate protection of personality rights (ie the rights to reputation and privacy) against defamation and other cross-border torts committed through the internet has been one of the first private-international-law questions raised by the internet.[566] To this day, it is still being passionately discussed, both by academics and in court, globally[567] and within the European Union.

(1) Jurisdiction

185 Within the framework of the Brussels I Regulation, special jurisdiction for violations of personality rights can be based on Art 7(2) Brussels Ia, according to which a person domiciled in a member state can be sued in the member state 'where the harmful event occurred or may occur'. Following the ECJ's seminal decision in *Bier*,[568] this place has to be understood as both the place of the causal event and the place of the direct damage[569] –

565 Under III.C.

566 See above, at [143].

567 As to which see also below, IV.B.2.c.

568 Case 21/76 *Bier* ECLI:EU:C:1976:166.

569 ibid, [19]. See also Case C-189/08 *Zuid-Chemie* ECLI:EU:C:2009:475, [23]; and see, in more detail, AG Bobek, Opinion on Case C-304/17 *Löber* ECLI:EU:C:2018:310, [30]–[44].

a broad interpretation that the Court first had to apply to cross-border defamation in a case involving offline publication in a newspaper.[570]

186 Regarding the first limb, the *place of the causal event*, the Court held that it would be the place where the publisher is established 'since that is the place where the harmful event originated and from which the libel was issued and put into circulation.'[571] This interpretation has later been confirmed with regard to online publication.[572] It should be noted, though, that in both cases, the material had been put into circulation by the defendant *publisher*; if material is put into circulation by the *author* themselves (eg by uploading it to a blog that is 'published' by a third party), it seems consistent with the principle of proximity[573] and the ECJ's decisions in similar cases[574] to consider the place where the author has acted as the place of the causal event.[575]

187 As to the second limb, the *place of the damage*, the ECJ held in *Shevill* that this would be every place where the defamatory material had been distributed and where the defendant claimed to have suffered injury to their reputation;[576] but the jurisdiction of the courts at these places would be limited 'to rule on the injury caused in that State to the victim's reputation'.[577] This so-called 'mosaic approach' became subject to criticism

---

570 Case C-68/93 *Shevill* ECLI:EU:C:1995:61.

571 ibid, [24].

572 *eDate* (n 180), [42].

573 Expressly referred to in both *eDate* (n 180), [41], and *Shevill* (n 570), [21].

574 Cases C-360/12 *Coty Germany* ECLI:EU:C:2014:1318, [50]–[51]; C-228/11 *Melzer* ECLI:EU:C:2013:305, [27]–[30]; see also the ECJ's case law on IP right violations, discussed below at [188].

575 See also Oster (n 430), 115; Mankowski, 'Der Deliktsgerichtsstand am Handlungsort – die unterschätzte Option', in Schütze (ed), *Fairness Justice Equity. Festschrift für Reinhold Geimer* (Beck 2017), 429, 439–41.

576 *Shevill* (n 570), [29]–[30].

577 ibid, [30].

almost immediately,[578] especially in view of its potential extension to online content, which might be considered to be published everywhere.[579] Yet, when the first case of online defamation was referred to the ECJ in *eDate*,[580] the court confirmed the *Shevill* doctrine,[581] acknowledging (only) the difficulties it might cause to the claimant:

> *[T]he placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. […]*
>
> *[Thus,] the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal […] [which] contrasts […] with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.*[582]

To remedy this problem, the Court introduced an additional forum, the claimant's centre of interests,[583] at which they may claim compensation for their entire damage:[584]

> *The connecting criteria [established in* Shevill*] must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused […] where the alleged victim has his centre of interests.*[585]

---

578 See, eg, Parléani, Dalloz 1996, 61, 64–65; Kreuzer/Klötgen, 'Die Shevill-Entscheidung des EuGH' IPRax 1997, 90, 95. For further references see Márton (n 318), 173–84.

579 See Lein, in Dickinson/Lein (n 93), [4.112]; Hess (n 430), 81, 89–90; Oster (n 430), 116–17.

580 Above, n 180.

581 ibid, [42]–[44], [51].

582 ibid, [45]–[47].

583 ibid, [48]–[50].

584 The criterion does not appear to be limited to damage caused within the EU: see Lein, in Dickinson/Lein (n 93), [4.119]; Márton (n 318), 289–95.

585 *eDate* (n 180), [48].

188 Unfortunately, the Court did not clarify the textual basis of this new forum.[586] While the wording in *eDate*[587] could have been understood as introducing a new, third way to interpret the notion of the 'place of the harmful event' (that would supplement the two traditional dimensions of the term that had been established in *Bier*),[588] the ECJ's later decision in *Bolagsupplysningen*[589] seems to consider the claimant's centre of interest as a mere extension of the place-of-the-damage leg.[590] This would be in line with the Court's argument that 'the criterion of the "victim's centre of interests" reflects the place where, in principle, the damage caused by online material occurs most significantly'[591] but appears difficult to reconcile with other decisions on what is now Art 7(2) Brussels Ia.[592]

189 More importantly, the ECJ's interpretation in *eDate* went considerably beyond the proposition of AG Cruz Villalón, who had argued for jurisdiction to be vested in the courts of the member state at the 'centre of gravity of the dispute'.[593] This place was supposed to be established by having regard to both the claimant's centre of interests and the place(s) where the content is objectively relevant.[594] The ECJ, however, reduced this test to its first

---

586 See Mills (n 325), 21. See also Bollée/Haftel, 'Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt *eDate Advertising* et *Martinez*' Dalloz 2012, 1285, 1287: 'un excès de pouvoir de la part de la CJUE'.

587 *eDate* (n 180), [48]: 'The connecting criteria referred to in paragraph 42 of the present judgment must therefore be *adapted*.' [own emphasis].

588 ie the place of the causal event and the place of the damage (see above, n 569).

589 Case C-194/16 *Bolagsupplysningen* ECLI:EU:C:2017:766, [30], [32]–[33].

590 See, in particular, ibid, [33]: '[T]he criterion of the "victim's centre of interests" reflects the place where, in principle, the damage caused by online material occurs most significantly, for the purposes of Article 7(2) […].' Carrascosa (n 424), [80]–[81] seems to assume a similar conceptualisation.

591 *Bolagsupplysningen* (n 589), [33].

592 See, eg, Case C-364/93 *Marinari* ECLI:EU:C:1995:289, [14]: 'Whilst it has […] been recognized that the term "place where the harmful event occurred" […] may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.'

593 AG Cruz Villalón, Opinion on Joined Cases C-509/09 and C-161/10 *eDate Advertising* and *Martinez* ECLI:EU:C:2011:192, [55].

594 ibid, [60]–[66].

element, effectively creating a *forum actoris*.[595] A claimant's centre of interests will be presumed to coincide with its habitual residence[596] or place of registration.[597] A rebuttal of the presumption is possible, but unlikely except for the case of a legal person that is registered in one member state but does the majority of its business in another;[598] in this case, the centre of interests coincides with the claimants actual main place of business. Other than that, the new criterion (unlike the 'centre of main interests' used in the Insolvency Regulation)[599] does not rely on any test of foreseeability. Thus, it allows the claimant, in the vast majority of cases, to seek compensation for their entire damage in their 'home' forum.[600]

190 Following the ECJ's case law, a plethora of fora is available to victims of alleged infringements of personality rights. They can bring an action for all damages in the courts of the defendant's state of domicile (Art 4(1) Brussels Ia), the courts of the member state in which the defendant has acted (Art 7(2) Brussels Ia), and the claimant's domicile (as their centre of interests, also Art 7(2)) or for a part of the damage in every member state where the online content has been made available (also Art 7(2)).

191 With regard to the latter ground, the question has arisen whether it would also be available to a claimant seeking a remedy that cannot be split into territorial slices as easily as compensatory damages, such as, in particular, an injunction to stop or prevent the publication of online content. One might argue that special jurisdiction under Art 7(2) Brussels Ia should be available regardless of the remedy sought, at least as far publication

595 See Bollée/Haftel (n 586), 1286–90.

596 *Bolagsupplysningen* (n 589), [40]; *eDate* (n 180), [49].

597 *Bolagsupplysningen* (n 589), [41].

598 As it was in *Bolagsupplysningen* (n 589): see ibid, [42].

599 See Art 3(1), which requires the centre of main interests to be 'ascertainable by third parties'.

600 See also Lutzi, 'Shevill is dead, long live Shevill!' (2018) 134 LQR 208, 210–11.

in the member state in question is concerned; but such an approach quickly runs into problems in cases in which the defendant is unable to limit publication to a certain member state – be it because it is technologically unfeasible, be it because the content in question is specifically aimed at an international audience (such as the members of a social network or the editors and readers of an online encyclopedia); in these cases, a court order not to publish in a certain member state would be equivalent to an order not to publish at all.[601] At the same time, for online publications with a higher level of control over their geographic dissemination, geographically limited injunctions will often do very little to protect the victim's rights.[602]

192 Accordingly, the English Court of Appeal (applying common-law rules of jurisdiction) has historically been hesitant to assume jurisdiction for an injunction based on the availability of online content in England, arguing that

> *since the websites are presumably controlled in California, it must at least be problematic whether that application [for an injunction] could be said to require or prohibit anything being done within the jurisdiction [of the English courts].*[603]

It has meanwhile taken a more flexible approach, though, arguing that

> *[w]here a defamatory statement has received insignificant publication in this jurisdiction, but there is a threat or a real risk of wider publication, there may well be justification for pursuing proceedings in order to obtain an injunction against republication of the libel.*[604]

601 See Bogdan (n 320), 1, 5; Hartley (n 428), 31–32; Hess (n 430), 90; 106; Schultz (n 316), 814–16. See also AG Bobek, Opinion on Case C-194/16 *Bolagsupplysningen* ECLI:EU:C:2017:554, [126].

602 For an illustration, see *PJS v News Group Newspapers* [2016] UKSC 26, in particular at [86]–[90] (Lord Toulson). The need to obtain injunctions in countless jurisdictions has been described by one barrister as 'not a practical way to proceed for anybody': see Booth/Grierson, 'Publication of hacked David Beckham emails renders injunction worthless' (*theguardian.com*, 6 Feb 2017).

603 *King v Lewis* [2004] EWCA Civ 1329, [2].

604 See *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75, [74].

In a similar vein, AG Bobek argued that where the Court allowed jurisdiction to be based on the mosaic approach, there would be no legal basis to limit the scope of its jurisdiction with regard to injunctive remedies:

> *If it were, hypothetically speaking, established that the Appellant's claim is well founded and the Estonian courts have international jurisdiction for the harm caused to the Appellant in Estonia, I am of the view that that court will also be competent to issue the requested remedy, provided that such a remedy exists under national law. This is so because of the unitary nature of the source of the alleged harm in the present case. There is just one website. It simply cannot be rectified or deleted only 'in proportion' to the harm suffered in a given territory.*[605]

193 The ECJ, meanwhile, had first been confronted with the question by the German *Bundesgerichtshof's* submission in *eDate*;[606] but as the ECJ's decision allowed the German courts to base their jurisdiction for all claims on the newly introduced centre-of-interests criterion,[607] the European Court did not need to answer it. The Court could not escape the question when it was asked a second time, by the Estonian *Riigikohus*, though. In its decision in *Bolagsupplysningen*, the ECJ went the opposite way than the Advocate General[608] and held that territorially limited jurisdiction would be insufficient for an injunction.

> *[I]n the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal […] an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage […] and not before a court that does not have jurisdiction to do so.*[609]

---

605 AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [126]. For similar approaches, see Art 2:501 CLIP Principles; § 214 ALI Principles.

606 *eDate* (n 180), [24] (question 1).

607 See BGH 8 May 2012, NJW 2012, 2197.

608 See immediately above, [192].

609 *Bolagsupplysningen* (n 589), [48].

The Court thus introduced a new distinction, between 'divisible' and 'indivisible' remedies.[610] While jurisdiction for the former group of remedies (which may, in fact, be limited to compensatory damages) can be based on the accessibility of online content (but will be limited to the damage caused in the respective member state), jurisdiction for the latter group (which includes injunctive relief as well as, arguably, restitutionary, vindicatory, and punitive damages) requires a ground for 'full' jurisdiction (which only exists at the claimant's centre of interests, the place at which the defendant acted, and the defendant's domicile).[611]

(2) Applicable Law

194 The concentrating effect that the ECJ may have aimed for with *eDate* is not reflected when it comes to the question of the applicable law. As violations of personality rights are excluded from the Rome II Regulation,[612] the applicable law is determined by national choice-of-law rules, many of which follow the *Shevill* doctrine and apply the mosaic principle.[613] This is true for legal systems that traditionally follow the mosaic approach to jurisdiction in defamation cases[614] as well as for those that do not.[615]

195 The concentrating effect of *eDate* is thus severely limited by national conflict rules, which may require the courts to apply numerous substantive laws cumulatively, even

---

610 On which see already AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [84].

611 See above, [191]; see also Lutzi (n 600), 211–12.

612 Art 1(2)(g) Rome II. See Lein, in Dickinson/Lein (n 93), [4.112].

613 For an overview see MainStrat, 'Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality' JLS/2007/C4/028, Final Report, 77–112; see also below, [276].

614 For English law see Lord Collins et al (n 15), [35.118]–[35.120]; Mills (n 325), 17–18, 21–22. The mosaics of jurisdictions and applicable laws are however not identical: while the former is simply divided geographically (with the English courts usually having jurisdiction over a non-resident publisher only for publication in England), the latter is governed by the double-actionability rule (requiring the defamation to be actionable under English law for publication in England and under both English and foreign law for publication abroad).

615 For German law see OLG Hamburg 8 Dec 1994, NJW-RR 1995, 790, 792.

where jurisdiction for all damages is concentrated in the claimant's centre of interests. Accordingly, the ECJ seemed to gladly seize the opportunity it was given in *eDate* to also clarify the role of the country-of-origin principle in the e-Commerce Directive as a substantive corrective that exempts content providers established in the EU from the need to comply with substantive laws that impose a heavier regulatory burden than the substantive law of their home country.[616] Not only does this seem to balance out the disadvantage defendants face in light of the novel centre-of-interests head of jurisdiction, it also reduces the potential mosaic of applicable laws in general. Of course, both of these effects are limited to information society service providers established within the EU.

196 In light of the legal uncertainty resulting from the diversity of national choice-of-law rules, it was agreed that the Commission would submit a study 'on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality' to the Parliament by the end of 2008[617] in order to initiate consultations about a possible extension of the regulation's scope of application. The study was published in early 2009[618] and followed by a legislative proposal by the Parliament in 2012,[619] which has however never been taken up by the Commission.

616 *eDate* (n 180), [64]–[67].

617 Art 30(2) Rome II.

618 MainStrat (n 613).

619 European Parliament Resolution of 10 May 2012, 2009/2170(INI).

b. Protecting IP rights

197 The protection of IP rights has long been a central area of international harmonisation efforts, which were extended to the challenges posed by the internet from early on.[620] These efforts have focused on substantive harmonisation, though, which may explain why their implications on private international law have largely been ignored until relatively recently.[621]

198 In the EU, two separate regimes now co-exist: most IP rights are still protected by national law, which has been harmonised through directives, while some (specifically plant variety rights,[622] design rights[623], trade marks[624])[625] are also protected directly, and with uniform effects, through EU regulations. This dichotomy is reflected in EU private international law, which subjects all violations of IP rights to the general rules of Regulations Brussels Ia and Rome II,[626] unless they are governed by specific European instruments that contain special rules on jurisdiction and choice of law.

199 As far as the general rules of EU private international law are concerned, the protection of IP rights differs from the protection of personality rights in a number of regards. First, because it is inspired by a strong belief in the 'territoriality' of IP rights.[627]

---

620 See above, [99].

621 See above, [138].

622 Regulation (EC) 2100/94.

623 Regulation (EC) 6/2002.

624 Regulation (EU) 2017/1001.

625 On patents, see Regulations (EU) 1257/2012 and (EU) 1260/2012 and the Agreement on a Unified Patent Court of 19 Feb 2013, which has still not been fully set up.

626 According to Fentiman (n 455), 133, the public character of IP law would lead to a reluctance of national courts to allow claims based on foreign IP rights; this expectation does not seem to have materialised (see also *Lucasfilm v Ainsworth* [2011] UKSC 39, [108]: 'There is no doubt that the modern trend is in favour of the enforcement of foreign intellectual property rights.'; and [109]: 'There are no issues of policy which militate against the enforcement of foreign copyright.' (Lord Walker and Lord Collins)).

627 See AG Jääskinen, Opinion on Case C-170/12 *Pinckney* ECLI:EU:C:2013:400, [44]–[50]. See also above, [137].

Second, because it is one of the very few areas of EU private international law in which repeated references from national courts have given the ECJ an opportunity to develop and refine its case law.[628] Third, because the ECJ has expressly refused to extend its approach to jurisdiction for violations of personality rights in *eDate* to violations of IP rights. And fourth, because the Court's approach to jurisdiction and choice of law interplays with its interpretation of substantive EU law.

(1) Jurisdiction

200 Under Art 7(2) Brussels Ia, special jurisdiction for violations of IP rights is vested, on the one hand, in the courts of the *place of the causal event*. With respect to this criterion, the ECJ has extended the interpretation developed in *eDate*,[629] holding that it has to be understood as the place where the defendant acted and where the technical process leading to the alleged violation was activated,[630] rather than the place of establishment of the provider whose services were used for the violation.[631]

201 On the other hand, jurisdiction is vested in the courts of the *place of the damage*. While some authors argue that there cannot be a distinct place of the damage for violations of IP rights (as the proprietary character of these rights is limited to preventing others from certain acts of exploitation),[632] the ECJ has reliably followed the *Shevill* doctrine,[633]

628 Savin (n 184), 123. On the lack of such references in other areas see Düsterhaus, in Gössl et al (eds), *Politik und Internationales Privatrecht (?)* (Mohr Siebeck 2017), 73.

629 See above, [185].

630 *Hejduk* (n 447), [24]; Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220, [34]–[35], [37].

631 *Wintersteiger* (n 630), [36]. See also *AMS Neve Limited v Heritage Audio* [2018] EWCA Civ 86, [31].

632 See, eg, Fawcett/Torremans (n 174), [5.66]; Jooris, 'Infringement of foreign copyright and the jurisdiction of English courts' [1996] EIPR 127, 139–40; Schack, 'The Law Applicable to (Unregistered) IP Rights After Rome II', in Leible/Ohly (n 451), 79, 84; Peifer, 'Internationale Zuständigkeit nach Art. 5 Nr. 3 EuGVVO und anwendbares Recht auf Markenverletzungen' IPRax 2013, 228, 229; Schack, 'Anm. zu EuGH, 3.10.2013, C-170/12 – Pinckney' NJW 2013, 3629, 3629–30.

633 This seems to be based on a distinction between the right to reproduce a work (which can only be infringed at the place of acting) and the right to distribute copies (which can be infringed at a wider range of places): see AG Jääskinen, Opinion on *Pinckney* (n 627), [53]–[56].

according to which the claimant may seise the courts of each member state in which the right in question is protected and has allegedly been violated, with jurisdiction being limited to the respective part of the damage.[634] While the starting point for this approach is the same as in the area of personality rights – the understanding that the infringement of a right can only cause a damage in the member state where it is protected[635] – the conceptualisation of IP rights as strictly territorial has provided the ECJ with another reason to follow the mosaic approach in this area exclusively.[636] Consequently, the ECJ saw no need to extend the centre-of-interest criterion developed in *eDate* to violations of IP rights and expressly refused to complement the mosaic approach by an additional forum at which the claimant could bring a claim for their entire damage.[637]

202 Applying these principles, the ECJ has held that jurisdiction for the violation of national *trademarks*,[638] the protection of which is inherently territorial,[639] lies with the courts of the member state of registration.[640] Jurisdiction for the violation of *copyrights*, which are protected in all member states[641] but still considered to be subject to the principle of territoriality,[642] requires that the infringement complained of may have

634 See above, [187]. For an offline case see Case C-387/12 *Hi Hotel* ECLI:EU:C:2014:215, [35], [38]; for an online case see *Hejduk* (n 447), [29], [36].

635 See *Shevill* (n 570), [29]–[30]; *Hi Hotel* (n 634), [35]; Case C-170/12 *Pinckney* ECLI:EU:C:2013:635, [33].

636 See *Pinckney* (n 635), [46].

637 *Wintersteiger* (n 630), [24]–[25]. See Bogdan, 'Jurisdiction in Disputes about Infringements of the Intellectual Property Rights on the Internet in View of Recent ECJ Case Law' (2013) 7 Masaryk U JLTech 193, 197–98.

638 Now governed by Directive (EU) 2015/2436.

639 See *Wintersteiger* (n 630), [25]; Bogdan (n 637), 198.

640 *Wintersteiger* (n 630), [28]. See also OGH 10 Jul 2012, GRUR Int 2013, 59, 61. If the case concerns the validity of the registration itself, even if raised as a defence, the courts of the member state of registration even enjoy exclusive jurisdiction under Art 24(4) Brussels Ia (with the new provision confirming the earlier decision in Case C-4/03 *GAT v Luk* ECLI:EU:C:2006:457).

641 By virtue of the Information Society Directive.

642 *Hejduk* (n 447), [22]; *Pinckney* (n 635), [39]; AG Jääskinen, Opinion on *Pinckney* (n 627), [44]–[50]; see also Bogdan (n 637), 199.

happened (or may happen) on the territory of the member state in question,[643] eg via a homepage that is accessible in that state,[644] but is limited to the damage caused through an infringement in that state.[645]

203 The requirement that the infringement has happened on the member state's territory needs to be carefully distinguished[646] from the criteria developed by the Court in light of the ubiquity of internet communication with regard to the *substantive* scope of certain IP rights governed by EU instruments.[647] These criteria go beyond the mere accessibility of a potentially infringing website and, in addition, require it to be targeted at the member state in question.[648] After the Court had hinted at a possible alignment of these criteria and the requirements of Art 7(2) in *Football Dataco*[649] (which was however only concerned with the substantive scope of the Database Directive)[650], it was provided with an opportunity to do so in *Pickney*.[651] Yet, rejecting the opinion of AG Jääskinen,[652] the Court stated that

---

643 *Hejduk* (n 447), [29]; *Pinckney* (n 635), [43]. See also *Hi Hotel* (n 634), [35].

644 *Hejduk* (n 447), [34]; *Pinckney* (n 635), [44].

645 *Hejduk* (n 447), [36]; *Pinckney* (n 635), [45]. See also *Hi Hotel* (n 634), [38]–[39].

646 See explicitly AG Jääskinen, Opinion on *Pinckney* (n 627), [62], [65]. See also AG Cruz Villalón, Opinion on Case C-441/13 *Hejduk* ECLI:EU:C:2014:2212, [29]; Bogdan (n 637), 200; Depreeuw/Hubin, 'Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU' (2014) 9 JIPLPract 750, 761; Stone, 'Territorial targeting in EU private law' (2013) 22 InfoCommTechL 14, 22–23.

647 See, in particular, *Football Dataco* (n 311), [35].

648 ibid, [39] (on Directive 96/9); *L'Oréal* (n 395), [64] (on Directive 89/104/EEC and Regulation 40/94). See also Cases C-5/11 *Donner* ECLI:EU:C:2012:370, [28]–[29] (on the Information Society Directive) and Joined Cases C-446/09 and C-459/09 *Philips* and *Nokia* [2011] ECR I-12469 (on Regulation 40/94 and others) regarding offline infringements and Case C-98/13 *Blomqvist* ECLI:EU:C:2014:55 (on the Information Society Directive, Directive 2008/95/EC, and Regulation 207/2009) concerning actual delivery to customers in the EU; Depreeuw/Hubin (n 646), 753–56.

649 *Football Dataco* (n 311), [29]–[30].

650 ibid, [17]. See also *Football Dataco v Sportradar* [2011] EWCA Civ 330, only referring the question of the substantive scope of the *sui generis* database right created by the English Copyright and Rights in Databases Regulations 1997, SI 1997/3032; AG Jääskinen, Opinion on *Pinckney* (n 642), [63]; Stone (n 646), 22.

651 See *Pinckney* (n 635), [15].

652 AG Jääskinen, Opinion on *Pinckney* (n 642), [64]–[65].

> *[a]t the stage of examining the jurisdiction of a court to adjudicate on damage caused, the identification of the place where the harmful event giving rise to that damage occurred for the purposes of [Art 7(2)] cannot depend on criteria which are specific to the examination of the substance and which do not appear in that provision. [Art 7(2)] lays down, as the sole condition, that a harmful event has occurred or may occur.*
>
> *Thus, […] [it] does not require, in particular, that the activity concerned to be [sic] 'directed to' the Member State in which the court seised is situated.*
>
> *It follows that […] jurisdiction […] is already established in favour of the court seised if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and that the harmful event alleged may occur within the jurisdiction of the court seised.*
>
> *[…] [T]hat likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction.*[653]

204 The ECJ extended this interpretation to online cases in *Hejduk*.[654] It can be assumed that it can be extended to other IP rights[655] such as *patents* (which are protected similarly to trademarks),[656] the *artist's resale right* (Directive 2001/84), and the *sui generis database right* (Directive 96/9), provided that the claimant asserts their infringement under the implementing national laws in the way required by the ECJ's case law.

205 As a consequence, victims of IP right violations can seise the courts at the defendant's country of domicile and at the place in which the defendant acted to claim all damages they allegedly suffered as a result of that conduct as well as the courts at each member state in which there has allegedly been an infringement of their IP rights – eg through the accessibility of online content in this country – for the damage caused by this particular infringement. But unlike for violations of personality rights, the victim cannot

---

653 *Pinckney* (n 635), [41]–[44].

654 *Hejduk* (n 447), [31]–[34]. See also Torremans, 'Private International Law Issues on the Internet', in Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Wolters Kluwer 2016), 379, 384–85.

655 Stone (n 646), 23; Grünberger, 'Zuständigkeitsbegründender Erfolgsort bei Urheberrechtsverletzungen' IPRax 2015, 56, 57, 65.

656 See Lein, in Dickinson/Lein (n 93), [4.115].

sidestep this mosaic of jurisdictions by bringing an action for all damages at their centre of interests.

206 For so-called uniform EU IP rights, which are protected under specific EU regulations,[657] the general rules of the Brussels Ia Regulation are largely displaced by the more specific rules on jurisdiction provided in the relevant instruments,[658] which generally seem to aim for a higher degree of concentration.[659] Similarly to Art 4(1) Brussels Ia, these instruments provide for universal jurisdiction of the courts of the member state in which the defendant is domiciled or established.[660] In addition, and in partial overlap with Art 7(2) Brussels Ia, they provide for jurisdiction of the courts of the country 'where the harmful event occurred […] in respect of infringements alleged to have been committed in the territory of the Member State' (for plant variety rights)[661] or the courts of the country 'in which the act of infringement has been committed' (for community designs and trade marks)[662]. While the former phrase mirrors the wording of Art 7(2) Brussels Ia, the latter one has to be understood as referring only to the place of the causal event,[663] which should be interpreted consistently with the decisions in *Shevill*, *Hejduk*, and *Wintersteiger* as the place where the defendant has actually acted;[664] where the defendant has acted in multiple

---

657 See above, [198].

658 Joined Cases C-24/16 and C-25/16 *Nintendo* ECLI:EU:C:2017:724, [42]. Some general provisions, such as Art 8(1) Brussels Ia, may still apply, though (see ibid, [44]).

659 *Coty Germany* (n 574), [27].

660 See, eg, Art 82(1), 83(1) Regulation (EC) 6/2002; see also *Nintendo* (n 658), [61], [64]–[66].

661 Art 101(3) Regulation (EC) 2100/94.

662 Art 82(5) Regulation (EC) 6/2002; Art 125(5) Regulation (EU) 2017/1001.

663 *Coty Germany* (n 574), [34]–[37]; see also *AMS Neve Limited v Heritage Audio* (n 631), [38]–[39]. Before the ECJ had clarified this interpretation, some authors had argued that it should be understood similarly to Art 7(2) (see the references given in BGH 28 Jun 2012, GRUR Int 2012, 925, [20], and the German Court's own opinion ibid, [21]–[24]), while others had argued in favour of a targeting test (see Stone (n 646), 23).

664 See, to this effect, BGH 9 Nov 2017, EuZW 2018, 84, [31]; Rosati, 'International jurisdiction in online EU trade mark infringement cases: where is the place of infringement located?' (2016) EIPR 482, 486–87. See also AG Jääskinen, Opinion on Case C-360/12 *Coty Germany* ECLI:EU:C:2013:764, [33]–[35], [43].

places, identification of this place will require 'an overall assessment of the defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened.'[665]

207 For uniform IP rights, the 'place of the damage' dimension of Art 7(2) Brussels Ia has accordingly been maintained only for plant variety rights. For all others, the claimant needs to seise the courts of the member state in which the defendant is domiciled or has acted – a concentration of jurisdiction that may hold some potential for how the problem of ubiquitous internet communication may be approached more generally.[666]

(2) Applicable Law

208 The distinction between IP rights protected under the laws of each member state[667] and unitary IP rights is even more obvious when it comes to the applicable law.[668] Art 8(1) Rome II claims to follow a 'universally acknowledged principle'[669] and submits the former to the *lex loci protectionis* (the law of the place for which protection is claimed) while Art 8(2) Rome II refers the latter to the *lex loci actus* (the law of the place of the infringing act) to the extent that the instrument establishing the uniform right does not decide the question itself.

209 Given that Art 8(2) Rome II is only needed as a fallback provision for rights that are otherwise uniformly regulated by the respective EU regulations,[670] it is not surprising that the EU legislator opted for a relatively straightforward connecting factor, which is

---

665 BGH 9 Nov 2017 (n 664), [34], quoting the ECJ's decision in *Nintendo* (n 658), [103].

666 See below, [327]. See also Fawcett/Torremans (n 174), [5.109].

667 This includes rights that have been created by national law transposing an EU Directive (see *Football Dataco* (n 311), [31]; Dickinson (n 112), [8.15]).

668 For a general overview see Leistner, 'The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights' in Leible/Ohly (n 451), 97–121.

669 Recital (26) Rome II.

670 One of them, Regulation 6/2002, even contains a specific choice-of-law rule (in Art 89(1)(d), which also refers to the *lex loci actus).*

interpreted similarly to the causal-event limb of Art 7(2) Brussels I[671] and comes at little risk of an overlap between different applicable laws. Indeed, the ECJ has recently made clear that

> *the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened.*[672]

210 The same cannot be said for rights that are protected in the national IP laws of each member states, which still contain significant differences despite ongoing harmonisation efforts by the EU. Parallel to the mosaic of jurisdictions under the place-of-the-damage limb of Art 7(2) Brussels I[673] and based on a broad concept of territoriality,[674] Art 8(1) Rome II submits the question of the violation[675] of these rights to whatever law the claimant chooses to invoke for protection, provided that the alleged infringement falls within its (territorial and material) sphere of application.[676] As many national IP laws consider the accessibility of content in the country to which they apply as sufficient for a potential infringement to fall within its scope, Art 8(1) will often create a plethora of overlapping national laws between which the claimant can chose[677] – and with which the defendant has to comply. Unlike in the field of personality rights, this multiplication of applicable laws is not balanced out by the country-of-origin rule in Art 3 e-Commerce

671 See *Nintendo* (n 658), [103], [108]; see also *Coty Germany* (n 574), [34].

672 *Nintendo* (n 658), [103].

673 Picht, 'Von eDate zu Wintersteiger' GRUR Int 2013, 19, 24.

674 See above, n 627.

675 The question of initial ownership, however, remains governed by national choice-of-law rules (see De Miguel Asensio (n 452), 158).

676 Dickinson (n 112), [8.25]–[8.26].

677 See Dickinson (n 112), [8.27]; Hugenholtz (n 447), 309.

Directive as infringements of IP rights are specifically excluded from its scope of application.[678]

211 Instead, courts and legislators have tried to reduce the number of applicable laws in internet cases by using a narrower concept of territoriality at the level of substantive law. Thus, the ECJ has developed the aforementioned[679] criterion of targeting[680] to find that material has been 're-used' in the sense of Art 7(2)(b) Directive 96/9 on *sui generis* database rights[681] or that there has been a 'sale, offer for sale, or advertisement' in the sense of Art 5 Directive 89/104/EEC and Art 9 Regulation 40/94 on trademarks[682] in a certain country. Similarly, the WIPO has recommended that using a sign on the internet should be considered as 'use' in a specific country only if it has 'commercial effects' there;[683] and national courts have applied similar requirements to domestic IP laws.[684] In the same vein, academics have argued to impose substantive limits on the territorial range of IP laws;[685] a few even question the very idea of a patchwork of national laws that each protect IP rights for the territory of one country, arguing, instead, for the recognition of single, universal IP rights that exist independently of the territory of any particular state.[686]

---

678 See Art 3(3) e-Commerce Directive and Annex, 1st indent.

679 Above, at [203].

680 See also *Donner* (n 648), [28]–[29] (on the Information Society Directive) and *Philips* (n 648), [28]–[29] (on Regulation 40/94 and others) regarding offline infringements.

681 *Football Dataco* (n 311), [39].

682 *L'Oréal* (n 395), [64]–[66].

683 WIPO, 'Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet' (n 310), Art 2, 3; see also the dispute resolution mechanism in Art 9–12. Kur (n 449), 179: '[A] common-sense-inspired compromise solution'.

684 See TGI Paris 11 Mar 2003 *Sa BD Multimedia v Joachim H*; BGH 8 March 2012 *OSCAR*, IPRax 2013, 257, sub II.3.b); BGH 13 Oct 2004 *Hotel Maritime*, RIW 2005, 465, sub II.2.b).

685 See Kur (n 449), 181–82, 186–89; Bettinger/Thum, 'Territorial Trademark Rights in the Global Village – International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet [Part I]' (2000) 31 IIC 162, 181–82 and Bettinger/Thum (n 449) [= Part II], 295–302.

686 See Schack (n 632), 90–91; 'Das auf (formlose) Immaterialgüterrechte anwendbare Recht nach Rom II' in Baetge (ed), *Die richtige Ordnung. Festschrift für Jan Kropholler* (Mohr Siebeck 2008),

c. Ensuring Fair Competition

212 Considering its traditional focus on markets (rather than states),[687] one might expect to see a rather different picture in the private international law of unfair competition.[688] Yet, under the impression of the general convergence between the protection of intellectual property and competition,[689] the approach to internet cases in EU private international law has developed along similar lines in both areas.

(1) Jurisdiction

213 As far as special jurisdiction for acts of unfair competition is concerned, the ECJ has expressly aligned the area of unfair competition with the protection of IP rights. In *Coty Germany*,[690] a case of an offline trademark infringement, the Court extended its interpretation of Art 7(2) Brussels Ia established in *Wintersteiger* and *Pickney*[691] to infringements of unfair-competition law. It held that jurisdiction over alleged acts of unfair competition would be vested in the courts of the member state in which the defendant has acted (as the place of the *causal event*)[692] as well as in every member state in which the behaviour complained of may have violated unfair competition law, limited to the damage caused in this country (as the place of the *damage*).[693]

651; Oppermann, *Die kollisionsrechtliche Anknüpfung internationaler Urheberrechtsverletzungen* (Nomos 2011), 97–105.

687 See De Miguel Asensio (n 452), 152–53.

688 The following section will focus on unfair competition in the sense of Art 6(1) and (2) Rome II, which raises particular problems in internet cases; regarding the ECJ's approach to cases of 'unfree' competition in the sense of Art 6(3), see Case C-352/13 *CDC* ECLI:EU:C:2015:335, [34]–[56].

689 See above, [141]. This convergence also influenced the negotiations of the Rome II Regulation: see Dickinson (n 112), [8.04].

690 Above, n 574.

691 See the explicit references made ibid, [55], to *Wintersteiger* (n 630), [25], and *Pinckney* (n 635), [33].

692 *Coty Germany* (n 574), [49]–[51].

693 ibid, [56]–[57]. This goes against the proposition to align the interpretation of Art 7(2) Brussels Ia in unfair competition cases with Art 6(1) Rome II: see Dickinson (n 112), [6.14]; Vilà Costa, 'How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: A Coherent Approach', in Basedow/Francq/Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart 2012), 17, 28).

214 For a while, it was unclear, though, whether this interpretation also applied to acts of unfair competition committed through the internet. Some national courts, such as the Austrian *Oberster Gerichtshof*, certainly understood the ECJ's case law that way and assumed jurisdiction under the place-of-the-damage of the damage head based on the accessibility of online content in the member state in question and the allegation of a violation of this state's unfair-competition law.[694] Others, such as the French *Cour de cassation* and the German *Bundesgerichtshof*, however openly digressed from the ECJ's interpretation of Art 7(2) Brussels Ia and required – in addition – that the online activity in question must have a connection to, or be directed towards, a market in a given member state for that state to have jurisdiction.[695]

215 Following a reference of the French *Cour de cassation*, the ECJ recently got an opportunity to confirm that Art 7(2) Brussels Ia does not require such an additional connection to the market in question. It held that

> *the place where the damage occurred is to be regarded as the territory of the Member State which protects the prohibition on resale by means of the action at issue, a territory on which the appellant alleges to have suffered a reduction in its sales.*[696]

Regarding such a reduction in sales,

> *the fact that the websites on which the offer of the products covered by the [prohibition on resale] appears operate in Member States other than that of the court seised is irrelevant, as long as the events which occurred in those Member States resulted in or may result in the alleged damage in the jurisdiction of the court seised.*[697]

The ECJ thus confirmed the availability of special jurisdiction for alleged infringements of national unfair-competition law based on the mere accessibility of a homepage in the

694 See OGH 10 Jul 2012 (n 656), 61–62; 10 Jul 2012, GRUR Int 2013, 292, 294.

695 See Cass, Ch com, 20 Mar 2012, n° 11.10-600 and BGH 12 Dec 2013, RIW 2014, 377, [24]; 30 Mar 2006 *Arzneimittelwerbung*, IPRax 2007, 446, [21]–[22]; see also BGH, *Hotel Maritime* (n 684), [17].

696 *Concurrence SARL* (n 385), [35].

697 ibid [34]. See also, outside of the online context, *flyLAL* (n 464), [35]–[36].

respective member state. Indeed, the French court subsequently assumed jurisdiction on this basis.[698]

216 Just as in the area of IP law, it seems unlikely that the ECJ will extend the centre-of-interest approach to unfair competition law, though.[699]

(2) Applicable Law

217 By aligning the rules on special jurisdiction in the areas of IP and unfair-competition law, the ECJ seems to have accepted a certain disconnect between jurisdiction and choice of law in the latter area. The Rome II Regulation has always put an emphasis on market effects, which the Court only recently started to acknowledge also in the context Art 7(2) Brussels Ia.[700]

218 According to Art 6(1) Rome II, acts of unfair competition are governed by 'the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.' The provision has traditionally been understood as referring to the affected market, similar to the more explicit references in Art 6(3).[701] Such an understanding could, in theory, have allowed to reduce the number of situations in which multiple national laws claim application for the same act done on the internet; but given that markets are still largely understood as national markets,[702] Art 6(1) Rome II is, in fact, still generally understood as referring to multiple national laws wherever the same action has effects on multiple (national) markets – or, indeed, where a market covers the area of

698 Cass, Ch com, 5 Jul 2017, n° 14-16.737.

699 See Lein, in Dickinson/Lein (n 93), [4.121].

700 See *flyLAL* (n 464), [38]–[41].

701 See De Miguel Asensio (n 452), 160–61; Honorati, 'The Law Applicable to Unfair Competition' in Malatesta (ed), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM 2006), 127, 150.

702 See *flyLAL* (n 464), [39]–[40]. See also Dickinson (n 112), [6.50]–[6.51], for some possible qualifications.

multiple member states.[703] The mosaic of applicable laws following from Art 6(1)Rome II would thus barely look different from the one created by Art 8(1).

219 Still, this reading of Art 6(1) Rome II has not only been questioned by national courts who have expressed doubts as to whether the accessibility of online content is sufficient for a market to be 'affected';[704] the ECJ also seems to have digressed from it in the context of unfair terms in consumer contracts. In its decision in *VKI*,[705] the Court held that the country in which consumer interests are affected in the sense of Art 6(1) would be the country to which the defendant had directed the activity in question.[706] While this new criterion seems to have the potential to reduce the number of applicable laws, it may be limited to the specific area in which Art 6(1) Rome II overlaps with Art 6(1) Rome I. Besides, it should be kept in mind that acts of unfair competition, especially those committed over the internet, will often be directed at consumers in more than one country;[707] in these cases, even a targeting approach does not prevent the application of multiple national laws to a single act of unfair competition.

220 In cases not involving consumer contracts, on the other hand, the country-of-origin principle of the e-Commerce Directive will prevent information society service providers established in the EU from the exposure to any laws that impose a greater regulatory burden on them than their home laws.

---

703 See OGH, 20 Sep 2011, *HOBAS-Rohre*, GRUR Int 2012, 468, 474; De Miguel Asensio (n 452), 161–62; Dickinson (n 112), [6.50], [6.56], [6.64]; Drexl, in Säcker et al (eds), *Münchener Kommentar zum BGB* (7th edn, Beck 2018), Band 12, Teil 9, [187]; Weller/Nordmeier, in Spindler/Schuster (eds), *Recht der elektronischen Medien* (3rd edn, Beck 2015), Art 6 Rom II, [9]. See also recital (21) Rome II.

704 See KG Berlin 27 Nov 2015, WRP 2016, 392, [47]. *Contra* Wurmnest/Gömann, 'Die Konturierung des Lauterkeits- und Markenkollisionsrechts durch "Buddy-Bots"' IPRax 2018, 480, 483.

705 Above, n 111.

706 ibid, [43].

707 In *VKI*, the application of Austrian law was based on the finding that *Amazon's* German website *amazon.de* (also) targeted consumers in Austria.

d. Regulating Agreements

221 The EU private international law of contract to internet cases is noticeably different from the approach of tort law in at least three ways. First, it relies on default rules that are significantly less vulnerable to the difficulties of online cases than many of the rules found in tort law. Second, it carves out significantly more room for party autonomy, generally allowing the parties to select the competent courts and applicable law in their contract. Both of these aspects are however heavily qualified, third, by important exceptions that aim to protect structurally weaker parties, particularly consumers.

222 This section will focus on the general rules for contracts in EU private international law, while the following one will describe the special rules for structurally weaker parties in more detail.

(1) Jurisdiction

223 Art 7(1) Brussels Ia vests special jurisdiction for contracts in the courts of the place of performance of the contractual obligation in question (with Art 7(1)(b) concentrating jurisdiction in the place of delivery or provision of service for sales of goods and service contracts, respectively). For contracts that are physically performed, the 'place of performance' appears as a reasonable connecting factor[708] that provides a significantly more predictable legal framework than the 'place of the damage' used in Art 7(2). For the growing number of contracts that are performed only digitally, eg by giving the other party access to a file or stream, though,[709] identifying a distinct place of performance will often be very difficult, if not impossible.[710] Thus, the Geneva Round Table on Electronic

708 It is also used in Art 6(4)(a) Rome I and is of relevance for the escape clauses in Art 4(3) and (4) Rome I.

709 See above, [144]–[146].

710 See Hörnle, 'The Jurisdictional Challenge of the Internet', in Edwards/Waelde (n 233), 121, 126; Wang (n 322), 52–57.

Commerce hosted by the Hague Conference on Private International Law in 1999 argued already that,

> *[f]or on-line contracts in general, in the matter of jurisdiction and applicable law, if the performance of the relevant obligation takes place off-line, the existing rules of private international law referring to the place of performance remain relevant. If the performance takes place on-line, the place of performance is not appropriate as a connecting factor.*[711]

224 Regardless, the criterion was carried over from the Brussels Convention to the Brussels I, and then further to the Brussels Ia Regulation. Consequently, a national court may well find itself in a position where it needs to identify the place of performance for a contract over the sale of a music file or the provision of cloud storage (let alone contracts that are concluded and performed entirely within a 'virtual environment' such as an online game). Under Art 7(1), the first question the court would have to answer would be whether the contract qualifies as a sales or as a service contract.[712] In practical terms, this would only matter for the rare cases which do not fall into either of the two categories, though;[713] in all other cases, Art 7(1)(b) vests jurisdiction for all obligations arising under the contract in the courts of the country to which the information society service in question is 'principally' delivered or in which it is 'principally' performed.[714]

225 With regard to contracts for the sale of goods, the ECJ has held that performance happens at 'the place where the goods were physically transferred or should have been physically transferred to the purchaser'[715] since 'the principal aim of a contract for the sale

---

711 Hague Conference on Private International Law, Geneva Round Table on Electronic Commerce and Private International Law, Press Release (*hcch.net*, Sept 1999).

712 See Wang (n 322), 52–53.

713 According to Haibach (n 478), 260, contracts for the provision of cloud storage space usually qualify as service contracts; the same may be true for contracts that involve access to a streaming platform.

714 See Case C-386/05 *Color Drack* [2007] ECLI:EU:C:2007:262, [40]; Case C-19/09 *Wood Floor* ECLI:EU:C:2010:137, [40]. This place has to be ascertained independently of the applicable law: Cases C-381/08 *Car Trim* [2010] ECLI:EU:C:2010:90, [52]–[53].

715 *Car Trim* (n 714), [60].

of goods is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.'[716] While it may be tempting to extend this reasoning to the sale of digital goods and treat the place at which the buyer downloads or otherwise accesses the file as the place of performance,[717] this seems to contradict the aims of proximity and predictability underlying the provision[718] as this place will often be completely unpredictable.[719] Alternatively, one might consider either the buyer's domicile or habitual residence as the place of performance[720] (which would however come at the risk of creating yet another *de facto forum actoris*), or the seller's domicile or habitual residence[721] (which would leave the buyer with only one available forum). Another option would consist, of course, in applying the same reasoning as the ECJ did in *Besix*[722] and not apply Art 7(1) at all 'where it is not possible to determine the court having the closest connection with the case by making jurisdiction coincide with the actual place for performance.'[723]

226 So far, national courts have rarely received the opportunity to engage with these questions. This is due to the fact that many contracts over digital content and online services are governed by complex terms and conditions that usually include jurisdiction (and, indeed, choice-of-law) clauses.[724] Of course, this does not necessarily mean that the

716 ibid, [61].

717 Which has been proposed for the similar criterion in Art 6(4)(a) Rome I by Martiny, in Säcker et al (n 703), Art 6 Rom I, [18].

718 See *Car Trim* (n 714), [48]–[49], [61]; *Wood Floor* (n 714), [22], [27], [31].

719 See Wang (n 322), 54, 56.

720 ibid, 56–57.

721 See Droz/Gaudemet-Tallon, 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en Reglèment' (2001) Rev crit DIP 601, 636; Gottwald, in Krüger/Rauscher (eds), *Münchener Kommentar zur ZPO* (5th edn, Beck 2017), Band 3, Brüssel Ia-VO Art. 7, [30].

722 Case C-256/00 *Besix* ECLI:EU:C:2002:99.

723 ibid, [48]. See Wang (n 322), 49–50; Haibach (n 478), 261 fn 21; and below, [372].

724 Haibach (n 478), 256, 266; Wang (n 322), 19.

question of jurisdiction raises no problems as courts are, in turn, regularly confronted with the question of the validity of these clauses.

227 The ECJ first had to answer questions regarding the *formal* validity of these clauses. In *El Majdoub*,[725] it had to decide whether a jurisdiction clause included in the terms and conditions of a website that could only be accessed by clicking on a link when entering into the contract (so-called 'click-wrapping') would conform with the requirement of what is now Art 25(1)(a) Brussels Ia, according to which jurisdiction clauses need to be in writing. In the context of electronic communication, Art 25(2) specifies that the method of communication has to provide 'a durable record of the agreement' to be considered 'in writing'. The ECJ employed a purposive interpretation and held:

> *The purpose of that provision is […] to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means […]. In order for electronic communication to offer the same guarantees, in particular as regards evidence, it is sufficient that it is 'possible' to save and print the information before the conclusion of the contract.*[726] *[…]*
>
> *[Here], it is not disputed that click-wrapping makes printing and saving the text of the general terms and conditions in question possible before the conclusion of the contract. Therefore, the fact that the webpage containing that information does not open automatically on registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction.*[727]

228 Regarding the clause's *substantive* validity, Art 25(1) Brussels Ia refers to the law of the Member State of the court or courts designated by the clause, including its choice-of-

725 Case C-322/14 *El Majdoub* ECLI:EU:C:2015:334.

726 ibid, [36].

727 ibid, [39].

law rules (recital (20)). In many cases,[728] the validity of the clause will be subject to the law that governs the main contract.[729]

229 Alternatively, the parties are free to agree more specifically on a place of performance. For sales and service contracts, this follows from the wording of Art 7(1)(b);[730] but it is also acknowledged more generally.[731] Yet, where the parties are using this option only to establish the jurisdiction of a certain national court (eg by selecting a place of performance in a contract that only involves the exchange of digital goods and currency), the agreement has to comply with the same formal and substantive requirements as a jurisdiction clause.[732]

(2) Applicable Law

230 The connecting factors used to determine the applicable law create significantly less uncertainty in online cases. According to Art 4 Rome I, contracts are generally governed by the law of the country where the party required to effect the characteristic performance is habitually resident.[733] As the provision focuses on the habitual residence of one of the parties, it designates an easily identifiable applicable law even for contracts that are concluded and performed online.[734] What is more, Art 4(1)(b), which will usually render the law of the habitual residence of the provider of an information society service applicable, aligns very well with the country-of-origin principle of the e-Commerce

728 The law applicable to choice-of-court agreements has not been harmonised and is accordingly still governed by the national conflict-of-law rules of the member states: see Art 1(2)(e) Rome I; Case C-222/15 *Hőszig* ECLI:EU:C:2016:525, [50].

729 As to some possible limits in consumer cases, see below, [232].

730 See *Car Trim* (n 714), [46]; *Wood Floor* (n 714), [38].

731 See Case 56/79 *Zelger* ECLI:EU:C:1980:15, [5]; Lehmann (n 93), [4.54].

732 See Case C-106/95 *MSG* [1997] ECLI:EU:C:1997:70, [31]–[34].

733 Art 4(1)(a), (b), (d)–(f), (2) Rome I. Art 4(1)(c), (f), (g) Rome I, on the other hand, are based on a (presumably) closer connection that some particular contracts have to a specific other place.

734 Haibach (n 478), 261; Nordmeier, 'Cloud Computing und Internationales Privatrecht' MMR 2010, 151, 152.

Directive, according to which the provider of such a service must not be subject to more restrictive laws than the ones of the country in which they are established.

231 The criteria used in the Rome I Regulation only struggle with internet cases where the habitual residence of the characteristic performer happens to be unknown (as might be the case within the virtual environment of an online game). In these cases, guidance might be found in Art 4(3), (4) Rome I, which allow to take into account other factors, such as the place of contract performance or the law applying to other contracts concluded in the same environment.[735]

232 Despite the high level of legal certainty that the Rome I Regulation provides, the majority of contracts over information society services contain choice-of-law clauses.[736] It was in the context such a clause (used on *amazon.de*) that the ECJ recently got the opportunity to clarify that regardless of the type of action in which the validity of such a clause is assessed,[737] its substantive validity is governed by the Rome I Regulation and thus depends on the chosen law (Art 3(5), 10(1) Rome I).[738]

e. Protecting Structurally Weaker Contract Parties

233 EU private international law protects structurally weaker contract parties – consumers, employees, and the insured and other beneficiaries of insurance contracts – in several

735 Regarding the latter option, see Lutzi (n 480), 2072, and below, [421].

736 See Rühl, 'The Unfairness of Choice-of-Law Clauses, or: The (unclear) Relationship of Art. 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive' (2018) 55 CMLR 201, 207. According to its Art 3(3) and Annex, fifth indent, these clauses remain unaffected by the country-of-origin principle in the e-Commerce Directive.

737 *VKI* (n 111), [49]–[57]. In this case, the clause was challenged by a consumer-rights organisation that sought an injunction to prevent *Amazon* from using it; the applicable law to such an action is governed by Art 6(1) Rome II: ibid, [38]–[48].

738 ibid, [58].

ways, including through more favourable default rules[739] and through safeguards against an overly disadvantageous choice of court or law.[740]

234 As far as the default rules for weaker parties are concerned, the Brussels Ia and the Rome I Regulation follow a similar approach.[741] In the present context, the rules for consumer contracts – a category that the ECJ has repeatedly widened by adopting a clearly purposive interpretation[742] – are of particular importance. In what are two of the very few provisions of the Regulations that were drafted under the impression of new technological developments (although they are not technology-specific),[743] Art 17(1)(c) Brussels Ia and Art 6(1) Rome I make the application of these protective provisions dependent on whether the professional pursues their activity in, or targets it at, the member state in which the consumer is domiciled (Brussels Ia) or habitually resident (Rome I).

235 The second criterion, which aims 'to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce'[744] has been further defined with regard to contracts concluded through a website that has been made available in another member state. In Joined Cases *Pammer* and *Hotel Alpenhof*,[745] the ECJ emphasised that the criterion was introduced

739 See Art 10–16, 17–18, 20–22 Brussels Ia and Art 6(1), 7, 8 Rome I.

740 See Art 6(2) Rome I, Art 15–16, 19, 23 Brussels Ia.

741 See Crawford/Carruthers, 'Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations' (2014) 63 ICLQ 1, 18–23.

742 See Case C-498/16 *Schrems*, ECLI:EU:C:2018:37, [39]–[40]; Case C-218/12 *Emrek* ECLI:EU:C:2013:666, [24]. See also Lutzi, 'What's a consumer? (Some) Clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation' (2018) 25 Maastricht JEu&CompL 374, 377–78.

743 See above, n 564.

744 Case C-180/06 *Ilsinger* [2009] ECLI:EU:C:2009:303, [50].

745 Joined Cases C-585/08 and C-144/09 *Pammer* and *Hotel Alpenhof* ECLI:EU:C:2010:740. While this case is only concerned with Art 17(1)(c) Brussels Ia, there is no reason why Art 6(1) Rome I should be interpreted differently: see recital (24) Rome I; Briggs (n 14), [7.172]; McParland (n 117), [12.145]–[12.162].

> *because of the development of internet communication, which makes it more difficult to determine the place where the steps necessary for the conclusion of the contract are taken and at the same time increases the vulnerability of consumers with regard to traders' offers.*[746]

Still, it held that the mere use of a website that can be accessed in another country is not sufficient for an activity to be 'directed' at this state.[747] Instead,

> *the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile.*[748]

Such an intention can be evidenced, for instance, by clear expressions (eg mention of specific countries to which the professional is prepared to offer their services),[749] by advertisements aimed at consumers in particular countries,[750] by the language and currency used (provided that it is different from the one ordinarily used in the country from which the professional exercises their activity),[751] or, indeed, the actual conclusion of a contract with consumers in the member state in question.[752] The mention of an email or physical address,[753] or the use of an 'interactive' (as opposed to 'passive') website,[754] on the other hand, are no suitable criteria to establish a professional's intention to solicit the custom of consumer's who are living in another member state.

---

746 *Pammer* (n 745), [62].

747 ibid, [71]–[74].

748 ibid, [75].

749 Ibid, [81]. On the flip side, it seems likely that the express exclusion of certain countries from the professional's intention to do business in a disclaimer should exclude the application of the consumer-protection provisions (see AG Trstenjak, Opinion on Joined Cases C-585/08 and C-144/09 *Pammer* and *Hotel Alpenhof* ECLI:EU:C:2010:273, [99], and Øren, 'International jurisdiction over consumer contracts in e-Europe' (2003) 52 ICLQ 665, 682, 691–94), provided that it corresponds to subsequent business practice (see Case C-190/11 *Mühlleitner* ECLI:EU:C:2012:542, [44]; McParland (n 117), [12.163]–[12.164]).

750 ibid, [81].

751 ibid, [84].

752 *Emrek* (n 742), [26], [29]; *Mühlleitner* (n 749), [44].

753 *Pammer* (n 745), [83].

754 ibid, [79].

236 Interestingly, the ECJ has started to use the criterion of 'directing' an internet activity in other cases typically involving vulnerable parties outside the area of contract law, such as the law of unfair-competition[755] or data-protection.[756] It is all the more surprising that there has not been a greater effort to accommodate it within the new Geo-Blocking Regulation.[757] Under the Regulation, many professionals will be required to offer information society services indiscriminatingly in all member states, which will either make it impossible for consumers to establish targeting in the sense established in *Pammer* or expose professionals to the courts and laws of every single member state.[758]

237 Regarding the protection of consumers through rules that prevent an overly disadvantageous choice of court or law,[759] the ECJ recently emphasised the role of Art 6(2) Rome I, according to which a choice of law in a consumer contract must not have the effect of depriving the consumer 'of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.'[760] Although it is unclear whether Art 6(2) Rome I does itself provide a basis for the application of the national provisions transposing Directive 93/13/EC on unfair terms in consumer contracts,[761] the ECJ considered the choice-of-law clause in question to violate Art 3(1) of Directive 93/13/EC to the extent that it

---

755 See above, [219].

756 See below, [271] and [331]. And see its application to define the substantive scope of certain IP rights discussed above at [203].

757 Above, n 295.

758 See also von Hein, 'Geo-blocking and the conflict of laws: ships that pass in the night?' (*conflictoflaws.net*, 31 May 2016).

759 See generally Rühl (n 116), 346–56.

760 *VKI* (n 111), [59], [70].

761 See Rühl (n 736), 208–10, who proposes Art 3(5), 10(1), Art 9(2), or Art 23 Rome I as alternative bases (ibid, 210–18).

> *leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.*[762]

It is unclear whether this restriction of the parties' freedom to agree on the applicable law in a consumer contract can be extended to choice-of-court agreements[763] that are governed – perhaps exclusively – by Art 25 Brussels Ia.

2. Shortcomings of the Approach of EU Private International Law

238 Looking at the approach EU private international law has taken with regard to the challenges of internet communication in different areas of law, two trends are clearly visible.

239 First, EU *legislation* on private international law pursues a number of different approaches and relies on a range of connecting factors in the different fields affected by the internet. In the area of tort law, it vests special jurisdiction in a number of courts, both at the place of the causal event and the place of the damage, and regularly allows for the application of multiple laws. In the area of contract law, it relies on narrower connecting factors that usually vest jurisdiction in a single court and lead to the application of only one national law; these rules are however balanced out by practically important exceptions for consumer cases. The substantive requirements under the e-Commerce Directive further add to this plethora of approaches.

240 In the *jurisprudence* of the ECJ, not all of these connecting factors have turned out to be equally problematic. In general, it can be said that those factors that allow for the identification of a specific state or legal system independently of the technology involved

762 ibid, [71].

763 Directive 93/13/EC only makes reference to arbitration clauses (in Annex 1(q)).

have posed little difficulty, while those relying on connections that tend to multiply in internet cases have turned out to be highly problematic. The defendant's domicile (Art 4(1) Brussels Ia), habitual residence (Art 4 Rome I) and establishment (Art 7(5) Brussels Ia), for instance, remain unaffected by the means of communication used in question and cause, if anything, only evidential problems.[764] Similarly, identifying the place in which the defendant has acted (Art 7(2) Brussels Ia) has ultimately not caused much trouble to the ECJ.[765] The criterion of the place of damage (Art 7(2) Brussels Ia; Art 4(1) Rome II),[766] however, has turned out to be difficult to give any meaningful interpretation to where information can seamlessly be communicated to the entire world. By the same token, the place of contract performance (Art 7(2) Brussels Ia) appears to provide little guidance where contracts can be performed online and independently of where the parties are physically located. In general, only criteria that focus on the *effects* of online communication have created problems, by leading to a multiplication of potentially relevant connections in internet cases.

241 Second, whenever the ECJ has been confronted with such a multiplication of connections, it tended to give effect to virtually all of them. The Court has repeatedly favoured a broad interpretation of these criteria that gives the claimants numerous options to bring their claims (which effectively allowed them to seise their home courts in *eDate*, *Wintersteiger*, *Pickney*, *Hejduk*, *Concurrence*, and *Pammer*),[767] often against the advice of the Advocate General. Although the Court has repeatedly held that the grounds for special

764 On anonymity, see above, [132] and [147].

765 See above, [185] and [200].

766 On the remaining difficulties to give effect to the criterion in other cases of intangible harm, see Case C-12/15 *Universal Music* ECLI:EU:C:2016:449, [30]–[38]; AG Bobek, Opinion on *Löber* (n 569), [34]–[45].

767 They were prevented from doing so in *Bolagsupplysningen* (n 589): see Lutzi (n 600), 213.

jurisdiction in Art 7(2) Brussels Ia are not intended to protect the claimant,[768] the Court's jurisprudence in internet cases seems inspired by a strong wish to protect the party whose rights have allegedly been violated,[769] giving them access to a wide range of fora and applicable laws (for territorially limited claims).

242 Apart from this, it is still surprisingly unclear which considerations are guiding the European legislator and Court of Justice when it comes to internet cases. It may be a consequence of this uncertainty as to the regulatory aims that EU private international law has so far failed to provide satisfactory solutions to the two problems of coordination identified in Section III.B.3. above. In the following, the shortcomings of the present approach will be analysed (a.) before the potential reasons will be discussed in more detail (b.). It will then be shown that the shortcomings of EU private international law are symptoms of some wider difficulties that systems of private international law face with regard to internet cases (c.), before some preliminary conclusions will be drawn (d.).

a. Unsatisfying Solution to Problems

243 So far, EU private international law does not seem to fulfil either of the two tasks of coordination identified above: it neither fulfils its function of horizontal coordination between national courts and legislators (1); nor does it fulfil its function of vertical coordination between public regulators and private actors (2).

(1) Horizontal Coordination Between National Courts and Legislators

244 The fundamental problem of coordination that arises in internet cases has been described above as private international law being 'confronted with an overwhelming amount of increasingly tenuous connections to a multitude of legal systems.' Unfortunately, the different connecting factors used in EU private international law and their cautious,

768 Cases C-45/13 *Kainz* ECLI:EU:C:2014:7, [31]; C-133/11 *Folien Fischer* ECLI:EU:C:2012:664, [46].

769 See, in particular, *eDate* (n 180), [47].

claimant-friendly interpretation by the ECJ do very little to reduce the number of potentially relevant connections. In tort law, the victims of personality and IP right infringements and acts of unfair competition can often pick from a range of available fora and rely on a mosaic of national laws; in contract law, the potential for such overlaps is smaller, but a number of ambiguities persist.

245 Despite the ECJ's repeated references to the principles of proximity,[770] legal certainty,[771] and sound administration of justice,[772] the interpretation applied by the Court often seems to undermine these aims[773] – and to forego the discipline's potential for effective coordination between national courts and legislation. It is no coincidence that means of concentration had to be found, instead, at the level of substantive law; examples include the criterion of targeting (which reduces the number of effectively applicable IP laws)[774] and the country-of-origin provision in the e-Commerce Directive (which reduces the number of effectively applicable laws in several other areas of law).[775]

246 Still, the fact that private international law leaves this kind of coordination entirely to substantive law and shies away from any form of concentration has a number of unfortunate consequences.

247 First of all, it confronts the courts with difficult questions of fact when they are deciding on whether they have jurisdiction over a certain case. Where their jurisdiction is territorially limited, the courts will have to determine which part of the damage has been

770 See, eg, *Concurrence SARL* (n 385), [4], [26].

771 See, eg, ibid, [4].

772 See, eg, ibid, [4], [26].

773 See in more detail Lutzi, 'Internet Cases in EU Private International Law – Developing a Coherent Approach' (2017) 66 ICLQ 687, 693–95. See also AG Cruz Villalón, Opinion on *Hejduk* (n 646), [44]; AG Jääskinen, Opinion on *Pinckney* (n 642), [68]; AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [79]; Oster (n 430), 116–17; Picht (n 673), 23.

774 See above, [203], [211].

775 See above, [66], [195].

caused by the availability of the online content in their jurisdiction.[776] For the purpose of Art 17 Brussels Ia, they will have to decide whether a certain country has been targeted. Similar questions arise when identifying the applicable law.

248 Second, the mosaic approach and the resulting existence of territorially limited jurisdiction raise the question of whether such limited jurisdiction can be used to seek remedies that cannot easily be split into territorial slices, such as injunctions.[777] For violations of personality rights, the ECJ has recently decided that an injunction for the rectification and removal of content can only be made 'before a court with jurisdiction to rule on the entirety of an application for compensation for damage'.[778] Considering the significant problems of jurisdiction for injunctions being based on the accessibility of online content alone,[779] this decision should certainly be welcomed. It avoids potentially prohibitive liability risks for defendants who are unwilling or unable to limit online publications to individual member states.

249 It is not entirely clear, though, whether the decision can be extended to other areas of law, such as IP and unfair-competition law, which the ECJ has treated differently in the past. On the one hand, the distinction between divisible and indivisible remedies[780] can easily be transferred to other torts, for which claimants generally seek similar kinds of

776 See *eDate* (n 180), [46]: 'not always possible […] with certainty and accuracy'; AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [80]: 'difficult if not impossible'; AG Cruz Villalón, Opinion on *Hejduk* (n 646), [20], [39]–[40], [42]; Hess (n 430), 106; Lein, in Dickinson/Lein (n 93), [4.112]; Márton (n 318), 177–78; Stone (n 441), 17.

777 Bigos (n 255), 617–18, and Bogdan (n 320), 5, have both argued that this question should be solved by the courts exercising the discretion they enjoy under the applicable procedural law; however, this presupposes, first, that the courts enjoy such discretion and, second, that as matter of principle, they may have jurisdiction for such injunctions. What is more, recent decisions such as the UK Supreme Court's decision in *PJS v News Group Newspapers* (n 602) (upholding an injunction against publication in England of material that had been widely disseminated online) and the Canadian Supreme Court's decision in *Google v Equustek* (n 316) (granting a worldwide injunction against publication online) indicate that exercising this discretion is not an easy task.

778 *Bolagsupplysningen* (n 589), [48].

779 See above, [191].

780 See above, [193].

remedies; they seem to be similarly affected by the ECJ's reasoning and its focus on the substantive scope of the national courts' jurisdiction. On the other hand, the ECJ may be hesitant to do so, given that 'full' jurisdiction at the claimant's centre of interests is only available for violations of personality rights. For all other torts, the only forum available to claimants seeking an injunction would be the country in which the defendant has acted and the defendant's country of domicile, both of which would often be the same member state. This would run counter to the otherwise rather protective position taken by the ECJ. Indeed, the Court seems to have allowed mosaic-approach jurisdiction for an arguably indivisible remedy (the order to remove products from websites that were not operated from, but could be accessed in, the member state in question) in its decision in *Concurrence*.[781]

250 Third, the mosaic approach to jurisdiction raises the question of the extent to which the courts have to take into account actions in other member states[782] (that are based on the availability of the same online content in numerous member states).[783] Again, the answer may depend on the remedy sought. If the court to decide this question has jurisdiction for the entire claim (eg as the court of the defendant's domicile), the question should be answered by Art 29(1), (3) Brussels Ia, which give preference to the court first seised and may require other courts to decline their jurisdiction, possibly even where it is only for one part of the overall claim. Where the courts of different member states are seised for a territorially limited part of the damage, though, each claim is likely to be considered a different cause of action; pursuant to Art 30(1) Brussels Ia, it will then be in the discretion

781 See above, [215].

782 Regarding actions brought in the courts of non-member states, Art 33, 34 Brussels Ia give the courts in EU member states a wider discretion as to whether they want to stay proceedings.

783 See AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [81]–[83]; see also Márton (n 318), 175, 190–95; Picht (n 673), 23. But see Bigos (n 255): 'Stays may overcome any perceived consequential fragmentation of litigation.'

of each of these courts to decide whether they want to stay their proceedings. Of course, even where they decide to so, such a stay only solves the problem of parallel lawsuits with (essentially) the same object; neither Art 29 nor Art 30 answer the question of what authority the courts should attach to these foreign decisions once they resume the proceedings. In fact, nothing in the Brussels Ia Regulation prevents a court from coming to a different conclusion regarding the part of the damage for which it has jurisdiction than another court that has jurisdiction for another part of the damage;[784] yet, such a result would seem to run counter to the Regulation's aim of ensuring 'that irreconcilable judgments will not be given in different Member States.'[785]

251 Fourth, a similar kind of risk arises from the potential application of multiple laws to the same set of facts by the same court. The effectiveness of substantive laws is significantly reduced if other, contradictory laws apply simultaneously.[786] This is particularly evident if one considers laws that restrict a certain behaviour and those that allow it to be of equal authority.[787] The national copyright laws of the EU member states, for instance, have been harmonised only to a certain degree, with the Information Society Directive leaving them significant margins of appreciation with regard to potential exceptions.[788] As the balance struck in national law diverges from one country to another,[789] it is easily circumvented where claimants are allowed to selectively enforce a

784 The rules on recognition and enforcement of judgments from other member states are equally restricted to specific causes of action: see Art 45(1)(d).

785 Recital (21) Brussels Ia.

786 See Van Eechoud (n 174), 106, 222.

787 Svantesson (n 439), 350: '[I]n assessing whether two (or more) laws are in conflict we need to take account of both the duties and the rights those laws provide for. […] [E]ven where the duties do not clash, the rights of one country may clash with the duties of another country.' See also Svantesson (n 802), 228–29; Mayer (n 5), [121].

788 See Art 5(2), (3) Information Society Directive. See also above, [138].

789 See, eg, the patchwork of different approaches to 'freedom of panorama' documented on Wikipedia ('Freedom of panorama').

particularly restrictive law based solely on the availability of online content. EU private international law thus undermines the margins of appreciation that are left to national legislators (except where all 28 member states make use of them).

252 That this is more than a theoretical concern is illustrated by a recent lawsuit involving the American *Project Gutenberg*. The website offers eBooks that are not protected under US copyright law, usually because the copyright has expired. In early 2018, it was ordered by a German court to remove access from Germany to, and pay damages for the publication in Germany of, 18 books, which were in the public domain according to US copyright law (as they had been published before 1978 and more than 56 years ago)[790] but were still protected under German law (because their authors had died less than 70 years ago)[791].[792] While jurisdiction in this case was based on domestic law, the German court relied on a similar kind of mosaic-approach reasoning that would be required under Art 7(2) Brussels Ia for jurisdiction over a defendant domiciled in the EU[793] (including, arguably, even for the injunction, which, in this case, could be considered 'divisible' in the sense of the ECJ's decision in *Bolagsupplysningen*)[794]. The defendant reacted to the decision by blocking its entire collection of more than 50,000 books for users with German IP addresses, arguing that it would be unable to ensure that their publication would be in compliance with German copyright law.[795]

253 The fact that German users have thus lost access to a large collection of eBooks, the vast majority of which can be assumed to be in the public domain even under German law,

---

790 See Sec 23 US Copyright Act 1909.

791 § 64 German Urheberrechtsgesetz.

792 LG Frankfurt am Main 9 Feb 2018, 2-03 O 494/14.

793 ibid, 1.

794 See above, [221].

795 See Project Gutenberg Literary Archive Foundation, 'Court Order to Block Access from Germany' (*pglaf.org*, 28 March 2018).

illustrates the difficult position in which internet users find themselves under the current approach of EU private international law. By publishing content online, they risk being sued in every member state of the European Union in which the content has become available, under countless different national laws.[796] Even though jurisdiction based on the mere availability of content will be limited to a geographically-defined slice of the overall publication and appears to be unavailable for injunctions,[797] these different lawsuits can be burdensome to defend,[798] may still lead to the award of substantial damages,[799] and result in a 'manifest potential offered to the claimant to harass the defendant with oppressive claims in parallel jurisdictions'.[800]

254 To avoid this, potential defendants[801] (who do not want to withdraw from the internet altogether) are left with two options. On the one hand, they can try to comply with every law that might apply to the content in question. However, private actors are not even necessarily aware of the laws of their own country of domicile, let alone of the laws of other countries;[802] and even where they are, the large number of potentially applicable

796 See AG Cruz Villalón, Opinion on *Hejduk* (n 646), [43]; Lein, in Dickinson/Lein (n 93), [4.112]; Oster (n 430), 116; Stone (n 622), 17; Sujecki, 'Zur Bestimmung des Erfolgsortes nach Art. 7 Nr. 2 EuGVVO bei Internetdelikten' K&R 2015, 305, 309. According to Trimble, 'The Multiplicity of Copyright Laws on the Internet' (2015) 25 Fordham IPMed&EntLJ 339, 391–401, (writing in the context of copyright infringements), the practical importance of that problem is reduced by 'the realities of cross-border copyright litigation', which deter claimants from bringing claims in numerous countries or in one country under numerous laws.

797 See above, [221].

798 Carrascosa (n 424), [91], sub (4); Kur (n 449), 181.

799 See *Bin Mahfouz v Ehrenfeld* (n 314), where the defendant was ordered to pay £ 115,000 as compensation for 23 copies of her allegedly defamatory book that were sold in England and the first chapter that was made available online. See also Hartley (n 428), 31–32.

800 AG Bobek, Opinion on *Bolagsupplysningen* (n 601), [88]. See also Svantesson (n 241), 460; Reymond, 'The ECJ's *eDate* Decision: A Case Comment' (2011) 13 YbPIL 493, 503; Briggs 'The Brussels Convention' 15 (1995) YbEuL 487, 490–91; Picht (n 673), 23.

801 The rules on jurisdiction do not require that the party trying to establish liability actually brings the claim; they equally apply to the situation in which the party claimed to be liable seeks a negative declaration (see *Folien Fischer* (n 768), [52]–[53]). Purely for the sake of readability, this thesis will nevertheless refer to the party who is claimed to be liable for providing or using an information society service as 'defendant', and to the other party as 'claimant'.

802 See C Reed (n 245), 13–14.

laws will often require them to comply with the most restrictive law in the EU, if not the world.[803] The consequences are a risk of self-censorship and a 'chilling effect' on free speech on the internet.[804] In 1999 already, the British Columbia Court of Appeal cautioned:

> *It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.*[805]

On the other hand, potential defendants may decide not to comply with foreign laws[806] – or only with those the enforcement of which appears particularly likely to them.[807] Either way, EU private international law seems to have clearly detrimental effects on the compliance with, and the effectiveness of, national tort law.

255 It should be noted that these problems are somewhat limited to the area of tort law. With regard to contract law, it is true that professionals using the internet still risk being sued by consumers from the entire EU in the latter's respective countries of domicile, who may rely on the substantive law of their country of habitual residence; but this risk can generally be mitigated – at least to a certain degree[808] – through jurisdiction and choice-of-law clauses as well as through the selective targeting of certain member states. The fact

803 See Kohl (n 36), 274; Svantesson, 'The Holy Trinity of Legal Fictions Undermining the Application of Law to the Global Internet' (2015) 23 IntJLInfoTech 219, 228; Svantesson (n 439), 349; Van Eechoud (n 174), 106, 222; Fentiman (n 455), 145. Kur (n 449), 185, fn 35, on the other hand, considers it 'a virtue' of the *lex loci protectionis* rule that 'it helps to raise the awareness of courts and parties to the fact that certain cases do have legal implications for more than one country'.

804 Svantesson (n 439), 349; Reymond (n 800), 503. See also Bone (n 259), 309–10.

805 *Braintech v Kostiuk* (n 258), [63].

806 See Ryngaert/Zoetekouw (n 356), 196–200.

807 For a 'doctrine of selective legal compliance' see Svantesson (n 439), 350–54.

808 But see Art 19, 25 Brussels Ia and Art 6(2) Rome I, limiting the effect of jurisdiction and choice-of-law clauses, and below, [333]–[334], for problems regarding the criterion of targeting. Admittedly, the latter problems do not usually apply to the area of contract law, where the fact that a contract has been concluded will often be indicative of the targeting of consumers in the respective member state (see *Mühlleitner* (n 749), [44]).

that this latter avenue may soon be curtailed by the new Geo-Blocking Regulation[809] is not so much a problem of EU private international law as it is testimony to a disconnect between conflicts and substantive legislation within the EU.

256 Turning, finally, to the position of potential claimants, it seems fair to say that they are affected less adversely by the overlaps of jurisdiction and applicable laws created by EU private international law. They profit from a wide range of available courts, including the *forum actoris* created in *eDate*, and an even wider range of applicable laws. Still, the usefulness of these individual fora will often be limited as they can only be used to claim a territorially limited part of the damage. With the exception of personality-right violations, claimants will often have to chose between bringing their claim at the defendant's domicile (based on Art 4(1) or the causal-event limb of Art 7(2) Brussels Ia) or in up to 27 other member states (based on the damage limb of Art 7(2)) to recover (most of) their damage.[810] Similarly, the application of multiple tort laws to a single online publication makes it hard for potential claimants to predict the extent of their remedies and their chances of success in court.

(2) Vertical Coordination Between Public and Private Regulators

257 The problems that have been identified above also impact the ability of private international law to fulfil its regulatory function *vis-à-vis* instances of private ordering.

258 The high number of potentially competent courts and potentially applicable laws creates a complex regulatory environment of overlapping competences and unpredictable, sometimes contradictory norms. Internet users will often have to make difficult decisions

809 See above, [237].

810 See Carrascosa (n 424), [91], sub (2); Márton (n 318), 181–82; Šrámek, 'Brussels I: Recent Developments in the Interpretation of Special Jurisdiction Provisions for Internet Torts' (2015) 9 Masaryk U JLTech 165, 171; see also Kreuzer/Klötgen (n 578), 96.

as to the national laws they comply with;[811] the hosts of online platforms, who often fulfil important regulatory functions,[812] will have to decide which national law or laws (if any) to ensure compliance with. As explained above,[813] neither of these decisions will necessarily depend on the intricacies of private international law and will, instead, often be guided exclusively by the question of which of these laws is most likely to actually be enforced.[814]

259 Platform hosts have long tried to reduce – or, rather, sidestep – these uncertainties by establishing their own rules and standards, which apply across the platform and govern the different legal relationships that involve it. In some cases, the hosts even provide dispute-resolution mechanisms through which these rules and standards can be enforced.[815] The effectiveness of their enforcement has created, in turn, an expectation by the users of these platforms that their behaviour on these platforms will primarily (if not exclusively) be governed by these rules and standards, rather than by any potentially applicable rules of state law.[816] Still, these rules and standards do not presently purport to replace the applicable law.[817] They may try to adjust its substantive content through platform rules and standards that are incorporated in the platform's general terms, but they do so in full awareness of the otherwise applicable law. Accordingly, the effectiveness and

811 See Svantesson (n 440), 348–49.

812 See above, [115]–[116].

813 At [117].

814 See Bygrave (n 242), 102–03; C Reed (n 245), 13–14, 122–23.

815 See above, [116]. This escape into private ordering differs from other forms such as the Uniform Domain Name Dispute Resolution Policy (above, [112]), which solve a highly specific type of dispute about the allocation of resources that are part of the internet's infrastructure; accordingly, they concern 'infrastructure intermediaries' rather than 'information intermediaries'.

816 See above, [118].

817 See above, [117] and [177].

scope of these terms depends on the substantive law designated by rules of private international law.

260 In the (admittedly unusual) case that the host has not tried to select this law through a choice-of-law clause, the current framework of EU private international law will regularly frustrate any attempt to create a uniform regulatory framework across an online platform. As far as the *contractual* relationship between the host and an individual user is concerned, the effectiveness of specific contract terms depends on the applicable law under the Rome I Regulation, ie the law of the consumer's or service provider's habitual residence (Art 6(1), 4(1) Rome I).[818] For *non-contractual* claims, on the other hand, Art 4 Rome II, Art 6(1) Rome II (as interpreted by the ECJ in *VKI*),[819] the '*lex loci protectionis*' rule in Art 8(1) Rome II, and several national conflicts rules for personality-right infringements all give the claimant the option to pick one out of several potentially applicable laws (and thus try to escape certain contract terms), which challenges the uniformity of the effects given to the substantive rules and standards to which the platform terms refer. In light of the ECJ's decision in *Brogsitter*,[820] according to which claims must be qualified as contractual as long as they demonstrate a sufficiently close factual link to a contract,[821] only few claims[822] between host and user(s) that raise questions as to the validity of the platform terms may be qualified as non-contractual. However, the ECJ has not yet confirmed that the decision in *Brogsitter* also applies to the delineation between

818 See *VKI* (n 111), [50], [58].

819 See above, [220].

820 Case C-548/12 *Brogsitter* ECLI:EU:C:2014:148.

821 See ibid, [24]–[26]. On the difficulty of identifying the relevant test pursuant to the decision, see Dickinson, 'Towards an Agreement on the Concept of "Contract" in EU Private International Law?' [2014] LMCLQ 466, 471–73.

822 One could think of an IP-right infringement for which the platform contract provides a potential defence.

the respective scopes of the Rome I and Rome II Regulations;[823] in fact, the Court may have somewhat turned away from the *Brogsitter* test(s) and towards the criterion of whether or not the obligation in question arose 'under the contract'.[824] Besides, claims between individual users will often qualify as *non-contractual*; in their regard, the widespread reliance on the mosaic approach and the resulting variety of applicable national laws creates an undeniable risk that the uniform regulatory framework that substantive platform terms purport to create will be frustrated.

261 Consequently, platform hosts usually include a choice-of-law clause in their standard terms. By selecting a single substantive law to govern the platform contract, they aim to create a uniform legal framework that ideally governs all relationships involving the platform. Yet, even in this case, EU private international law only supports this aim to a certain degree. While Art 3(5), 10(1) Rome I further a certain degree of uniformity by submitting the question of the validity of the choice of law to the law thus chosen, Art 6(2) Rome I makes sure that such a choice cannot deprive consumers of the protection they enjoy under the mandatory provisions of the law of their habitual residence, provided that the host's activity has been directed to this country.[825] As most online platforms target consumers in different countries, the effects of many choice-of-law clauses will inevitably differ from one country to another. Furthermore, the ECJ has held in *VKI*,[826] that a clause that does not itself point out this limitation may be found to be intransparent in the sense of Art 5 of Directive 93/13/EC. If the applicable law has been validly chosen, it should, in

823 See Joined Cases C-359/14 *Ergo Insurance* and C-475/14 *Gjensidige Baltic* ECLI:EU:C:2016:40, [44]–[46] (making no reference to *Brogsitter*).

824 See Joined Cases C-274/16, C-447/16, and C-448/16 *flightright*, *Becker*, and *Barkan* ECLI:EU:C:2018:160, [59]; Case C-249/16 *Kareda* ECLI:EU:C:2017:472, [30]; *Committeri v Club Méditerranée* [2018] EWCA Civ 1889, [55].

825 See *VKI* (n 111), [59].

826 ibid, [69]–[71]. See also above, [232].

principle, apply to both contractual and non-contractual claims between host and user(s) pursuant to Art 4(3) Rome II. The practical effects of this escape clause are however limited by its unavailability for two of the most relevant online torts – infringements of IP rights and acts of unfair competition – as well as for personality-right violations (which are completely excluded from the Rome II Regulation)[827]. Besides, the ECJ seems to have cast some further doubt on the potential of Art 4(3) Rome II by explaining (*obiter*)[828] in *VKI* that the law chosen by *Amazon* for individual contracts 'cannot legitimately constitute […] a closer connection [in the sense of Art 4(3) Rome II]'[829] in the case of a claim for an injunction brought by a consumer protection association because

> *[i]f it were otherwise, a professional such as [Amazon] would de facto be able […] to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation.*[830]

262 EU private international law thus limits the hosts' ability to create a uniform substantive framework on their platform by selecting the applicable law and refining it through substantive rules. In fact, *Facebook's* initial reaction to these different limitations seemed to be a cascade of three separate choice-of-law clauses: generally, all disputes were submitted to the law of California;[831] for consumers who were habitually resident in an EU Member State, the law of that Member State applies;[832] and for users who are domiciled in Germany, German law applied.[833] This rather complex system of choice-of-

827 Art 1(2)(g) Rome II.

828 Art 4(3) Rome II would not have been available anyway, as the applicable law was determined by Art 6(1) Rome II, which is not subject to the escape clause: see *VKI* (n 111), [45].

829 ibid, [46].

830 ibid, [47].

831 Facebook, 'Statement of Rights and Responsibilities' (n 380), s 15(1), first paragraph.

832 ibid, second paragraph.

833 ibid, s 16(3), and Facebook, 'Für Nutzer mit Wohnsitz in Deutschland' (*facebook.com*, last accessed 10 June 2018).

law clauses has been replaced in April 2018 by a clause that only differentiates between European consumers and other users; it reads as follows:

> *If you are a consumer and habitually reside in a Member State of the European Union, the laws of that Member State will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products ('claim'), and you may resolve your claim in any competent court in that Member State that has jurisdiction over the claim.*
>
> *In all other cases, you agree that the claim must be resolved in a competent court in the Republic of Ireland and that Irish law will govern these Terms and any claim, without regard to conflict of law provisions.*[834]

263 The language of this clause is quite clearly limited to the legal relationships between *Facebook* and its individual users. While the interactions between different users may be effectively governed by the substantive terms that *Facebook* enforces across their platform, *Facebook* does not seek to fix or alter the state law that applies between them. The legal relationships between individual users will consequently often be governed by a range of different laws, according to the rules of EU private international law discussed above.

264 To avoid the resulting uncertainties, the platform users could, of course, select the applicable law. In fact, their use of the platform and consent to the platform terms might be considered to constitute an *implied* choice of the same law that governs the platform contract(s).[835] Yet, Art 3(1) Rome I and Art 14(1) Rome II require such a choice to be demonstrated 'clearly' or 'with reasonable certainty', respectively, with Art 14(1) Rome II also being limited to agreements that have been 'freely negotiated' between commercial parties, which seems to exclude most standard-form platform contracts.[836] An *express*

834 Facebook, 'Terms of Service' (n 378), s 4.4.

835 For a more indirect consideration of this choice of law via escape clauses, see below, IV.C.3.b.(2).

836 See Dickinson (n 112), [13.38], with reference to the Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), A6-0211/2005, Amendment 25. If commercial

choice of law may be equally unlikely, given that platform users seem to generally trust the platform hosts to regulate and police their relationships with other users; where they are unsatisfied with the result, they often turn towards the hosts and bring legal proceedings against them.[837] In the overwhelming majority of cases, claims between different users of an online platform will consequently remain governed by the default rules of EU private international law.

b. Underlying Reasons

265 *Prima facie*, the problem of horizontal coordination in particular appears primarily as a consequence of the problems created by outdated connecting factors that focus on physical places and the difficulties of identifying geographical places of damage or performance in cases that simply have no connection to any particular physical place. These difficulties also affect the problem of vertical coordination by obfuscating the relevant point of reference against which the legitimacy of private ordering can be assessed.

266 However, it might be insightful to look beyond the problem of outdated rules. It seems at least arguable that the ECJ's reluctance not to (allow national courts to) take jurisdiction and not to (allow national courts to) apply the national law on which the claimant relies are also testimony to a more fundamental policy concern: a deep-rooted fear held by courts and legislators to leave the internet unregulated, and the citizens unprotected from its dangers.

---

parties are found to have made a valid choice of law by agreeing to the platform terms, though, their implicit choice would be unlikely to be displaced by Art 14(2), (3) Rome II, given that 'all elements relevant to the situation' will never be concentrated in one place as long as the damage is understood to be suffered in every single country in which content has been made available. See also Art 6(4), 8(3) Rome II.

837 See above, [118]; see also Kohl (n 330), 31.

267 The main reason why this argument appears compelling is the political and, indeed, academic background against which the first decisions on cross-border internet cases[838] had to be made.[839] While these decisions clearly demonstrate a struggle with the seemingly unsuited criteria that the courts had to apply, they can also be seen as a reaction to a prominent line of scholarship that suggested that the internet could and/or should not be governed by state law, but by 'the law of cyberspace'.[840] Fuelled by some serious concerns about the effectiveness of state law *vis-à-vis* a rapidly growing number of websites and platforms that appeared to operate in complete ignorance of – *inter alia* – the laws of intellectual property, this scholarship gave rise to fears of a lawless 'cyberspace' in which the private-law rights of individuals are left unprotected.[841]

268 This concern seems to have influenced the courts and legislators that had to answer questions of jurisdiction and choice of law in the early days of the internet.[842] To make sure that private international law would not impede the protection of private rights,[843] they repeatedly took a protective approach and gave the existing rules on jurisdiction and choice of law a wide interpretation, allowing potential claimants to seise a large number of national courts and to rely on an equally large number of national laws. Instead of reducing the problematically high number of connections to which the internet gives rise by selecting few, particularly useful ones for the allocation of adjudicatory and prescriptive jurisdiction, they gave effect to all of them. Instead of a cyberspace in which

838 For examples see above, [83].

839 See Svantesson (n 242), 96–100.

840 See above, [85]–[86]. See also Goldsmith (n 256), 1202–05.

841 See Slane (n 6), 140–44.

842 See ibid, 139; Kohl (n 36), 276–78, 285–88.

843 See explicitly Carrascosa (n 424), [113]; Hess, 'Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht', JZ 2012, 189, 191.

no court has jurisdiction and no law applies, they created a cyberspace in which all courts have jurisdiction and every law applies.

269 In the case of EU private international law, this approach can be identified in a number of decisions and instruments, which all shy away from vesting jurisdiction solely in specific, easily identifiable courts that have a particularly close connection to the case at hand and from allocating regulatory authority to the legal system of a single member state. Instead, they regularly give the claimant access to a variety of fora (including their domicile)[844] and allow them to rely on a large number of applicable laws.

270 The Court's case law on Art 7(2) Brussels Ia alone provides numerous examples.[845] The ECJ openly justified the creation of an additional forum in *eDate* by the reduced usefulness of the criterion of distribution and 'the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.'[846] While this forum was not extended to other torts committed online, the Court nonetheless allowed the claimant in each decision rendered in this context (with the notable exception of the recent decision in *Bolagsupplysningen*)[847] to seise their 'home' courts (usually of their domicile) based on the mosaic approach.

271 Similar examples can be found at the level of choice of law. In *VKI*, for instance, the Court reinterpreted 'the country in which the collective interests of consumers are

844 See also the new *forum actoris* in Art 79(2) GDPR; regarding its protective nature, see Franzina, 'Jurisdiction Regarding Claims for the Infringement of Privacy Rights under the General Data Protection Regulation', in De Franceschi (ed), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution* (Intersentia 2016), 81, 85–86, 97–98; Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' ZVglRWiss 117 (2018), 50, 67–69.

845 The ECJ's recent decision in *Schrems* (n 742) provides another one: see above, [234].

846 *eDate* (n 180), [47]. See also *Pinckney* (n 635), [36].

847 *Bolagsupplysningen* (n 589), [44], [48].

affected within the meaning of Article 6(1) of the Rome II Regulation [as] the country of residence of the consumers to whom the undertaking directs its activities'.[848] In the same decision, the Court held that choice-of-law clauses used on online platforms have to comply with national provisions transposing Directive 93/13/EC on unfair terms in consumer contracts, although the legal basis for such a requirement is far from clear,[849] and confirmed the wide, targeting-based interpretation of Art 4(1)(a) Data Protection Directive it had established in earlier decisions[850] (and which has meanwhile been codified in Art 3(2)(a) GDPR).[851]

272 The ECJ has adopted a similarly protective attitude when interpreting substantive provisions in internet cases. The Court has, for instance, repeatedly applied a broad interpretation to the criterion of 'communication to the public' in Art 3(1) InfoSoc Directive, effectively extending its scope to certain acts that may be described as accessory to the actual copyright infringement (such as posting links to protected works that have been published without the author's consent[852] or providing indexing services[853]).[854] This interpretation has been justified, in particular, by the 'high level of protection' of intellectual property[855] that the Directive aims to achieve.[856]

848 *VKI* (n 111), [43]. See also above, [219].

849 See above, [232].

850 Case C-230/14 *Weltimmo* ECLI:EU:C:2015:639, [41]; *Google Spain* (n 386), [60].

851 *VKI* (n 111), [75]–[77], [81]. See also Lüttringhaus (n 844), 62–64.

852 *GS Media* (n 402).

853 *The Pirate Bay* (n 402).

854 See Groom, 'The Pirate Bay: CJEU rules that operating a torrent file indexing site is a communication to the public' (2017) 12 JIPL&Pract 965, 967.

855 See recitals (4), (9) InfoSoc Directive.

856 See, eg, *GS Media* (n 402), [30]; *The Pirate Bay* (n 402), [22].

c. Similar Dynamics in Other Jurisdictions

273 These dynamics are by no means exclusive to the European Union. All around the globe, courts have reacted to the perceived risks of unregulated online communication by applying wide and protective interpretations to existing rules of private international law;[857] they establish their jurisdiction based on often rather tenuous connections to a given case and regularly allow claimants to rely on multiple national laws.[858] The Canadian Supreme Court, for instance, has recently made headlines by granting a worldwide injunction requiring *Google* to de-index certain websites engaging in acts of unfair competition.[859] The Court adopted a similarly protective approach when holding that the choice of the Californian courts in *Facebook's* standard terms would be unenforceable to the extent that it prevented a consumer from seeking protection under British Columbia's Privacy Act.[860]

274 Still, the most commonly referred to example for this global trend are online violations of personality rights. Not only have they occupied courts and legislators all over the world for more than two decades, they have also been excluded from some aspects of European harmonisation (namely the Rome II Regulation)[861] – which has not stopped the courts of the member states from often adopting similar approaches.

275 Regarding, first, said courts in EU member states, their approach to *jurisdiction* over defendants who are not domiciled in the EU (and therefore subject to national rules

857 See generally Kohl (n 36), 274–78; Svantesson (n 242), 96–100, 105–11; Wimmer, 'International Liability for Internet Content: Publish Locally, Defend Globally', in Thierer/Crews (n 244), 239.

858 To the extent that this approach allows courts to adjudicate a case under the *lex fori*, it evidently coincides with a more general (not necessarily objectionable) preference for doing so: see also Dinwoodie (n 152), 537.

859 *Google v Equustek* (n 316), [36]–[53].

860 *Douez v Facebook* [2017] SCC 33, [52]–[63] (Karakatsanis, Wagner, Gascon JJ), [104]–[117] (Abella J). For the ECJ's similar decision in *VKI* (n 111), see above, [237].

861 See Art 1(2)(g) Rome II.

on jurisdiction pursuant to Art 6(1) Brussels Ia), shows a varying degree of harmonisation with the framework developed by the ECJ in *Shevill* and *eDate*.[862] Some member-state courts seem to apply the *Shevill* approach of splitting up jurisdiction into territorial slices,[863] while others always assume 'full' jurisdiction[864] and require a qualified connection to the forum to do so.[865] The courts of England and Wales traditionally follow the multi-publication rule, according to which every act of communication constitutes a new publication.[866] Much like the *Shevill* doctrine, this rule allowed the English courts to assume jurisdiction for a limited part of the overall publication that had been made available (and actually accessed)[867] in England and was readily extended to online publications.[868] Unlike the *Shevill* doctrine,[869] however, it had always been subject to the requirement of a 'real and substantial' tort, the defence of abuse of process, and the doctrine of *forum non conveniens*, which had all been used on several occasions to strike out claims with little to no actual connection to England.[870] Regardless, the UK legislator established a much higher, and much more inflexible, threshold for jurisdiction in 2013,

862 As to which, see above, IV.B.1.a.(1).

863 See TGI Paris 12 Jun 2013 *Les Editions R v Google*.

864 The German Reichsgericht already held in RG 18 Oct 1909, RGZ 72, 41, 44–46, that jurisdiction of the German courts for material published in several countries would not be limited; newer decisions, which were concerned with injunctions, have not questioned that any jurisdiction of the German courts would be 'full' (see BGH 19 Dec 1995, BGHZ 131, 332, [16]).

865 According to German case law, such a connection exists, in the case of printed content, if it has intentionally been published in Germany (BGH 3 May 1977, NJW 1977, 1590, [11]) or, in the case of online content, if it is objectively connected to Germany (BGH 2 March 2010 *New York Times*, BGHZ 184, 313, [20]; see also LG Düsseldorf 5 Jun 2013, IPRspr 2013, Nr 228, 493, [29], erroneously applying this test to a case that clearly fell under Art 2(1), 5 No 3 Brussels I).

866 See *Berezovsky v Forbes* [2000] 1 WLR 1004 (UKHL), 1012–13; *Kroch v Rossell* [1937] 1 All ER 725 (EWCA), 726; *Duke of Brunswick v Harmer* (1849) 14 QB 185. See also Hartley (n 428), 29–30.

867 See *Tamiz v Google* (n 390), [23]–[24]; *Al Amoudi v Brisard* [2006] EWHC 1062 (QB), [32].

868 *King v Lewis* (n 603), [2].

869 See Joubert, 'Cyber-Torts and Personal Jurisdiction: The Paris Court of Appeal Makes a Stand' (2009) 58 ICLQ 476, 478.

870 See *Karpov v Browder* [2013] EWHC 3071 (QB); *Jameel v Dow Jones* (n 604); see also Lord Hoffmann (n 428). But see also *Mardas v New York Times* [2008] EWHC 3135 (QB), where 'a few dozen [people having accessed the content in question]' were considered sufficient for the English courts to take jurisdiction: ibid, [31].

limiting the circumstances in which an English court has jurisdiction for an action in defamation to those in which

> *the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.*[871]

276 When identifying the *applicable law* (a question excluded from the Rome II Regulation and thus exclusively governed by the choice-of-law rules of each member state), the courts of several member states have been open to following a mosaic approach along the lines of *Shevill*,[872] while others seem to follow a centre-of-interests approach similar to *eDate*.[873] Of course, where a court takes jurisdiction only for that specific part of a larger publication that had been made available in the forum, the *lex fori* usually applies without much difficulty.[874]

277 Regarding, second, courts outside of the European Union, the courts of many common-law countries have unsurprisingly followed an approach similar to the one of the English courts.[875] Based on the orthodox multi-publication rule, the courts in Australia[876] and Canada[877] have assumed jurisdiction over those parts of an overall online publication that they considered to have been made available in the forum and applied the *lex fori* to it as the law of the place where the tort has been committed. Despite their protective

---

871 UK Defamation Act 2013, s 9.

872 See above, [194].

873 See Thiede, 'Zum Anwendungsbereich der Rom II-Verordnung auf Persönlichkeitsrechtsverletzungen', ecolex 2017, 774, 775, discussing OLG Wien, 26 Apr 2017 (n 420), which mistakenly applied Art 4(1) Rome II.

874 See Hartley (n 428), 27.

875 See also Slane (n 6), 137–40.

876 See *Gutnick* (n 261), [44], [48] (per Gleeson CJ, McHugh, Gummow and Hayne JJ).

877 See *Breeden v Black* [2012] SCC 19, [19]–[21]; *Burke v NYP Holdings* [2005] BCSC 1287, [29]–[33]. See also *Bangoura v Washington Post (Bangoura I)* (2004) 235 DLR (4th) 564 (Ontario SCJ), reversed on appeal in *Bangoura v Washington Post (Bangoura II)* (2005) 258 DLR (4th) 341 (Ontario CA); and see *Haaretz.com v Goldhar* (n 328), [22]–[24], [35]–[38] (Côté, Brown, Rowe JJ), [165]–[167] (Wagner J) (on jurisdiction *simpliciter*).

approach in other areas,[878] the Canadian courts also seem to have developed a more nuanced approach to defamation over time,[879] with the Supreme Court recently confirming a stay for *forum non conveniens* in the case of defamation by an Israeli newspaper the online version of which could also be accessed from Ontario, Canada.[880]

278 While there evidently is a larger variety of approaches outside the common-law world, the courts in many other countries follow equally protective approaches to jurisdiction. The Chinese courts, for instance, can be seised on the basis of the allegedly defamed claimant being domiciled in China or of the defamatory content having been accessed there;[881] as Dan J Svantesson summarises:

> *The approach taken in the PRC towards jurisdiction over defamation could in summary be said to be very accommodating indeed, and rarely would a people's court find itself prevented from exercising jurisdiction.*[882]

US courts, which do not follow the common law's multi-publication rule[883] and apply a variety of tests instead (which seem to converge towards the criterion of targeting)[884] to establish a sufficiently significant connection between the case and the forum,[885] still regularly allow a claimant to seise the courts of their home state (which then has jurisdiction for the entire publication) and apply the law of state.[886] This is paired with a

878 See above, [273].

879 See, eg, *Bangoura II* (n 877).

880 *Haaretz.com v Goldhar* (n 328).

881 Svantesson (n 241), 305–07.

882 ibid, 307.

883 Under the Uniform Single Publication Act, which has been adopted in most states: see Svantesson (n 241), 238.

884 See, eg, *Tamburo v Dworkin* 601 F 3d 693 (7th Cir 2010), sub II.B.2.a.; *Baldwin v Fischer-Smith* 315 SW3d (Mo App 2010); *Young v New Haven Advocate* 315 F3d 256 (4th Cir 2002).

885 See Svantesson (n 241), 238–46.

886 See, eg, *Tamburo v Dworkin* (n 884); *Tamburo v Calvin* 1995 WL 121539 (ND Ill 1995).

particularly restrictive approach to recognition and enforcement of foreign judgments that are alleged to violate the first-amendment rights of US defendants.[887]

279 Some of the more recent decisions just cited (such as the Canadian Supreme Court's decision in *Haaretz.com v Goldhar*)[888] might be seen as indications of a certain trend to reconsider and refine the overly broad rules that had been developed in reaction to the first cases of online defamation, similar to the ECJ's decision in *Bolagsupplysningen*.[889] Still, as long as these rules allow for vast overlaps of jurisdiction and choice of law in internet cases, many of the problems of coordination described above will persist.[890]

d. Conclusion

280 In conclusion, it appears fair to say that private international law, and EU private international law in particular, does not satisfactorily fulfil its potential for the effective regulation of internet cases. When confronted with the virtually unlimited number of connections created in internet cases, the courts have shied away from vesting jurisdiction in a small number of courts and identifying a single applicable law. Instead, they have given the claimant access to a wide range of fora and national laws to seek protection under. Consequently, rules of private international law often fail to effectively coordinate the different claims to regulatory authority over internet cases made by different public regulators, and by private parties.

281 Instead, the broad and protective interpretation given to rules of private international law creates a myriad of problems of coordination. It requires the courts to engage with complicated questions of fact only to determine the territorial scope of their

887 See Wimmer (n 857), 251–55.

888 See above, [277].

889 *Bolagsupplysningen* (n 589), as to which see above, [189], [193], and Lutzi (n 600).

890 Under IV.B.2.

jurisdiction[891] – which, in turn, raises equally complicated questions of law with regard to the available remedies.[892] It requires the courts to apply different, potentially contradictory substantive laws to individual, territorially-defined slices of a single online tort[893] – and creates the risk of irreconcilable decisions where these claims are decided by different courts.[894] It creates significant liability risks for potential defendants, who are often left in a situation where they can either comply with every law that a claimant could possibly rely on or simply ignore foreign law as long as there is no immediate threat of enforcement.[895]

282 Rules of (EU) private international law thus have the effect of undermining the effectiveness of substantive law and reducing legal certainty for parties using the internet. And yet, it would be simplistic to only blame inadequate rules and outdated connecting factors for these problems. Arguably, the way in which these rules have been given a broad interpretation to allow prospective claimants to seise the courts of their home country and seek protection under its laws almost independently of the circumstances of the specific case has played at least an equally important part. In the following section, it will be shown that many of the existing rules of private international law *are* capable to apprehend the challenges of internet cases and offer ample potential for their resolution – provided that they are applied in awareness of their societal and regulatory implications.

---

891 See above, [247].

892 Above, [248]–[249].

893 Above, [251]–[253].

894 Above, [250].

895 Above, [254]–[255].

C. Exploiting the Full Potential of Private International Law

283 The problems created by the current approach of private international law to internet cases that have been discussed in the previous section raise the question of how private international law could better react to the undeniable challenges of internet communication. In the following section, a proposition will be developed as to how the existing rules of EU private international law could be reinterpreted, readjusted or supplemented to better accommodate and effectively address these challenges and use the discipline's potential for the coordination of different claims to regulatory authority to a fuller extent.

284 Unlike other propositions that have tried to solve specific conflict-of-laws problems created by the internet,[896] the proposal will put an emphasis on identifying and addressing the *common* difficulties of private-law internet cases that have been identified above. It will be developed in four steps. First, it will be discussed whether the reliance on technical and ostensibly neutral rules of private international law that is prevalent in the EU is at all suited to address new challenges of a globalised world such as the inherently international medium that is the internet (1.). Having answered this question in the affirmative, the discussion will then turn to the two fundamental challenges that have been identified above, ie the horizontal coordination between different national courts and legislators (2.) and the vertical coordination between public regulators and private parties (3.). Finally, the different propositions that have been made in these subsections will be put together in a consolidated proposal (4.), which will be applied to the five private-law problems that have been discussed in sections III.C. and IV.B. above (5.).

---

896 See, eg, the specific solutions proposed by Svantesson for (online and offline) defamation (Svantesson (n 241), 569–91) and (online and offline) contracts (ibid, 593–615).

1. Substantive Approach or Neutral Rules?

285 It has long been argued that private international law may only meaningfully react to the challenges of globalisation if it discards the 'foundational myth of methodological neutrality'[897] and abandons the paradigm of substantive blindness.[898] This claim has been repeated with regard to the phenomenon of online communication and the difficulty of giving effect to traditional connecting factors in internet cases.[899]

286 In particular, some authors have revisited propositions that were originally put forward during the American 'conflicts revolution' and argued in favour of a 'substantive' approach that abandons the restraints of technical rules, methodological neutrality, and substantive blindness of Savignyan private international law.[900] Considering the particular difficulties associated with applying a system of neutral, often geographically-defined connecting factors to an elusive medium that is prone to produce ubiquitous effects, this look towards the US 'revolution' should not be particularly surprising. After all, it was one of the central concerns of its proponents to remedy the perceived inability of the formalistic and inflexible rules of the First Restatement to solve complex multi-state cases.[901] In fact, European authors, too, have argued that in particularly complex cases in which traditional private international law does not yield a clear solution, substantive results should be taken into account:[902]

> *Where, however, conflict law does not give a clear reference to one foreign legal system, it ceases to ensure its principal values such as protection of*

---

897 Muir Watt (n 2), 2.

898 See also Vischer (n 56), 93: 'The discomfort arising in connection with a blind reference has always been apparent.'

899 See, eg, Dinwoodie (n 152), 542–79 (in particular 535–37); Faucher (n 318), 1066–72; Geller (n 152), 107–12.

900 As to which see above, II.A.1.

901 See Shreve/Buxbaum (n 136), 58–60. See also above, [57]–[59].

902 Zweigert (n 126), 447–48.

> *reasonable expectations of the parties and international equality of decisions. In this case […] the judge should apply the better rule of the jurisdictions concerned in the case at issue.*[903]

287 Indeed, the internet seems to emphasise the limits of traditional private international law and its difficulties to give effect to potentially conflicting policy objectives – such as protecting the victims of online torts, encouraging internet use and innovation, and ensuring the sound administration of justice – through a system of seemingly inflexible connecting factors. In this sense, the relatively new challenges of internet communication may appear as a welcome opportunity to question the preoccupation of private international law with the mechanical coordination between legal systems and the fulfilment of the parties' notional reasonable expectations in that regard, and to (re)consider alternative approaches that put a stronger emphasis on its regulatory aims and implications.

288 However, as explained above, such political considerations can be given effect in a number of ways. They can be confined to the limited gateways of *ordre public* and *lois de police*,[904] they can inform the identification of the relevant connecting factors,[905] or they can replace traditional private international law altogether and directly determine the substantive solution of each case.[906] In the following, it will be argued that although the internet poses undeniable challenges to traditional private international law, it does not require a fundamental change of methodology in the latter sense. It is submitted that private international law can overcome these challenges while preserving its blindness towards the substantive outcome of specific cases – provided that it is applied sensibly, in

903 ibid, 452 (VI.).

904 See above, II.A.2.

905 See above, II.B.1.

906 See above, II.B.2.

consideration of the unique challenges of the internet and its regulatory potential and political impact.

289 This proposition stands despite the weighty arguments that have been put forward in support of alternative approaches that openly consider the substantive outcomes of internet cases. First, because their proponents fail to demonstrate how these approaches would provide more adequate solutions to the problems identified above (a.); and second because these problems can in fact be solved appropriately through traditional methodology (b.).

a. Arguments Against a Substantive Approach

290 The first proposition to solve the problem of an unmanageably large number of potentially applicable laws in internet cases by skipping the choice-of-law analysis entirely seems to have been made as early as 1993, by John D Faucher. In the context of inter-state disputes about online defamation in the US, he argued that rather than wasting time 'on abstruse conflicts analysis', federal courts should 'create rules of federal common, or judge-made, law to [sic] computer bulletin board libel cases […] as they need them.'[907]

291 In a similar vein, Paul E Geller advocated a turn towards the substance of the applicable law – 'from categorical to functional analysis'[908] – to solve the problem of copyright infringements on the internet. Relying on the work of David F Cavers, he proposed to solve the conflict of laws through 'principles of preference', which would focus on the substance of the potentially applicable laws – and usually result in applying the most protective one.[909]

907 Faucher (n 318), 1068.

908 Geller (n 152), 107.

909 See ibid, 107–12.

292 Both propositions were strongly inspired by the works of American 'revolutionists'[910] and the idea that by ignoring the substantive conflict at hand, traditional conflict-of-laws thinking prevents the finding of adequate solutions to complex cross-border cases. A similar argument has been made more recently by Richard Fentiman,[911] who suggested a 'de-legalisation' or 'de-localisation' of IP law and a move from the application of national law towards 'the identification of the norms to be employed to resolve given cases'.[912] What all these proposals fail to provide, though, are arguments that go beyond their potential for more adequate solutions of individual cases.

293 Such arguments were offered by Graeme Dinwoodie,[913] who proposed a substantive-law approach as a remedy to the inability of 'public international [copyright] lawmaking […] to serve as the sole means means of pursuing internationalist goals while accommodating other competing considerations.'[914] Whereas public international lawmaking had 'a codifying rather than a dynamic character',[915] national courts, solving private copyright disputes, could in his view contribute to the 'internationalization' of copyright – which was necessary, not least, in light of the increasingly international exploitation of copyright in cyberspace.[916] According to Dinwoodie, the fact that traditional conflicts-of-laws methodology and intellectual-property theory required courts to apply

910 See Faucher (n 318), 1068–69, referring to the works of Reese and Juenger, and Geller (n 152), 107, referring to the works of Cavers.

911 Fentiman (n 455), 146–47.

912 Ibid, 147.

913 Dinwoodie (n 152), 542–79. See also Dinwoodie, 'Conflicts in International Copyright Litigation: The Role of International Norms', in Basedow/Drexl/Kur/Metzger (n 449), 195, 206–10; 'The Development and Incorporation of International Norms in the Formation of Copyright Law' (2001) 62 Ohio State LJ 733, 777–81.

914 Dinwoodie (n 152), 472–73. Some hints towards this creative potential can also be found in Faucher (n 318), 1071–72.

915 Dinwoodie (n 152), 472. See also ibid, 518–21.

916 ibid, 534–42.

national laws that operate territorially to international cases[917] prevented the development of an international copyright law;[918] but the problems to apply these laws to internet cases suggested

> *the need for a rethinking of copyright law in the digital environment where copyright disputes are inherently international. But the lessons of such an inquiry need not be limited to digital cases. The problems of cyberspace bring these questions into sharper focus, and it is there that they appear most acute. But the cyber-revolution merely highlights problems endemic to internationalization, which must be confronted more generally. […] [A] different approach to choice of law in international copyright cases – whether digitally based or not – may both offer better solutions to international disputes and make a positive contribution to the internationalization of copyright law.*[919]

Dinwoodie proposed that courts should solve international copyright disputes by having regard to the policies and rules of the different states and international agreements concerned in developing new substantive rules of (domestic)[920] copyright law that give effect to these policies in international cases.[921] By creating these new rules, the courts would contribute to the internationalisation of copyright and 'supply the dynamism appropriately missing from classical public international lawmaking.'[922]

294 This proposition is strongly inspired by the works of Arthur Taylor von Mehren and Friedrich K Juenger, who advocated the creation of 'special multijurisdictional rules' for 'situations and transactions […] that cannot appropriately be localized'.[923] It combines

---

917 See ibid, 528–33, 534–35. See also Dinwoodie, 'Trademarks and Territory: Detaching Trademark Law from the Nation State' (2004–05) 41 Houston LRev 885, 904–06, 951–52 (on trademarks).

918 Ibid, 532–33.

919 ibid, 542.

920 ibid, 546, 570–71, 577.

921 ibid, 543, 545–69.

922 ibid, 569–71.

923 Von Mehren (n 144), 357. See also von Mehren, 'Choice of Law and the Problem of Justice' (1977) 41 L&ContempP 27, 38–39; Juenger (n 121), 194–99, 233–37; 'The Need for a Comparative Approach to Choice-of-Law Problems' (1998–99) 73 Tulane LRev 1309, 1331–35. The method is summarised by Symeonides (n 41), 18–20.

a shift of focus towards the substantive outcome of each case with a move away from the 'jurisdiction selection' that traditional private international law is aiming for.[924] In this regard, it markedly goes beyond other 'substantive law' approaches,[925] which merely tried to identify the most appropriate rule out of those that might potentially apply; by contrast, according to Dinwoodie, the courts should not only chose 'between competing rules' but 'between […] competing solutions' and be free to 'develop the law in a way that does not involve the application of a single pre-articulated rule'.[926]

295 Considering the difficulties associated with applying traditional connecting factors to internet cases that have been identified above, this turn towards potential alternatives is hardly surprising. In fact, the work of the US 'revolutionists', who were trying to address similar problems[927] in the multi-state context of the United States,[928] may appear as particularly interesting from the perspective of EU private international law (while raising the question of the extent to which it can be applied outside of federal systems). What is more, a 'substantive law' approach might indeed have the greatest potential to incorporate a wide range of different perspectives representative of a globalised world.[929] Still, it is subject to important counter-arguments, both on a theoretical level and with regard to its appropriateness for the solution of individual cases.

296 The proposition is based on two pillars: first, on the idea that giving the courts the flexibility to consider a broad range of rules and regulatory interests (including non-state

924 See Dinwoodie (n 152), 547–48; 'Conflicts' (n 913), 207–08; 'Development' (n 913), 780. Generally on 'jurisdiction-selecting' and 'content-oriented' approaches Symeonides (n 41), 36–43.

925 As to which see above, at [58].

926 Dinwoodie (n 152), 548.

927 See above, [286].

928 See Dinwoodie (n 152), 545; see also above, at [58].

929 See also Dornis (n 458), 261–62.

rules)[930] will allow them to achieve a just outcome in individual cases of international copyright use;[931] and second, on the hope that this new-found flexibility will make it possible to 'harness the generative faculty of international litigation'[932] and further 'international copyright lawmaking'.[933]

297 Just like other substantive-law methods, this proposition seems to leave very little room for traditional considerations of private international law such as proximity, predictability, or international coordination (at least as far as choice of law is concerned).[934] Every case is referred to the *lex fori*, which will then addresses its international dimension purely at the level of substantive law. The aforementioned considerations might still play a subordinate role in identifying the systems that are relevant for the solution of a given case but they would no longer guide their selection and/or combination. Instead, it would always be up to the local judge to weigh the merits of the solutions found in the systems identified as relevant against each other and, in particular, against the solution provided by the *lex fori*. The proposition would thus perpetuate the trend identified above[935] to sidestep private international law completely and address the problems created by online communication exclusively at the level of substantive law.[936] Whatever distinct (coordinating) function private international law may have would likely be lost.

---

930 See ibid, 555–56; Dinwoodie, 'Conflicts' (n 913), 209.

931 Dinwoodie (n 152), 547.

932 ibid, 569.

933 ibid, 567, 569–71. See also Dinwoodie, 'Conflicts' (n 540), 207–08; 'Development' (n 540), 781.

934 This resonates with Lawrence Lessig's observation in a similar context that 'conflicts of law is dead – killed by a realism intended to save it': Lessig (n 7), 1409.

935 At [247].

936 By contrast, see Dinwoodie's propositions on trademark law, which also are substantive in nature but do not aim to replace traditional private international law (Dinwoodie (n 919), 957–69).

298 Dinwoodie's proposition in particular puts a strong emphasis on its potential to compensate this loss by the creation of new international norms that will progressively be shared by more and more jurisdictions. However, this hope not only runs counter to the strong bias towards the *lex fori* inherent in many approaches formulated during the American 'revolution'[937] and the large variety of rules and connections from which judges are supposed to chose. Even if it could eventually become a reality, it seems unlikely that the same solutions would be shared worldwide, especially in areas where different states and judges attach fundamentally different levels of significance to principles such as free speech, fair use, and the protection of personality and IP rights.[938] At the very least, it would take a significant amount of time until any appreciable form of harmonisation would be achieved (provided if it would not just be realised through international conventions, which, of course, is already an option).

299 In the meantime, the proposed approach – while eliminating the distinct role of private international law at the level of choice of law – would significantly increase the importance of rules of international jurisdiction, which would remain unaffected by the proposition. As national courts would weigh the different solutions they are supposed to take into account differently, they would provide a strong incentive for forum shopping[939]

---

937 See Hay, 'Flexibility Versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law' (1991) 226 Recueil des cours 282, 356: '"Better law" as the source of new multistate solutions […] may have less of a forum bias. However, it ultimately suffers from the same *ad hoc* nature as the 'better law' approach from which it derives.' See also Shreve/Buxbaum (n 136), 116, 139–41; Neuhaus (n 494), 805–06; Mayer (n 5), [174]–[175], [367].

938 See Dornis (n 458), 267–68. See also the experience with Leflar's 'better law' approach in a number of US states, analysed by Thomson, 'Method or Madness?: The Leflar Approach to Choice of Law as Practiced in Five States' (2013–14) Rutgers LRev 81, 94–137, who observes that '[e]ven where courts […] reach similar results on similar facts, their reasons for doing so are often markedly different' (ibid, 137) and concludes: 'there is nothing simple or predictable about the Leflar method as applied in the courts, and the myriad avenues for applying the method offer even more of an opportunity for obfuscation and facile judicial maneuvering than do other choice-of-law methods': ibid, 145.

939 See generally Baxter, 'Choice of Law and the Federal System' (1963–64) 16 Stanford LRev 1, 3, 9–10.

– an issue which has, of course, long been a central concern of private international law, not least within the context of the EU.

300 Moreover, the approach would inevitably come into conflict with other important aims of private international law. Most obviously, it would dramatically decrease legal certainty,[940] another traditional concern of private international law,[941] and EU private international law in particular.[942] It has always been one of the strongest criticisms of the different 'substantive law' methods that they 'diminish consistency and predictability in choice of law and increase the number of erratic choice-of-law precedents'.[943] According to Symeon C Symeonides, '[w]hen each case is decided *ad hoc* as if it were a case of first impression, multiple problems arise, including increased litigation costs, waste of judicial resources, and an increased danger of judicial subjectivism'.[944] This evidently is a particular concern in internet cases, in which a large number of legal systems may provide applicable rules and standards. In the example of an American copyright holder and a university from the fictitious country of Caledonia given by Dinwoodie,[945] only the application of, and potential for compromise between, American and Caledonian law are discussed; given that the implication of American law in this case is based largely on the mere accessibility of the content distributed by the defendant in the US,[946] one wonders

940 As to which see Dinwoodie (n 152), 571–75; Dinwoodie, 'Conflicts' (n 913), 209; Fentiman (n 455), 147.

941 See Neuhaus (n 494), 797–98, 803.

942 See Dickinson, 'Legal Certainty and the Brussels Convention—Too Much of a Good Thing?' in de Vareilles-Sommières (ed), Forum Shopping in the European Judicial Area (Hart 2007), 115; Mills (n 46), 470–71.

943 Thomson (n 938), 90. See also Neuhaus (n 494), 802–03; Baxter (n 939), 6.

944 Symeonidis (n 88), [369]. See also Kozyris, 'Interest Analysis Facing Its Critics – And, Incidentally, What Should Be Done About Choice of Law for Products Liability?' (1985) 46 Ohio State LJ 569, 580: '[A]ny system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion.'

945 Dinwoodie (n 152), 558–69.

946 See ibid, 561–62.

why the laws of other countries in which the content can be accessed should not taken into account as well. According to Dinwoodie, '[t]his may seem more daunting than it is likely to be in practice, because there will only be so many variations in rules among the interested countries.'[947] But even if this were the case, it would be very hard for internet users and service providers to predict which variation of these rules applies to them and what norms they have to follow.

301 By the same token, the approach seems prone to contradict other central conflicts paradigms such as proximity and legitimate party expectations. The importance attached to the substance of each potentially applicable solution, as well as the solution ultimately adopted, may have little to do with the degree to which they are connected to the case at hand, or to which they could have been predicted by the parties. In fact, if the sole aim is to find an 'appropriate' solution to a given case (which, ideally, can also be applied by other courts), considerations like legitimate expectations or proximity might well be relegated to being nothing more than an afterthought.

302 At the same time, a substantive approach would significantly increase the importance of courts and judges, as opposed to legislators, in the creation of norms for international cases. This raises important questions not only with regard to the appropriateness of the courts for this task but also with regard to the legitimacy of this form of law-making.[948]

303 Finally, it should be noted that one of the central concerns of the American conflicts 'revolution' was the observation that laws do not always claim universal application and that the number of 'actual' conflicts of laws was much smaller than traditional private

947 ibid, fn 294.

948 As to which see Dinwoodie (n 152), 575–77; Dinwoodie, 'Conflicts' (n 913), 209. See also Dornis (n 458), 266–68.

international law made it seem.[949] With regard to the internet, however, we are observing the opposite problem of numerous legislators claiming regulatory competence for the same subject matter.

304 In addition to these rather fundamental concerns, it seems highly questionable whether a substantive approach would actually provide appropriate solutions for internet cases. Even ignoring the inevitable difficulties in identifying the norms that are supposed to be taken into account and balanced out, it will often be hard to select between them, let alone finding any viable compromise. If one domestic law protects a person's reputation even against evidently true statements and another one protects freedom of speech through a defence of truth, what is the potential middle ground? If it is liability only for publication in certain places, then how is this different from the present approach of private international law; if it is some other form of partial liability, does the approach not risk to always render a defendant at least partially liable?

305 In the copyright example referred to above, Dinwoodie discusses two possible compromises between the (in this case) restrictive approach of US law, under which the publication in question would be a copyright infringement, and the permissive approach of Caledonian law, which would allow the publication under an exception for educational use: (1) requiring the defendant university to impose technological measures that restrict access to the content in question to students and (2) requiring it to pay a license fee.[950] In practical terms, both of these solutions would also be available under the exclusive application of US law as access restrictions could bring the publication in question under fair use and licensing would simply end the copyright infringement. It is hard to see,

949 See Currie (n 141), 171–73.

950 Dinwoodie (n 152), 564–69; geo-blocking as a potential third option is however dismissed (see ibid, 565 fn 303).

therefore, what the consideration of another substantive law adds to the solution of the case other than emphasising certain aspects that are also present (but, in this case, not decisive) in US law.

306 Overall, the case for a move towards a substantive approach does not seem to be very strong. While cyberspace may bring the question of how the law should react to a changing, international environment 'into sharper focus',[951] it seems to also provide a particularly strong argument against a purely substantive approach: if online content is connected, through its accessibility, to almost every legal system in the world, the inconsistencies and conflicts between them cannot be solved exclusively at the level of substantive law.[952] Instead, the law must enable internet users to identify the courts that are available to them and in which they can be sued and, even more importantly, the rules which they have to follow. This is precisely the role of private international law – which it can fulfil, as will be shown, even in digital and borderless environments.

b. Arguments for Conflicts Rules

307 In opposition to the *ad hoc* nature of the different 'substantive law' methods, it has repeatedly been argued that the aims of private international law can best be achieved through abstract rules that may be influenced by 'conflicts' considerations (as defined above[953]) but remain blind towards the content of the substantive laws they refer to.[954]

951 ibid, 542.

952 See also above, at [251]–[255].

953 At [45].

954 See Shreve/Buxbaum (n 136), 266–67. In addition to the authors quoted in the next paragraph, see also Symeonidis (n 88), [371]–[379]; Rosenberg, 'The Comeback of Choice-of-Law Rules' (1981) 81 Columbia LRev 946, 958–59; Reese, 'Choice of Law: Rules or Approach' (1972) 57 Cornell LRev 315, 333–34; Mayer (n 5), [114]–[115], [174]–[175], [367]–[369].

Justice should be achieved through a just selection process, rather than through selecting just rules.[955]

308 In 1971 already, David F Cavers noted that

> *the pursuit of justice in the individual case does not require the abandonment of rules but rather the formulation of rules with their just operation in particular situations in view.*[956]

In similar spirit, P John Kozyris argued that

> *fixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression.*[957]

More recently, Ralf Michaels, advocated a move from 'from politics to technique',[958] distinguishing technique from the empty formalism that the 'revolutionists' were criticising:

> *Formalism views the law as a mere constraint: the adjudicator becomes a mere machine that applies the law. Indeed, in conflict of laws, Currie has ridiculed the idea of the conflict of law machine. Technique, by contrast, requires a technician. Conflict of laws as technique is a way of doing things, in relative oblivion to outcomes, and indeed (for the time being) politics.*[959]

309 Of course, none of these authors wants to go back to a purely mechanical private international law that relies on broad, metaphysically justified connecting factors and is

---

955 See Cavers, *The Choice of Law Process* (University of Michigan Press 1965), 80: '[E]ven when the application of neither [potentially applicable] law […] would itself be unjust, the process whereby the choice is made can be unjust.'

956 Cavers, 'Legislative Choice of Law: Some European Examples' (1971) 44 Southern California LRev 340, 360 fn 177. See also Cavers, *The Choice of Law Process* (University of Michigan Press 1965), 77–81.

957 Kozyris (n 944), 580.

958 Michaels, 'Post-critical Private International Law. From Politics to Technique', in Muir Watt/Fernández Arroyo (n 2), 54.

959 ibid, 66.

unaware of its political implications;[960] rather, they argue for their canalisation into rules of private international law that are designed in light of specific regulatory aims:

> *The argument […] is fairly simple. A (pre-critical) formalism that is blind to the politics of conflicts is undesirable. However, a critical antiformalism that merely emphasizes the politics of the field without guiding response can lead to a critique of law altogether, but not to new law. A legal response to conflict of laws requires technique. To be justified, such technique must maintain awareness of politics.*[961]

Although they do not ignore the fact that private international law ultimately needs to promote just substantive results, their primary focus seems to be the achievement of 'conflicts' justice in the sense conceptualised by Kegel.[962] Thus, Symeon C Symeonides concludes his seminal account of the American 'revolution' by identifying desireable characteristics of rules that 'should aspire for conflicts justice, but without being oblivious to the need of material justice.'[963]

310 This line of argument resonates strongly with the challenges of internet cases identified above. The internet has lead to a multiplication of increasingly tenuous connections,[964] to which courts have generally reacted in a manner protective of those who claim that their rights have been violated, ultimately giving effect to all of these connections.[965] This has resulted in the frustration of the entire triad of interests that are reflected in conflicts rules according to Kegel: the interests of the parties in the dispute at hand (because the claimant always wins the jurisdictional and choice-of-law battle); the interests of other, undetermined parties (because they cannot predict where they might be

960 See Rosenberg (n 954), 958: 'Today no one would defend the system of broad and mechanistic choice-of-law rules that held sway through the first half of this century'. See also Symeonidis (n 88), [373]; Reese (n 954), 334.

961 Michaels (n 958), 67.

962 See above, at [43]; see also generally II.B.1.a.

963 Symeonidis, *The American Choice-of-Law Revolution* (n 88), [373].

964 See above, [104]–[106].

965 See above, IV.B.2.b.

sued and which laws they need to follow); and the interests of the legal order (in meaningful coordination between different legal systems).[966]

311 To bring these different interests into better balance, the adjustment of current conflicts rules is an obvious first port of call.[967] Indeed, if the predominant problems in internet cases are a lack of guidance for courts and internet users and insufficient coordination between them, it makes sense to focus on the traditional function of private international law to allocate regulatory authority, rather than on the substance of the laws to be ultimately applied.

312 What is required, of course, are rules that give effect to the considerations and policies that are relevant in internet cases. But there is no reason to believe that private international law is unable to effectuate these policies using the tools presently available to it. One of the central problems identified above, for instance, is the fragmented interpretation that has been given to the place of the damage in online tort cases, making it a far more practically relevant criterion than other connecting factors. The resulting difficulties can be adequately discussed from a conflicts perspective – eg by linking them back to the classic discussion about how to balance out the paradigms of damage compensation and conduct regulation in cross-border tort cases.[968] In fact, it is quite evident that the current approach of EU private international law gives strong preference to the former paradigm and almost entirely ignores the latter – a regulatory choice[969] that has been made in the formulation of rules of jurisdiction and applicable law. This choice

966 See above, IV.B.2.a.

967 See also, with regard to IP law, Hatzimihail (n 306), 308: 'At the end of the day, the solution can be somewhere between formalism and anti-formalism, in the mould of what has characterized modern private international law: a system of several rules, primary, subsidiary, with the occasional escape device.'

968 See above, [48].

969 See above, n 104.

can be challenged independently of whether the ultimately applicable norms actually give effect to it.[970]

313 Of course, this is not to say that substantive law itself must be ignored. As the ultimate *raison d'être* of private international law is substantive disagreement between legal systems, its rules will always be informed by the essence of this disagreement. Where national approaches do not diverge to a significant degree, a wider application of foreign law may be acceptable than where the divergence is stronger, and further safeguards and exceptions may be required. Different levels of substantive harmonisation may even justify different conflicts rules depending on the legal systems involved – as can be found in many EU instruments.[971] But again, as far as rules of private international law are concerned, their application should be independent from whether or not any underlying substantive disagreement actually exists in a given case.

314 It is submitted that many of the problems that the above account of EU private international law has revealed can helpfully be discussed along these lines – especially since most of them seem to be strongly linked to individual connecting factors that have turned out to be difficult to apply to online cases. It is suggested to focus on these individual rules and connecting factors and to recommend their reinterpretation or reform in light of the new situations and problems to which they will be applied, rather than to suggest an entirely new methodological system.

315 Indeed, the vast majority of propositions that engage with the particular challenges of internet communication focus on (re-)formulating traditional rules that react to these

970 See, in a different context, Dornis, 'Local Data in European Choice of Law: A Trojan Horse from across the Atlantic' (2016) 44 Georgia JInt&CompL 305, 321–36. See also Trimble (n 796), 374–82.

971 In addition to the instruments on jurisdiction, the application of which generally depends on whether or not the parties are domiciled in the EU, see, eg, Art 3(4), 7(1), (3)–(5) Rome I, Art 6(3)(b), 14(3) Rome II. See also § 204(3) ALI Principles (n 451).

challenges and give effect to specific policies. This is true for the plethora of individual scholarly propositions, most of which have focused on how to counter the ubiquitous effects of internet communication through concentrating connecting factors,[972] as well as for more institutionalised efforts. While they may not exclude substantive considerations entirely,[973] the sets of principles that have been developed for conflict of laws in IP by the Max Planck Group on Conflict of Laws in Intellectual Property (CLIP)[974] and the American Law Institute[975] as well as the Geneva Internet Disputes Resolution Policies[976] all mark attempts to find better connecting factors that give effect to policies many of which – convenience, predictability, proximity – are well-established conflicts considerations.

316 It may not be all too optimistic, when Dan JB Svantesson concludes his survey of current rules as applied to internet cases by declaring:

> *[T]he rules of private international law are not forces of nature above and beyond our control. We have created these rules, and we can change them. […] With a solid understanding of what makes certain forms of Internet communication different to other forms of communication, we will be able to construct private international law rules that deal adequately with Internet activities.*[977]

This is the endeavour of the following sections.

---

972 See below, IV.C.2.a.

973 See Art 3:603(3) CLIP Principles and § 321(2) ALI Principles, both leaving the court some discretion to avoid undesirable substantive outcomes.

974 CLIP Principles (n 451).

975 ALI Principles (n 451).

976 Université de Genève, 'Geneva Internet Disputes Resolution Policies 1.0', 2016.

977 Svantesson (n 241), 513. This seems to echo Donovan LJ's speech in *Gray v Formosa* [1962] 3 P 259 (EWCA), 271: '[T]hese rules of private international law are made for men and women – not the other way round – and a nice tidy logical perfection can never be achieved. Certainly elementary considerations of decency and justice ought not to be sacrificed in the attempt to achieve it.'

2. Coordinating National Courts and Legislation

317 If private international law does indeed provide a potent tool box to effectively coordinate the claims to regulatory authority made by different national courts and legislators in internet cases, the next step is to pick the right tools. The key to do so, it has been argued, is to apply and, where necessary, adjust the existing rules and mechanisms of private international law in view of the specific (conflicts) policies they should give effect to. In this section, it will be shown how this may be done, starting with a discussion of how the potentially infinite number of connections created by internet communication can be concentrated in a limited number of places (a.). It will be argued that the focal point for such a concentration should be the parties involved in a given case (b.), before it will be discussed by which rules this concentration could best be achieved (c.), how these rules could be implemented within the current (European) legal framework (d.), and which counter-arguments must be considered (e.).

a. The Need for Concentration

318 Originally, many courts[978] and academic commentators[979] were prepared to justify the wide range of competent courts and applicable laws in internet cases by arguing that a party's decision to use the internet were testimony to their intention to address a worldwide audience – which would justify their worldwide liability.[980] For instance, the four judges of the High Court of Australia giving the leading speech in *Dow Jones v Gutnick* held:

> *However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those*

978 See *eDate* (n 180), [45]; *Gutnick* (n 261), [39] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [181] (Callinan J); *King v Lewis* (n 603), [29], [33]–[34] (Lord Woolf CJ, Mummery and Laws LJJ).

979 See Bigos (n 255), 612; Goldsmith (n 256), 1244; Höning, 'The European Directive on e-Commerce and its Consequences on the Conflict of Laws' (2005) 5 GlJurTopics, Art 2, 30; Schultz (n 316), 820 (with qualifications); Dessemontet, 'Internet, le droit d'auteur et le droit international privé' SJZ 1996, 285, 293.

980 See also Slane (n 6), 136–37.

> *who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.*[981]

Although claims of this kind have been particularly prominent in the early days of the internet, the ECJ still held in 2011 that

> *the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content.*[982]

319 Others have countered this line of reasoning,[983] arguing that it

> *represent[s] an antiquated view of Internet use and seem[s] to completely overlook the widespread use of the Internet for domestic, or even local, distribution of information. […] [E]ven if people know that everything they put on the 'net'* can *be accessed from virtually anywhere in world, that does not necessarily mean that they* intended *to publish in every jurisdiction on the planet, or indeed, that publication all over the world was a* natural and probable consequence *[…].*[984]

Consequently, these authors are not convinced that internet users should face the risk of worldwide liability based on the mere fact that the internet allows for the relevant content to be accessible from all over the world.[985]

320 The latter line of reasoning finds support, first, in the observation that in a growing number of cases, the decision to use the internet is not so much a decision to reach a worldwide audience, as it is a necessity to have any audience at all.[986] There are few publications left – from local newspapers over academic journals to entire books – that do not make at least some of their content available online, such access being essential for the ongoing viability of their enterprise. In a growing number of cases, the expectation of *any*

---

981 *Gutnick* (n 261), [39] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

982 *eDate* (n 180), [45].

983 On which see more generally Slane (n 6), 141–44.

984 Svantesson (n 241), 461–62.

985 See also Joubert (n 869), 477–80; Mankowski, in Magnus/Mankowski (eds), *Brussels Ibis Regulation* (otto schmidt 2017), Art 7, [349]–[350].

986 See also Svantesson (n 241), 461.

group of readers that content will be available online, and accessible from anywhere in the world, seems to drive the decision to use the internet; in turn, this decision becomes less and less indicative of any intention to reach a *specific* group of readers.

321 It has to be taken into account, second, that there is an ever-growing number of uses of the internet that are inherently unable to be segmented geographically.[987] Social networks like *Facebook* and *LinkedIn*, platforms that collect ratings of restaurants or hotels like *Tripadvisor* and *Yelp*, which facilitate transactions between their users like *AirBnB* or *eBay*, online repositories and databases like *SSRN*, *github*, *Wikimedia Commons* or *WikiData*, and encyclopediae like *Wikipedia* all rely on a large, international user base that contributes content or uses the platform in whatever other way it is designed for. Slicing up this user base into territorially defined sub-communities would undermine this very business model and effectively make many of these projects impossible.

322 None of this is to say that the defendant's decision to use a medium with worldwide reach might never justify worldwide liability.[988] But the question must be asked whether this rationale still carries the same weight as it did ten years ago – and whether it does so in all circumstances. One might argue, for instance, that the argument is much stronger in cases that involve the conclusion of contracts with, or even the delivery of goods to,

---

987 On the impracticability of geo-blocking see Dinwoodie (n 152), 565 fn 303. At the same time, some forms of internet use have certainly become a lot easier to split up in that way; cf Thünken (n 178), 935, considering online advertising as 'indivisible'.

988 See, for instance, the *caveat-maleficus* approach to torts committed through the cloud discussed by Andrews/Newman, 'Personal Jurisdiction and Choice of Law in the Cloud' (2013) 73 Maryland LRev 313, 362–64, esp 363: 'Under this theory, jurisdiction would automatically—and only as a balancing mechanism—be proper in the plaintiff's place of residence. While this proposal might appear rigid and overly plaintiff-friendly, the very nature of torts in the cloud warrants its perceived harshness to defendants.'

people in the country in question[989] than in cases in which someone simply adds a description of a local restaurant to an online map.

323 Of course, many authors have not left it there but have started to look more generally for alternative connecting factors that could be used to limit the legal implications of the ubiquitous effects of internet communication to certain jurisdictions. Notably, most propositions of this kind would qualify as conflicts rules of a traditional kind, as they are aimed at giving effect to certain policies without sacrificing the substantive blindness of traditional private international law.

324 One of the first such factors to be widely discussed was the *place of the server*, which, in the early days of the internet, appeared as a reliable, easily-identifiable criterion similar to more traditional factors of private international law.[990] With the rapid increase in bandwidth, the growing availability of server space all over the world and the emergence of all kinds of shared computing, it has quickly turned out, though, that the place of the server, just as all other physical elements of the internet's infrastructure, would often be very hard to identify, could easily be manipulated, and would often have no meaningful connection to the case at hand.[991] As a consequence, it seems to have long lost most of its proponents.[992]

---

989 In *Mühlleitner* (n 749), [44], the ECJ held that the fact that a contract has been concluded at a distance is an indication that it is connected to an activity directed at the Member State in question; see also *Emrek* (n 742), [26], [29]; *L'Oréal* (n 395), [65].

990 See, eg, *Gutnick* (n 261), [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Canadian Association of Internet Providers* [2004] SCC 45, [146] (Le Bel J, dissenting); see also Slane (n 6), 136.

991 See, eg, *Wintersteiger* (n 630), [36]: '[I]n view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be the place where the event giving rise to the damage occurred.'; see also Reindl, 'Choosing Law in Cyberspace: Copyright Conflicts on Global Networks' (1998) 19 Michigan JIntL 799, 834–36; Gössl (n 255), 275–76.

992 See *Wintersteiger* (n 630), [36]; *Football Dataco* (n 311), [44]–[46]; Bigos (n 255), 603; Briggs (n 14), [3.156]; Hörnle (n 710), 126; Svantesson (n 241), 356–57; Gössl (n 255), 275–76. It is all the more surprising that a US District Court still relied on it in *MacDermid, Inc v Deiter* 702 F3d 725 (2nd Cir 2012).

325 A second relatively old criterion, which is however still advocated by many authors, is the *country of origin* – referring to the country from which an online activity emanates.[993] This country can be identified in a number of ways: it can be the online actor's country of domicile,[994] their country of residence,[995] the country in which they are established,[996] registered, or incorporated, or even the country in which they acted[997].[998] What all these places have in common is that they establish a single connection between an online act of communication and a country that is easily predictable for internet users[999] and would be well placed to regulate said act of communication.[1000] Given that this connection focuses on the 'starting point' of said act, it also remains unaffected by the multiplication of connections usually created by online communication.[1001] However, there seem to be at least three distinct ways in which the concentrating effect of this single connection can be used.

326 *First*, the country of origin can be relied on to create a fiction that some acts of communication exclusively happened in a certain place, regardless of which other

---

993 See Maier (n 316), 170–71. In the context of IP law, the term 'country of origin' is however often used to refer to the country in which a certain work has first been published (see Art 5(4) Berne Convention; Schack (n 632), 91–94). This terminological ambiguity can be explained by the particular focus that is put on the position of the rightsholder in this context. This is why the criterion, were it understood in that way, would do little to overcome the difficulties with the present, claimant-centred approach discussed above.

994 See Ginsburg, 'Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure' (1995) 42 J Copyright SocUSA 318, 338.

995 ibid.

996 See Art 2(d), 3(1), (2) e-Commerce Directive; see also C Reed, *Internet Law. Text and Materials* (CUP 2004), 253; and see Reindl (n 991), 833: 'the company's principal place of business'; Beckstein, *Einschränkungen des Schutzlandprinzips* (Mohr Siebeck 2010), 315–17.

997 See Reindl (n 991), 827, 833; Trimble (n 796), 359, 361; see also Ginsburg, 'Private International Law and of Copyright in an Era of Technological Change' (1998) 273 Recueil des cours 239, 332: 'the initiating act'.

998 On the right choice between them, see below, [354]–[356] and [367]–[369].

999 Kohl (n 176), 164; Kohl (n 330), 49; Reindl (n 991), 827, 832–33; Thünken (n 178), 936; Trimble (n 796), 361.

1000 See Hörnle (n 176), 108–13; Reindl (n 991), 827, 831; C Reed (996), 253–54.

1001 Kohl (n 176), 165.

countries they reach or affect. This approach has famously been taken in the EU Satellite and Cable Directive, according to Art 1(2)(b) of which an act of communication must be considered to happen exclusively in the country in which the satellite transmission was initiated.[1002] It is informed by the wish to concentrate regulatory authority over providers of information that regularly reaches numerous member states in a single one of them.[1003]

327 *Second*, the country of origin can be used as the basis of an actual conflicts rule, which refers internet cases to the courts and/or substantive laws of the country in which the internet user who committed the act in question has their domicile or some other kind of establishment.[1004] A rule of this kind is currently being used for infringements of uniform EU IP rights,[1005] with jurisdiction and choice of law both being concentrated in the country 'in which the act of infringement has been committed'.[1006] With regard to the applicable law, this concentrating effect has recently been emphasised by the ECJ when it held that the correct approach to identifying this country under Art 8(2) Rome II

> *is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened.*
>
> *Such an interpretation enables the court seised easily to identify the law applicable by using a single connecting factor linked to the place where the act of infringement at the origin of several acts alleged against a defendant was committed or threatened, in accordance with the objectives [or the Rome II Regulation].*[1007]

1002 See above, [65]; see also De Miguel Asensio (n 452), 151.

1003 See recital (14) Satellite and Cable Directive: 'such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting'. See also Kightlinger, 'A Solution to the Yahoo! Problem? The EC e-Commerce Directive as a Model for International Cooperation on Internet Choice of Law' (2002–03) 24 Michigan JIntL 719, 746–47.

1004 In favour of such a rule: Ginsburg (n 994), 338.

1005 See above, [206], [209].

1006 Regarding jurisdiction, see Art 82(5) Regulation (EC) 6/2002 and Art 125(5) Regulation (EU) 2017/1001 (as interpreted in *Coty Germany* (n 574), [34]–[37]; see above [206]); regarding choice of law, see Art 8(2) Rome II.

328 Interestingly, Art 3(2) of the e-Commerce Directive had originally been interpreted by some commentators as implementing a similar connecting factor.[1008] This interpretation has however famously been rejected by the ECJ in *eDate*,[1009] where the Court established a *third* kind of country-of-origin approach instead. Under this approach, the applicable law(s) are identified by rules of private international law using other connecting factors but their substantive effects are curtailed to the standard of liability that exists under the law of the information society service provider's country of establishment. While the approach realises the potential for concentration more indirectly, the EU legislator has recently hinted towards its expansion into areas of law to which the e-Commerce Directive does not yet apply.[1010] Considering how many of the difficulties identified above can be linked to overlaps of adjudicatory and prescriptive jurisdiction, this orientation towards a country-of-origin approach should be welcomed.[1011]

329 A third criterion that would allow for a concentration of jurisdiction and applicable laws is the criterion of *targeting*. Unlike the first two criteria, it does not aim to identify a single country that may be particularly closely connected to a given online activity but rather narrows jurisdiction and applicable law based on wider criteria (such as accessibility) to those legal systems towards which the activity in question has been directed.[1012] Two of the best known examples for such a test can be found in Art 17(1)(c)

1007 *Nintendo* (n 658), [103]–[104]; see also ibid, [65]–[66], applying a similar reasoning to the interpretation of Art 82(1) Regulation 6/2002; and see BGH 9 Nov 2017 (n 664), [34], extending the ECJ's interpretation of Art 8(2) Rome II to Art 97(5) Regulation 207/2009.

1008 See above, n 178.

1009 *eDate* (n 180), [68]. See also above, at [68].

1010 See Digital Single Market Strategy (n 230), 5.

1011 See also below, [342].

1012 See generally Kohl (n 36), 278–80; Kohl (n 330), 44–47; Geist, 'The Shift Toward "Targeting" for Internet Jurisdiction', in Thierer/Crews (n 244), 91.

Brussels Ia and Art 6(1)(b) Rome I, both of which make the application of the consumer-protection rules dependent on the contract being concluded

> *with a person who [...] by any means, directs [commercial or professional] activities to [the Member State of the consumer's domicile] or to several States including that Member State […].*

330 Like the country of origin, this criterion is not without ambiguity. It seems to be understood by its proponents in two different ways. The majority of courts[1013] and authors[1014] understand it as a *subjective* criterion that relies on the intention of the defendant – which may however be 'manifested' through objective factors such as the language used in a publication or the currency accepted for a transaction.[1015] Interpreting what is now Art 17(1) Brussels Ia, the ECJ, for instance, has held that for the provision to be applicable,

> *the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile.*
>
> *It must therefore be determined […] whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers.*[1016]

The Court later referred to this test to define certain acts of distribution under EU

1013 See, eg, BGH 12 Dec 2013 (n 695), [24]; *Arzneimittelwerbung* (n 695), [21]. BGH 29 Apr 2010 *Vorschaubilder*, BGHZ 185, 291, [14]; but see now BGH 21 Apr 2016 *An Evening with Marlene Dietrich*, GRUR 2016, 1048, [18], abolishing the criterion for infringements of IP rights.

1014 See, eg, De Miguel Asensio (n 452), 142; Depreeuw/Hubin (n 646), 753–56, 764; Lein, in Dickinson/Lein (n 93), [4.113]; Mankowski (n 985), [350]–[359] (although not excluding objective factors such as language: ibid, [353]–[354]); Savin (n 184), 59; Schultz (n 316), 816–19; Stone (n 622), 22–23; Van Eechoud (n 174), 224–25. See also Art 2:202 CLIP Principles; § 204(2) ALI Principles.

1015 See the objective factors listed in *Pammer* (n 745), [81]–[84].

1016 *Pammer* (n 745), [75]–[76].

instruments of IP law,[1017] and so did AG Jääskinen when he advocated the adoption of a similar test for internet cases more generally.[1018]

331 But there is also a second possible interpretation, according to which an activity is only targeted at a certain jurisdiction if it is *objectively* connected to it.[1019] Relying on a number of decisions by national courts on personality-right violations,[1020] such an objective criterion had been proposed by AG Cruz Villalón as part of the 'centre of gravity' approach he proposed in *eDate* – and which the ECJ adopted incompletely, by relying exclusively on the place at which the defendant's reputation is most affected to determine its 'centre of interests'[1021]. The Court's case law interpreting Art 4(1)(a) Data Protection Directive may also be seen as relying on an objective understanding of targeting.[1022]

332 Both understandings of targeting seem to have in common that they constitute a halfway point between concentrating jurisdiction and choice of law in a single country and the present mosaic of overlapping competences. They appear to strike a fair balance between many of the underlying considerations not least because a party that has targeted a certain country might be expected to defend an action in its courts and be subject to its national law.[1023] Accordingly, it may not be surprising that the ECJ has extended the

1017 *L'Oréal* (n 648), [64]–[66]; *Football Dataco* (n 311), [39].

1018 AG Jääskinen, Opinion on *Pinckney* (n 642), [63]–[66]. The requests for a preliminary ruling in *eDate* (n 180), [24], *Pinckney* (n 635), [15], and *Hejduk* (n 447), [14], may also be understood in this sense.

1019 See Reymond, 'Jurisdiction in Case of Personality Torts Committed over the Internet' (2012/13) 14 Yb PIL 205, 217–21; Svantesson (n 241), 365–68; Lutzi, '"Cross-border Defamation" auf Wikipedia', RIW 2014, 810, 813. See also *Burke v NYP Holdings* (n 877), [29], and Slane (n 6), 142–43, 149.

1020 Most importantly BGH, *New York Times* (n 865), [20]; see also *Harrods v Dow Jones* [2003] EWHC 1162 (QB), [32]; *Gutnick* (n 261), [154]; BGH 25 Oct 2011, BGHZ 191, 219, [11].

1021 See *Bolagsupplysningen* (n 589), [33].

1022 See *Weltimmo* (n 850), [32], [41], and *Google Spain* (n 386), [60], both searching for an objective connection between an establishment and the country towards which its activity is directed.

1023 See Van Eechoud (n 174), 224.

criterion (without necessarily specifying how it should be understood) to new areas typically involving vulnerable parties,[1024] such as data protection[1025] and acts of unfair competition affecting consumers.[1026]

333 Despite its undeniable appeal, the concentrating potential of the criterion may be smaller than one might think. Many of the arguments against effectively unrestricted jurisdiction of national courts and applicability of domestic laws that have been discussed above[1027] also apply to the criterion of targeting. In many cases, there simply will not be any targeting, at least in the subjective sense; users of social networks and other online platforms, for instance, may be considered to target a certain community, but they will rarely target a specific country.[1028]

334 In addition, it has to be kept in mind that today, the internet is used by a large variety of users for an even larger variety of purposes. Most of them will not organise their activity in any way and draw any form of distinction dependent on where the other party of a legally relevant interaction may be based. Under the new Geo-Blocking Regulation, they may even be prevented from doing so (within the EU).[1029] This is not to say that there are no cases in which targeting could be easily established and thus fulfill a helpful filtering function; but in many others, it appears at least questionable whether a criterion that seems to have no practical relevance should be a major factor in allocating jurisdiction and identifying the applicable law(s).

1024 See above, [236].

1025 See *VKI* (n 111), [75]–[77], [81], *Weltimmo* (n 850), [41], and *Google Spain* (n 386), [60], on Art 4(1)(a) of the Data Protection Directive; see now Art 3(2) GDPR.

1026 *VKI* (n 111), [43]. See also above, [236].

1027 At [320]–[321].

1028 See Mills (n 325), 26. See also *King v Lewis* (n 603), [34]: 'it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has "targeted", when in truth he has "targeted" every jurisdiction where his text may be downloaded.'

1029 See above, [237].

b. Focusing on the parties

335 Although most commentators agree that there is something to be said for greater concentration of jurisdiction and choice of law in individual, clearly identifiable jurisdictions, several connecting factors seem to be available to achieve this. It is submitted that in order to chose the right ones and to build a better and more coherent approach to internet cases, the focus must shift from the physical places in which internet communication may be considered – with a certain degree of artificiality – to have real-world consequences back to where the parties involved in it are located.

336 Jack L Goldsmith already argued in his seminal article 'Against Cyberanarchy' from 1998 that those questioning the ability of national law to regulate 'cyberspace'

> *overstate the differences between cyberspace transactions and other transnational transactions. Both involve people in real space in one territorial jurisdiction transacting with people in real space in another territorial jurisdiction in a way that some times causes real-world harms.*[1030]

While it has been shown above that the focus on said 'real-world harms' has, in fact, been one of the main reasons for the difficulties of private international law to accommodate the multiplication of connections prevalent in internet cases, a shift of focus towards the 'people in real space' who are acting online might be the key to their resolution.

337 Such a shift has been advocated before, by authors who were often writing more generally about the challenges of applying traditional rules of private international law to the internet.[1031] Pierre Mayer, for instance, has argued that

---

1030 Goldsmith (n 256), 1200.

1031 See also Bigos (n 255), 590; Reindl (n 991), 815; Brand, 'Persönlichkeitsrechtsverletzungen im Internet, E-Commerce und „Fliegender Gerichtsstand"' NJW 2012, 127, 129. With regard to contracts performed online, see Hague Conference, Geneva Round Table on Electronic Commerce and Private International Law (n 711): 'If the performance takes place on-line, the place of performance is not appropriate as a connecting factor. In that case, the relevant connecting factors are *the location of each of the parties involved*.' (own emphasis); with regard to infringements of IP rights, see § 321 ALI Principles, Comment b.: 'In choosing the appropriate laws to govern the issues in dispute, the parties and the court should seek to determine the places with the most significant relationship to the dispute. Because intellectual property rights are intended to create incentives to innovate, the States most

> *certainly, the nature of the means of communication used by the parties provides quite a weak basis for the invention of a world that is different from the real one; what counts more are the persons and goods implicated, the reality of which remains unchanged.*[1032]

In similar fashion, Adrian Briggs surmised that

> *[i]n the absence of a more radical alternative, a tentative guess may be that the place where the individuals, or their day-to-day office premises, are located will prove to be more significant than where the hardware is, and that both will be more significant than the notional places where links in the chain of communication may be found. […] Rough and ready locations can be ascribed to the persons who communicate, and the legal analysis may proceed from there.*[1033]

The most straightforward formulation of this idea may have been provided by Dan JB Svantesson – who argues that '[p]ersons, whether legal or natural, are always located somewhere'[1034] – while its most colourful illustration has been given by William G Jiménez and Arno R Lodder – who compare the sender and recipient of online communication to two harbours and the act of communicating to the high seas.[1035]

338 Considering the above account of connecting factors that promote a certain concentration, two criteria seem suited to put such a shift of focus into practice: the country of origin and the targeting test. Both criteria put an emphasis on the parties: the first one by focusing on the author of the relevant act of communication or internet use and the second one by focusing on its (potential) recipient(s). In the terminology established above,[1036] the country-of-origin criterion focuses on the defendant internet user

---

closely connected to that objective are those *where the parties resided, made their investment decisions, expected to exploit the work, and (where relevant) entered into a relationship*.' (own emphasis).

1032 Mayer (n 5), [55] (own translation).

1033 Briggs (n 14), [3.156].

1034 Svantesson, 'The Extraterritoriality of EU Data Privacy Law' (2014) 50 Stanford JIntL 53, 60.

1035 Jiménez/Lodder, 'Analyzing approaches to internet jurisdiction based on a model of harbors and the high seas' (2015) 29 Int Rev LCompTech 266, 268–69.

1036 See n 801.

while the targeting test focuses on the claimant. It is submitted that the link between the two criteria, and the factor that allows for their reconciliation, is the consideration of legitimate party expectations, which underlies both of them.

339 The protection of justified expectations is not only one of the oldest 'conflicts' considerations (in the sense established above[1037]),[1038] it also is one of the most universally acknowledged objectives of private international law.[1039] Thus, the current edition of *Dicey, Morris & Collins* states right at the outset that

> *[t]he main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.*[1040]

In 1942 already, Robert Neuner identified party expectations as one of just three policies underlying 'the whole system of conflict of laws', arguing that

> *[i]f the judge applies a rule, which is in fact new, as if it had been in force at the moment when the parties acted, the expectations of parties must necessarily be disappointed. Various remedies have been proposed to satisfy our sense of justice in this type of situation. It is the same consideration of justice, namely to respect the expectations of the parties, which permeates the whole body of rules of conflict of laws.*[1041]

1037 At II.B.1.a.

1038 Kegel starts his elaboration on 'conflicts' considerations (Kegel (n 80)) by pointing out that 'Every state considers their private law to be the most equitable […]. Still, it may be unjust for a state to apply its seemingly most equitable law. This is the case where the parties did not have to expect the application of *this* private law.' (ibid, 270, own translation).

1039 In addition to the authors quoted below, see Reese (n 954), 329–33; Rheinstein (n 29), 17–20; Shreve (n 52), 286–87; Svantesson (n 241), 101–03. See also American Law Institute, 'Restatement (Second) of Conflict of Laws' (1971), § 6 comment g.: 'Protection of justified expectations. This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.'

1040 Lord Collins et al (n 15), [1-005].

1041 Neuner (n 27), 482.

Similarly, Elliott E Cheatham and Willis LM Reese, in their seminal article on 'Choice of the Applicable Law',[1042] considered the protection of justified expectations as 'one of the basic reasons why we have choice of law rules at all.'[1043]

340 The protection of these expectations can take many forms. A classic example is the interpretation of the place of the wrong as the place of the wrongdoer, rather than the place of the harm, because

> *[o]nce we have recognized that the law of torts is the law of loss shifting and that, in general, our society allows the shifting of a loss to its author only when that author has failed to live up to the standard of the community, we know that […] the standard can, at least as a general rule, be furnished only by that community with the application of whose standard the actor could reckon when he carried on his conduct.*[1044]

In other words, an actor will often have a legitimate expectation that their acts are governed by the law of the country in which they acted,[1045] rather than by the law of the country in which their acts may have effects.[1046]

341 It is submitted that this line of reasoning can be extended to the more specific problem of internet cases and provide helpful guidance on how to address the aforementioned challenges. Just as any other private actor, few internet users[1047] will expect to be subject to the courts and domestic laws of all countries in which the internet content they upload and interact with can potentially be accessed; instead, their

---

1042 Cheatham/Reese, 'Choice of the Applicable Law' (1952) 52 Columbia LRev 959.

1043 ibid, 971.

1044 Rheinstein (n 29), 25–26. See also above, [48].

1045 Against this, it has been argued by Vischer (n 56), 94, that '[p]arties who are not experts in conflict of laws normally direct their expectations to a result rather than to the choice of law.' While this may be true, such a result will usually be informed by a certain substantive law – which brings the question back to which law a party usually expects to apply.

1046 Interestingly, Art 4(1) Rome II does not follow this approach, even though the expectations of the alleged tortfeasor play a significant role in its regard (see recital (16)).

1047 Regarding the expectations of the other party, see below, [344].

expectations will usually focus on the courts and laws of the country in which they are acting, and of the practice and content of which they are actually aware.[1048]

342 This observation provides an argument for a country-of-origin approach,[1049] which would align jurisdiction and choice of law with the legitimate expectations of internet users and overcome their present inability to comply with every law they may potentially be subject to.[1050] Chris Reed, who has done extensive research on how national law can remain relevant in cyberspace,[1051] has argued in a different context that

> *[c]ountry of origin regulation […] is the only regulatory model so far attempted which, at least in the author's opinion, is capable of resolving the conflicts between the multifarious and overlapping claims by national jurisdictions to regulate particular Internet activities.*[1052]

343 Indeed, the idea that the users and providers of services that regularly cross national borders should only be subject to the law of the country in which they are resident and acting underlies many of the different iterations of a country-of-origin approach that have been implemented in the European Union.[1053] Thus, the substantive approach in the Satellite and Cable Directive,[1054] the *lex-loci-actus* rule in Art 8(2) Rome II[1055] and the country-of-origin principle in Art 3(2) e-Commerce Directive[1056] are all based on the aim of reducing legal uncertainty and creating a predictable framework for the users and providers of the services in question.[1057]

1048 See also C Reed (n 245), 13–16.

1049 See also Ginsburg (n 994), 338; Reindl (n 991), 832.

1050 On which see Svantesson (n 439), 349–50; Dinwoodie (n 152), 551–52.

1051 See C Reed (n 245), *passim*.

1052 C Reed (996), 250.

1053 As to which, see above [326]–[328].

1054 See recitals (7), (14) Satellite and Cable Directive.

1055 See *Nintendo* (n 658), [104], attaching particular importance to 'the predictability of the law thus designated for all the parties'.

1056 See recitals (5), (22) e-Commerce Directive.

1057 See also Trimble (n 797), 361.

344 Yet, increasing predictability for the party who is claimed to be liable for using an information society service by giving effect to their expectation to be subject only to their 'own' courts and laws comes at the risk of frustrating the legitimate expectations of the party trying to establish this liability, who may expect to be protected by *their* home courts and laws.[1058] That potential claimants indeed attach a lot of significance to this protection is evidenced by the fact that the claimants in every single case decided by the ECJ in the context of private international law and internet communication[1059] had seised the courts of their own country of domicile/registration or application of this country's law. Besides, whereas the ECJ has repeatedly reiterated that the grounds of special jurisdiction in Art 7(2) Brussels Ia do not aim to protect the claimant,[1060] the European Court of Human Rights has held in the context of a television broadcast that not giving the claimant access to the courts of their home country despite the programme in question having an obvious connection to it would be a violation of Art 6(1) ECHR.[1061]

345 These different expectations thus need to be brought into balance. It is submitted that the expectations of the defendant internet user or service provider are a legitimate starting point. First, because it has been shown above that the present framework of EU private international law has particularly adverse effects on those who may be claimed to be liable for using or providing internet services;[1062] and second because the EU is

1058 See Carrascosa (n 424), [63], putting a strong emphasis on the practical disadvantages for the defendant who may only seise the courts of the defendant's country of domicile.

1059 See above, IV.B.1. The decision in *Bolagsupplysningen* (n 589) is the only one in which this attempt remained unsuccessful.

1060 See above, n 768.

1061 *Arlewin v Sweden* App no 22302/10 (ECtHR 1 Mar 2016), [72]–[73]. The claim was considered to fall outside Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) and its country-of-origin rules: ibid, [61]–[64].

1062 See above, [253]–[254].

committed to reducing 'barriers and fragmentation' within the Digital Single Market[1063] to encourage internet use by individuals and businesses, providing 'a clear and stable legal environment' that makes it easy for them 'to operate as effectively anywhere in Europe as it is home.'[1064] Vesting adjudicatory and legislative competence in the country of origin of internet communication aligns with these aims.

346 This country-of-origin rule must still be balanced out by a claimant-sided criterion (combined with a targeting test) in certain cases in which a potential claimant's wish for 'home country' protection is particularly justified. This is the case, in particular, were there is a structural imbalance between claimant and defendant. EU private international law addresses such an imbalance in consumer (and a small number of other) contracts, specifically with the aim to protect their reasonable expectations.[1065] It is submitted that this approach – which is subject to the targeting test of the aforementioned Art 17–19 Brussels Ia and Art 6 Rome I – can be extended to internet cases, and beyond the area of contract law. Consumers who act in pursuit of their private needs of consumption[1066] and who want to establish the liability of someone using or providing information society services in pursuit of their professional activities should be able to rely on the protection offered by the courts of their domicile and under the laws of their habitual residence.[1067] Access to these courts and application of these laws would thus be subject to two requirements: the claimant must be in a structurally weaker position vis-à-vis the defendant and the defendant must have taken steps (or could have avoided) that their acts have effects in the claimant's jurisdiction.

1063 Digital Single Market Strategy (n 230), 3.

1064 Mid-Term Review on the implementation of the Digital Single Market Strategy (n 302), 2.

1065 See Tang (n 483), 160–61.

1066 As to the exact definition, see below, [363].

1067 As to the specific connecting factors, see below, [358]–[365], [370].

347 A targeting criterion that focuses on the claimant would therefore balance out the rigidity of the country-of-origin approach and realises a regulatory aim (the protection of structurally weaker parties) without taking the defendant completely by surprise. As explained above, a similar combination between a straightforward, predictable default rule and a targeting-based exception for consumers already exists in the EU private international law for consumer contracts,[1068] which was drafted in light of the emergence of online communication.[1069] But interestingly, such a combination had already been suggested much earlier as a potential answer to the challenges raised by the internet.[1070] JANE C GINSBURG, for instance, had already suggested the use of alternative connecting factors for certain internet cases (including the defendant's residence or principal place of business) in her 1998 Hague lecture[1071] while ANDREAS REINDL had argued that '[internet-]related choice of law rules should rely primarily on the place from which an act of use originates';[1072] although there are can be good reasons to supplement this connecting factor to ensure the effectiveness of substantive law and the adequate protection of affected parties,[1073]

> *[b]oth copyright choice of law cases and complex conflicts cases outside copyright law suggest that an element of potential knowledge or perhaps even intent must exist before foreign copyright laws are applied to ensure fairness toward the defendant.*[1074]

348 Such a combination of two different criteria that allow for a concentration of jurisdiction and choice of law seems to present a number of significant advantages. It not

---

1068 Art 17–19 Brussels Ia, Art 6 Rome I.

1069 See *Pammer* (n 745), 62.

1070 See also Dessemontet (n 979), 291–92.

1071 Ginsburg (n 997), 332–33.

1072 Reindl (n 991), 831.

1073 See ibid, 836.

1074 ibid, 844.

only strikes a reasonable balance between the legitimate expectations of the two parties, but also promises to increase legal certainty (by relying on a simple default rule with limited exceptions) and proximity (by making said exceptions dependent on a number of requirements). Relying on the same considerations for jurisdiction and choice of law will also regularly create a (desirable)[1075] congruence between jurisdiction and choice of law.

349 At the same time, the proposition is evidently not immune to criticism. While the country-of-origin approach seems to raise obvious questions as to the incentives it creates for forum shopping and a regulatory race to the bottom,[1076] the targeting exception can be criticised for reducing the legal certainty that the approach should aim for. These and other counter-arguments evidently have to be taken into account; but it is submitted that many of them can be addressed through the conscious design of an approach built on the foundation just developed. Thus, the proposed approach and its possible implementation will be elaborated[1077] before discussion of its potential shortcomings.[1078]

c. Proposal for a New Approach

350 In the following section, the different considerations and ideas that have just been developed will be put together and translated into specific 'conflicts' rules that could supplement and adjust the existing rules and instruments of EU private international law. The aim of these rules will be to provide a more coherent, predictable legal framework for cross-border disputes involving the use or provision of information society services.

351 Private international law coordinates national courts and legislators with regard to these disputes on two levels, jurisdiction and applicable law. While the proposed

1075 See Trimble (n 797), 362.

1076 See, eg, Reindl (n 991), 836; Dinwoodie (n 152), 540.

1077 Immediately below, under IV.C.2.c., d.

1078 Below, under IV.C.2.e.

combination of a country-of-origin approach and a targeting-based exception for structurally weaker parties holds potential for both, its specific formulation will differ between the two levels.

(1) Jurisdiction

352 A first significant difference between jurisdiction and choice of law consists in the fact that the assumption of jurisdiction rests on multiple, sometimes overlapping grounds, whereas the applicable law for a particular obligation or issue is determined according to a theoretically seamless system of rules. Consequently, jurisdiction within the EU can be vested in the courts of more than one member state while the applicable law will have to be the law of only a single country.[1079] Indeed, despite the obvious need for concentration at both levels, several fora might be considered as potential implementations of the country-of-origin approach advocated above – and *a priori*, there is no reason to only rely on one.

— A Country-of-Origin Default Rule

353 In light of all that was said above, a concentration of jurisdiction at the country of origin of the act in question would however be difficult to reconcile with certain fora that are currently available, such as the place of the damage for torts or the place of performance for contracts. In internet cases, connecting factors that rely on physical places and focus on the effects of acts done online rather than on the actors, have generally turned out to be very difficult to give meaningful effect to.[1080]

1079 This does not mean that there is no room for provisions from other laws; this has always been possible through the traditional *ordre public* and *lois de police* exceptions and seems to be more common under European legislation with provisions such as Art 6(2) Rome I and Art 14(2), (3) Rome II carving out significant exceptions from a potential party choice of law; see also Art 17 Rome II, discussed below at [412].

1080 See above, IV.B.1. See also Svantesson (n 439), 438, 440–68.

354 Instead, a country-of-origin approach in the sense discussed above requires grounds of jurisdiction that clearly focus on the defendant information society service provider or user. Different connecting factors may fall into this category, but the one that usually reflects the most permanent and substantial connection between a person and a jurisdiction, and the most uncontested basis for the exercise of adjudicatory jurisdiction, is their 'domicile'. This is reflected in Art 4(1) Brussels Ia, which vests general jurisdiction in the courts of defendant's member state of domicile[1081] – a rule which gives effect to the principle of *actor sequitur forum rei*[1082] and aligns with the country-of-origin principle advocated in this thesis.[1083]

355 The same is true for mere extensions of this rule such as special jurisdiction over a branch, agency, or establishment under Art 7(5) Brussels Ia and other places of permanent establishment as defined in the e-Commerce Directive,[1084] which all seem to provide an adequate basis for country-of-origin-based jurisdiction.[1085] Unlike the criterion of domicile, they have the advantage of being activity-specific. Where a company is incorporated in one member state but appears to have exercised the activity in question from a fixed establishment in another,[1086] jurisdiction should also be vested in the courts of this member state; where it has more than a relevant establishment in more than one

1081 The Regulation only contains an autonomous definition of the term 'domicile' as far as legal persons are concerned (in its Art 63) but refers to the laws of each member state to ascertain whether a natural person is domiciled (in its Art 62). While this undeniably reduces the predictability of the criterion, the proposition made here aims to align with the Brussels Ia Regulation; instead of trying to fix the imperfect definition of domicile in its Art 62, it will supplement the criterion as discussed in the next paragraph.

1082 See *Coty Germany* (n 574), [38]; *Besix* (n 722), [53]. See also recital (15) Brussels Ia.

1083 See also Lutzi (n 776), 706–07, and more generally Svantesson (n 439), 426. As to the criterion used in the e-Commerce Directive, see immediately below, [355].

1084 See recital (19) e-Commerce Directive: '[T]he actual pursuit of an economic activity through a fixed establishment for an indefinite period.' Although the Directive does not contain rules on jurisdiction, it aims for a similar concentration regarding choice of law.

1085 See also Reindl (n 991), 833.

1086 Regarding the relevant threshold under Art 7(5) Brussels Ia, see *flyLAL* (n 464), [63]–[64].

member state, jurisdiction should be vested in the one most closely connected to the internet activity in question.[1087]

356 Whether this actor-based approach should be extended further to accommodate the causal-event limb of Art 7(2) Brussels Ia, according to which jurisdiction is also vested in the courts of the place of the event giving rise to the damage,[1088] is more difficult to decide. On the one hand, the criterion certainly aligns well with the predictability dimension of the country-of-origin approach; in fact, an actor may often be particularly aware of the legal environment at the place in which they are acting. On the other hand, the place in which a person actually acted will often be difficult to ascertain in online cases and is open to a certain degree of manipulation. Yet, neither of these obstacles is insurmountable. Helpful guidance on how to make the criterion workable can be found in a number of decisions by the ECJ. In *Wintersteiger*, the Court rightly put the focus on the actual tortfeasor as the party who activated the technical process, rather than on the third party who may have technically executed it;[1089] it also explained that for legal persons, the place of acting can usually be assumed to be their place of primary establishment.[1090] In *Nintendo*, the Court clarified that the similar criterion in Art 8(2) Rome II must be understood, in case of multiple acts of infringement,

> *not to refer to each alleged act of infringement, but [to require the court] to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened.*[1091]

1087 See also recital (19) e-Commerce Directive.

1088 See *Coty Germany* (n 574), [49]; *Bier* (n 569), [19].

1089 *Wintersteiger* (n 630), [34]. See also Mankowski (n 575), 439–41.

1090 *Wintersteiger* (n 630), [37]. See also Beckstein (n 996), 316. The Court's interpretation of the 'event giving rise to the damage' in *Wintersteiger* aligns with its decision in *eDate*, according to which in a case of online defamation, the place of the causal event was to be understood as referring to 'the place where the publisher of the defamatory publication is established' (*eDate* (n 180), [42]–[43]).

1091 *Nintendo* (n 658), [103]; see also *flyLAL* (n 464), [53], [56].

In the interest of avoiding frictions with the existing rules on jurisdiction and in order not to unnecessarily reduce the number of fora available to the victims of online torts committed online, it seems preferable to preserve the criterion of the place giving rise to the damage, provided that it does not lead to jurisdiction of the courts in an entirely fortuitous member state, in which the defendant may have unknowingly acted, eg while travelling. Jurisdiction of the courts of the member state in which the causal even took place will be most relevant where a defendant natural person is resident in a country in which they are not domiciled under the relevant national rules.[1092]

357 If one were to put these different considerations into a single formula, it might read as follows:

> **(1) In cases relating to the pursuit or use of an information society service, jurisdiction shall be vested in the courts of the member state in which the defendant is domiciled or permanently established.**
>
> **(2) In matters relating to tort, delict or quasi-delict, jurisdiction shall also be vested in the courts of the member state in which the event giving rise to the damage occurred, provided that the defendant could have reasonably expected to be subject to the jurisdiction of the courts of this country at the time at which this event occurred.**

— A Targeting-Based Exception for Structurally Weaker Parties

358 As explained above,[1093] the hard and fast country-of-origin rule for jurisdiction still needs to be balanced out by an exception that protects the legitimate expectations of structurally weaker parties and allows them to seise the courts of their own domicile. Its application should depend on two requirements: the claimant's relative weakness vis-à-vis the defendant and the fact that the member state of their domicile has been targeted by the activity in question.

1092 See above, n 1081.

1093 At [346].

359 The private international law of the European Union already contains such an exception for contracts concluded by consumers 'for a purpose which can be regarded as being outside [their] trade or profession', which allows them to seise the courts of their own country of domicile, provided that the other party 'pursues commercial or professional activities in […] or, by any means, directs such activities to that Member State.'[1094]

360 This latter element of the definition has helpfully been interpreted by the ECJ in *Pammer*.[1095] In short, the Court held that the mere fact that a website had been made available in a certain member state would not amount to an activity being directed there;[1096] instead,

> *the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile.*[1097]

This subjective intention may however be evidenced by a range of objective factors, including the use of targeted advertisement to reach consumers in the member state in question,[1098] the use of certain top-level domains,[1099] and the use a certain language or currency.[1100]

361 As a starting point, this test seems to align well with the considerations discussed above. Given that the rule in Art 17 Brussels Ia had been drafted in light of the particular

---

1094 Art 17(1)(c), 18(1) Brussels Ia. See also Art 6(1) Rome I.

1095 See above, [235].

1096 *Pammer* (n 745), [74].

1097 ibid, [75].

1098 ibid, [81].

1099 ibid, [83].

1100 ibid, [84].

new challenges of internet communication,[1101] its suitability for internet cases may be unsurprising. In order to provide a useful counterweight to the general country-of-origin rule, however, the scope of the consumer rule would have to be expanded. Although the significance of the targeting test is less obvious for torts than for contracts, nothing indicates that it could not fulfil the same function with regard to both contractual and non-contractual claims, and, with regard to the latter, as between parties who are not in a 'contractual' relationship; the test balances out the rigidity of the consumer forum (which is based on the structural weakness of consumers vis-à-vis professionals) by limiting the number of courts in which a professional may be sued to those that they could reasonably foresee by virtue of having directed their activity at the member state in question.[1102]

362 In order to fulfil this function when it comes to non-contractual claims, though, the targeting test should not be limited to the elements considered in *Pammer*. With regard to infringements of personality rights in particular, objective factors relating to the content of the publication in question should be taken into account as well in order to assess if a certain publication was intended to be read in one or several other member states, including the one in which the claimant was domiciled, and to affect their personality rights in this state.[1103]

363 With regard to the first requirement of the exception, the existence of a professional-consumer relationship, it seems equally feasible to extend existing categories and definitions. According to Art 6(1) Rome I, a consumer contract is concluded 'by a natural person for a purpose which can be regarded as being outside his trade or

1101 Proposal for Brussels I (n 564), recital (13), and Explanatory Memorandum, 4.5, Art 15. See also *Pammer* (n 745), [59].

1102 See also Mankowski (n 985), [350].

1103 AG Cruz Villalón had proposed a consideration of these objective factors as a second element of the criterion to be introduced in *eDate* but was ignored by the ECJ: Opinion on *eDate* (n 593), [60]–[66]. See also *Arlewin v Sweden* (n 1061), [72], by analogy.

profession';[1104] in *Benincasa*, the ECJ defined as a consumer contract every contract that is concluded 'for the purpose of satisfying an individual's own needs in terms of private consumption'.[1105] Building upon these definitions, one might consider as a consumer everyone who is affected by the content or act in question in pursuit of their private life, and outside their trade or profession. *Vice versa*, a professional may be defined as a natural or legal person acting in pursuit of their trade or profession, to earn money or make a profit, rather than to fulfil their 'own needs in terms of private consumption'. Although such a definition would not be without uncertainties and grey areas, it seems to offer a workable rule extending beyond the area of contract law, which adequately reflects the structural imbalance between the two sets of persons. Considering the ECJ's rather pragmatic decision in *Schrems*[1106] (where the Court held that a consumer would not lose this status by professionally litigating on behalf of himself and other consumers in the context of the contract in question), it is not unlikely that the Court will receive other opportunities to refine the category of consumers in view of specific scenarios – especially if the requirement of a contract between the parties were abolished.

364 The proposed definition may however appear unsatisfying with regard to personality rights, such as the rights to reputation and privacy. It is hard to see how these rights may ever be affected in a purely professional capacity without repercussions on someone's individual private life. And even where they are, it may seem very hard to defend that a claimant has to seise the courts of the defendant's home country over the publication of defamatory online content, which will usually affect them primarily in their own home country. Thus, the better approach may consist in generally considering

1104 See also Art 2(e) e-Commerce Directive.

1105 Case C-269/95 *Benincasa* ECLI:EU:C:1997:337, [17].

1106 Above, n 742.

violations of personality rights of a natural person as consumer cases in the sense established above.[1107]

365 In light of these considerations, a targeting-based exception to the country-of-origin rule proposed above might read as follows:

> **Where the party claiming to be affected by the pursuit or use of the information society service is so affected in their private life, outside his or her trade or profession, he or she may also bring proceedings in the member state of his or her domicile, provided that the other party**
>
> **– acted in pursuit of commercial or professional activities; and**
>
> **– directed the activity in question to this member state.**
>
> **Violations of privacy and rights relating to personality, including defamation, shall always be considered as affecting the claimant in their private life.**

(2) Applicable Law

366 While many of the above considerations may also prove useful in the search of a possible choice-of-law rule, the fact that such a rule should aim to refer to a single applicable law adds an additional layer of complexity.[1108]

367 This problem is particularly obvious with regard to the default country-of-origin rule. As a rule for jurisdiction, it could be implemented through a range of different defendant-focused connecting factors, some of which point to their domicile or place of establishment while others focus on the place of their acts. With regard to the applicable law, however, a decision between these different connecting factors is necessary. In bilateral relationships, in which both parties may be providing or using an information society service, a decision must also be made between (at least) two potential connections.

1107 The end result would thus usually be the same as under the solution advocated by Márton (n 578), 306–12, according to which jurisdiction should be concentrated in the victim's country of habitual residence. See also Mankowski (n 985), [363]: 'The main task is to ascertain […] where the victim has built a reputation. Starting point is the victim's habitual residence.'

1108 See above, [352].

368 Regarding, first, the relevant connecting factor, both the Rome I and Rome II Regulation focus on a party's habitual residence. This criterion is defined for legal persons as the place of their central administration[1109] and for natural persons acting in the course of a business activity as their principal place of business.[1110] Where the event giving rise to the damage occurs in the course of the operations of a branch, agency or establishment, or where the contract in question is concluded in the course of the operations of such an establishment, or supposed to be performed by it, the place where this establishment is located is treated as the place of habitual residence.[1111] So defined, the criterion usually coincides with the criterion of establishment used in the e-Commerce Directive.[1112] But it is also helpful with regard to natural persons who are not acting in pursuit of a business activity (on which the e-Commerce Directive is naturally silent); compared to the other criteria that have also been proposed as potential bases for jurisdiction, it is (generally)[1113] more flexible than the criterion of domicile but more predictable than the criterion of the causal event. The criterion of habitual residence consequently seems to come closest to reflecting the defendant's legitimate expectations as to the relevant normative framework. It would align well with the existing rules on the applicable law and with the proposed rule for jurisdiction as it would regularly coincide with the defendant's domicile or place of permanent establishment (which will also usually be the place in which they acted).

369 Regarding, second, contractual claims involving the use or pursuit of an information society service, a decision must be made between the different places of establishment of the parties involved. Unlike in tort cases, where the country-of-origin approach advocated

1109 Art 19(1) Rome I; Art 23(1) Rome II.

1110 Art 19(1) Rome I, Art 23(2) Rome II.

1111 Art 19(2) Rome I; Art 23(1) Rome II.

1112 As to which see above, [355].

1113 For natural persons, the Brussels Ia Regulation does not contain a harmonised definition (see Art 62).

above necessarily puts the focus on the habitual residence of the party whose liability is sought to be established, a contractual claim may involve two (or more) parties who pursue or use the same information society service. For the sake of harmony with Art 4(1) (b), (2) Rome I, and considering that the proposed rules aim to encourage the use and provision of information society services also for contractual performance, it seems sensible to focus on the characteristic performer of the obligation in question.[1114]

370 Again, the rule just described would need to be balanced out by an exception based on targeting. To align this exception with the proposed default rule – and in light of the existing consumer exception in Art 6(1) Rome I – it seems preferable to focus on the consumer's habitual residence, even if this means an occasional mismatch with the rules on jurisdiction. The term 'consumer' should be given the same broad interpretation as the one proposed above with regard to jurisdiction.[1115]

371 A rule to determine the applicable law in internet cases could thus be phrased as follows:[1116]

> **(1) In cases relating to the pursuit or use of an information society service, the applicable law shall be**
>
> **– in matters relating to tort, delict or quasi-delict, the law of the country in which the person claimed to be liable is habitually resident; and**
>
> **– in matters relating to a contract, the law of the country in which the party required to effect the characteristic performance of the contract is habitually resident.**
>
> **(2) However, where the party claiming to be affected by the pursuit or use of the information society service is so affected in their private life, outside his or her trade or profession, the applicable law shall be the law of the country in which he or she has his or her habitual residence, provided that the other party**
>
> **– acted in pursuit of commercial or professional activities; and**
>
> **– directed the activity in question to this member state.**

1114 Where the contract is for the provision of an information society service, the characteristic performer will almost inevitably be the service provider.

1115 At [363].

1116 But see the addition of an escape clause proposed below, at [400]; a consolidated version of all proposed rules is provided at [431].

> **Violations of privacy and rights relating to personality, including defamation, shall always considered to affect the claimant in their private life.**

d. Implementation

372 These rules could be implemented in different ways; in fact, some of them might not even require any legislative intervention. The proposed country-of-origin approach to jurisdiction, for instance, could arguably be realised through a mere reinterpretation of the existing rules of the Brussels Ia Regulation.[1117] Following the ECJ's decisions in *Réunion Européenne* and *Besix* in which the Court held that certain connecting factors used in what is now Art 7 Brussels Ia cannot be relied on where they are 'difficult or indeed impossible to determine'[1118],[1119] it seems possible to give effect to the considerations that should guide an approach to international jurisdiction in internet cases by disregarding those connecting factors that have been identified as simply being unsuited for these cases. Such an approach had actually been proposed by AG Cruz Villalón in *Hejduk*, who had argued that in the case of 'delocalised' damage caused by alleged copyright violations through a homepage,

> *the best option is to exclude the possibility of suing in the courts of the State where the damage occurred and to limit jurisdiction, at least that which is based on [Art 7(2) Brussels Ia], to that of the courts of the State where the event giving rise to the damage occurred.*[1120]

But the proposition seems to have fallen on deaf ears with the European Court,[1121] which has since reaffirmed the continued availability of place-of-the-damage jurisdiction under Art 7(2) Brussels Ia in internet cases on numerous occasions.[1122] Besides, it has been

---

1117 See in more detail Lutzi (n 776), 709–12.

1118 Case C-51/97 *Réunion Européenne* ECLI:EU:C:1998:509, [33].

1119 See ibid, [35]; *Besix* (n 722), [28], [48]–[50]. See also the restrictive approach to the 'place of the damage' criterion in *Universal Music* (n 766), [38].

1120 AG Cruz Villalón, Opinion on *Hejduk* (n 646), [45].

1121 See *Hejduk* (n 447), [34], [36]. AG Jääskinen had made a similar proposition in an offline case (Opinion on Case C-352/13 *CDC*, [47]–[53]), which remained equally unheard.

1122 See, eg, *Bolagsupplysningen* (n 589), [47].

argued above that even though a stronger focus on the country of origin of the defendant's activity would be advisable for numerous reasons, it should be combined with an exception to preserve 'home' court jurisdiction for structurally weaker parties. It is difficult to see how, outside the area of consumer contracts, such an exception could be implemented through mere judicial activism.

373 The same is true for the proposed rule on applicable law. While the rule would rarely lead to different results than the Rome I Regulation, which already focuses on the habitual residence of the characteristic performer (with some exceptions)[1123] and contains a targeting-based consumer exception, it does not align well with the Rome II Regulation, where it would require an expansion of its scope,[1124] significant digression from the existing rules,[1125] and the introduction of a new consumer exception, neither of which could (or should) be achieved by the ECJ alone.

374 The more realistic option to implement the proposed rules would therefore be an intervention by the EU legislator. Theoretically, this could take the shape of specific amendments to the Brussels Ia, Rome I, and Rome II Regulations. Yet, such amendments would not only raise additional technical questions of structure and drafting but would also further complicate these general instruments, with the proposed rules cutting across several of their provisions. The preferable solution would therefore be a new stand-alone instrument on jurisdiction and choice of law for claims involving information society services; it would best realise its potential for greater legal certainty for internet users and service providers if it took the form of a new regulation, the competence for which could

1123 See Art 4(1)(c), (g), (h), 5, 7, 8, governing special types of contracts that will rarely be performed online.

1124 In light of Art 1(2)(g) Rome II.

1125 Note that even though the e-Commerce Directive supplements the Rome II Regulation with a country-of-origin rule, this rule does not operate at the level of choice of law: see above, [66].

be found in either Art 4(2)(a), 26 TFEU (Internal Market) or Art 4(2)(j), 81 TFEU (Judicial Cooperation in Civil Matters).

375 With regard to its scope, helpful guidance can be found in the e-Commerce Directive, which establishes the term of 'information society service' that has been used throughout this thesis.[1126] As has been shown in many parts of this thesis, the problems resulting from the borderless nature of these services are not limited to the provision of these services but also affect their use, eg where someone uses a blog or an online platform to defame someone else or to commit acts of unfair competition. It has also been shown that these problems result from the wide interpretation that has been given to certain general connecting factors such as the 'place of the damage'.[1127] Consequently, the different problems of coordination that have been identified could be observed in many areas of law. To address these problems, the instrument should apply independently of the area of law under which one party tries to establish the liability of another as long as the claim is based on the use or pursuit of an information society service.

376 There is one area of law in which the current framework of EU private international law has however been found to operate satisfactorily and without creating the aforementioned problems. The protection of registered IP rights – both those that are registered under national law and those that are protected uniformly across the EU under specific EU instruments – is widely accepted to operate strictly territorially, with each registered right only being protected on the territory for which it is granted;[1128] accordingly, the aforementioned problems of coordination do not arise even where these

1126 See in more detail above, [14].

1127 See, in particular, above, IV.B.2.b.

1128 See above, [202], [206]–[207], [209].

rights are infringed through the internet.[1129] Given the wide-spread acceptance for this system, and considering that a strictly territorial approach can be justified by the requirement of registration, it is submitted that the proposed instrument should exclude infringements of registered IP rights even where they are committed through information society services. For IP rights that do not require registration, on the other hand, it is submitted that a similar territoriality is wrongly assumed;[1130] accordingly, infringements of these rights should not be excluded from the proposed instrument.[1131]

377 To facilitate the integration of the proposed instrument into the existing framework of EU private international law, the rules that have been proposed above use established terminology wherever possible. In congruence with the e-Commerce Directive, they apply to the pursuit and use of an information society service[1132] and refer to the service provider's establishment.[1133] They use the (imperfect)[1134] criterion of domicile of the Brussels Ia Regulation[1135] as well as the 'place of the event giving rise to the damage' established in *Bier*[1136] (as refined in later decisions),[1137] the consumer definition of Art 2(e) e-Commerce Directive, Art 6(1) Rome I and *Benincasa*,[1138] the targeting test of Art 17

1129 See Bettinger/Thum (n 449), 286–87; Schack (n 632), 89. In the case of so-called uniform IP rights, additional connecting factors are still needed occasionally, to allocate competence within the territory of the EU; they usually aim for a similar concentration of jurisdiction and applicable law as the rules proposed here: see above, [206]–[207], [209].

1130 See in more detail below, [442]–[445].

1131 The e-Commerce Directive, by contrast, generally excludes IP rights from its country-of-origin provision: see Art 3(3) and Annex, 1st indent. An earlier proposition by the author contained a similar exclusion: see Lutzi (n 773), 717.

1132 See Art 2(a), (c), (h)(i) e-Commerce Directive.

1133 Recital (19) e-Commerce Directive.

1134 See above, n 1081.

1135 Art 4(1), 62, 63 Brussels Ia.

1136 *Bier* (n 568), [19].

1137 See above, [356].

1138 *Benincasa* (n 1105), [17].

Brussels Ia and Art 6(1) Rome I, and contain a special provision for violations privacy and rights relating to personality, including defamation, as defined in Art 1(2)(g) Rome II.

378 Still, there may be points of friction with the existing rules and instruments. The most important one seems to be the role of party autonomy, to which all three instruments give (a certain degree of) preference over their default rules.[1139] Just like the e-Commerce Directive,[1140] the proposed rules do not aim to limit the parties' ability to select the competent court or applicable law by agreement; accordingly, if they were introduced via a separate instrument, this instrument should make clear that

> **These rules are without prejudice to the freedom of the parties to agree that a court or the courts of a member state are to have jurisdiction to settle the dispute in question and to choose the law applicable to it.**

Unlike the e-Commerce Directive,[1141] these rules do however address jurisdiction and applicable law for consumer contracts (as well as other claims brought by consumers against professionals). In this regard, there is no reason to reduce the safeguards that already exist in Art 19 Brussels Ia, Art 6(2) Rome I, and Art 14(1)(b) Rome II; where a consumer preserves the right to sue in the member state of their domicile even if there is an agreement to the contrary under the general rules of jurisdiction, there is no reason that the same privilege should not apply in an online case. If only for the sake of legal certainty, the proposed instrument should therefore clarify that the parties' freedom of choice is only preserved

> **within the limits set by Articles 19 Brussels Ia, 6(2) Rome I, and 14(1) Rome II.**

379 A consolidated version of the proposed rules including these amendments is provided in section IV.C.4. below.

1139 See Art 25 Brussels Ia, Art 3 Rome I, Art 14 Rome II.

1140 See Art 3(3) and Annex, 5th indent.

1141 See Annex, 6th indent.

e. The Main Counter-Arguments

380 Although the rules that have just been proposed would arguably create a much more predictable regulatory framework for internet cases and provide much more effective coordination between different claims to adjudicatory and prescriptive jurisdiction, they are open to several important counter-arguments. The three most pertinent arguments seem to be (1) the difficult delineation between online and offline cases they would require; (2) the risk of incentivising a regulatory 'race to the bottom', which may leave potential claimants without adequate protection; and (3) the difficulty to extend the proposed rules beyond the European Union.

(1) The Difficult Definition of 'Internet Cases'

381 The first important argument against the implementation of the proposed approach would be the distinction between online and offline cases that it would necessarily require. Both the country-of-origin default rule and the consumer exception have been proposed as remedies to the particular difficulties of cases involving information society services; accordingly, an instrument that would introduce these rules would have to be limited to these cases.

382 This is unfortunate because drawing a clear line between online and offline cases is notoriously difficult – and has, if anything, only become harder over time. Johnson and Post could still somewhat defensibly claim, in 1996, that

> *[t]reating Cyberspace as a separate 'space' […] should come naturally. […] [B]ecause entry into this world of stored online communications occurs through a screen and (usually) a password boundary, you know when you are 'there'.*[1142]

1142 Johnson/Post (n 252), 1379.

But this boundary has long disappeared.[1143] With access to the internet being virtually universal, available on an ever-growing number of devices (from mobile phone to kitchen appliance), with less and less content being published exclusively in print, and with almost any transaction being possible, and often easier, online, it is becoming increasingly difficult to define where the internet begins.

383 Yet, not only is it far from unusual that legal rules make it necessary to categorise human behaviour in light of the specific facts of a given case, the present framework of EU private international law already requires a distinction between the online and offline world. This is the case, in particular, for the 'centre of interests' forum the ECJ created in *eDate*,[1144] which is only available to persons who have 'suffered an infringement of a personality right by means of the internet.'[1145] Similarly, the e-Commerce Directive, which contains an important substantive counterweight to the operation of EU choice-of-law rules, only applies to the providers of 'information society services'.[1146] As mentioned above,[1147] this category of services, which was first introduced in 1998, is being used to define the scope of a growing number of substantive instruments.

384 In order to define the scope of application of the proposed instrument, the concept of 'information society services' thus provides a valuable starting point. Considering the aim to further the development of new internet services by creating a more predictable legal framework for the providers of these services and to align the proposed rules with the existing country-of-origin provision in the e-Commerce Directive, the proposed instrument should certainly apply to all *providers* of information society services that are

1143 See Katsch/Rabinovich-Einy (n 347), 11–13; Svantesson (n 242), 93. See also Dornis (n 458), 265–66.

1144 See above, [187].

1145 *eDate* (n 180), [48].

1146 As to the definition of which, see above, [14].

1147 ibid.

currently covered by the Directive. Given that many of the difficulties of the existing framework that have been identified above – such as the risk of being sued over an allegedly defamatory social-media post or the use of a copyrighted picture on a private homepage in numerous EU member states[1148] – affect anyone who uses these services, it is suggested that the same rules should also apply to all *users*[1149] of information society services as defined in the e-Commerce Directive.

(2) Race to the Bottom

385 The next important counter-argument against the proposed approach is the risk of a regulatory race to the bottom and a resulting decrease in the protection of potential claimants. Under the proposed combination of a country-of-origin default rule and a targeting-based consumer exception, claimants other than structurally weaker parties would generally have to seise the courts of the defendant's home country and only be protected to the extent that the laws of that country protect them. This creates the risk of potential defendants moving their domicile and/or relevant establishments to countries where the level of protection for certain rights holders is particularly low – and of national legislators trying to attract these parties by lowering it.[1150]

386 However, such a detrimental race to the bottom may be less likely than it seems at first glance.[1151] In the vast majority of cases, in which natural persons are using the internet, there is in fact very little risk that they would move their domicile or habitual residence to a different country just to reduce their risk of being found liable for their behaviour online. But even legal persons who could theoretically change their

1148 See above, [254].

1149 The e-Commerce Directive uses the term of 'recipient' (who enjoys certain rights and protections vis-à-vis the service provider under the Directive but does not profit from its country-of-origin rule).

1150 See Höning (n 979), 30–31; Kohl (n 176), 178–81.

1151 Höning (n 979), 31.

establishment to reduce liability risks would have to weigh this aim against a wide range of other factors, including other laws of a given place that might become available. Besides, such legal persons would inevitably qualify as professionals and could therefore only reduce their liability risks to the extent that they are dealing with other professionals or not targeting any country other than their own country of establishment.

387 An even better safeguard against any such race to the bottom would consist in international harmonisation and the adoption of substantive minimum standards.[1152] At a global level, such standards exist, if at all, in the area of copyright law.[1153] In the European Union, on the other hand, an ever growing number of such standards is being established in ever growing number of fields, including many of the areas that have been discussed here; even in areas in which the EU has not yet managed to harmonise substantive (or, indeed, private international) law (such as the protection of personality rights), all member states are bound to certain minimum standards by primary EU law and the European Convention on Human Rights.[1154] This high level of harmonisation may be the main reason why the e-Commerce Directive, which has been strongly incentivising 'home country regulation' for a wide range of internet activities for over 10 years, does not seem to have created a regulatory race to the bottom, let alone any noticeable migration of information society service providers.[1155] Thus, it does not seem likely that the proposed extension of this regime to the level of private international law would give raise to either of these phenomena, at least as far as the European Union would be concerned.

1152 See Kightlinger (n 1003), 747–49.

1153 See Trimble (n 796), 389–90; Ginsburg (n 493), 266: 'a de facto international copyright code'.

1154 Regarding personality rights, see Art 8 ECHR.

1155 See Savin (n 184), 47–48; Kohl (n 176), 187; Kohl (n 330), 50–51.

(3) Application Beyond the EU

388 The preceding observation raises the question of the extent to which the proposed approach can be extended beyond the highly harmonised common market of the European Union. This may be the most difficult question to answer positively.

389 Indeed, adoption of the approach would certainly be least attractive where it could lead to a situation in which the victim of a tort committed online would be required to travel to the other side of the world to obtain redress, or where the availability of such redress would depend exclusively on a law that does not even provide what EU member states would consider to be a necessary minimum level of protection.

390 In practical terms, this risk is reduced by two factors. First, the consumer exception limits this risk to situations in which a consumer seeks protection against another consumer or against a professional who has not targeted the consumer's home country, or in which a professional seeks protection against another professional. Second, as far as the applicable law is concerned, the courts will preserve their power to enforce the minimum standards of the *lex fori* as far as they are guaranteed by mandatory laws or considered as public policy. Still, neither of these safeguards excludes all risks of the proposed approach leaving potential claimants seriously underprotected. Accordingly, its extension, without adjustment, beyond the highly harmonised common market of the EU would be difficult to support, especially as far as the level of jurisdiction is concerned.

391 This difficulty underlines the strong interplay between substantive harmonisation on the one hand and coordination through private international law on the other.[1156] The more common minimum standards render the competence of foreign courts and the application of foreign law acceptable, the more agreeable the concentration of adjudicatory and

1156 See also above, [313].

prescriptive competence in the authorities of the country in question becomes.[1157] This is reflected, for instance, in § 204(3) ALI Principles, which provides additional fora for claims for which no WTO member state has jurisdiction according to the default rules.

392 As a general, overarching solution, the proposed approach is accordingly unlikely to be readily capable of adoption for situations that escape the outer boundaries of the European Union, at least as far as international jurisdiction is concerned.[1158] While the targeting-based rules for consumers could theoretically be applied to all consumers domiciled or habitually resident in an EU member state, independently of the defendant's domicile,[1159] the country-of-origin rules could only be applied to defendants from countries outside the European Union residually, in areas in which global minimum standards exist.[1160] In all other areas, the prospect of the – ideally reciprocal – adoption of the proposed rules of private international law might still provide an additional incentive for further harmonisation, as it offers an answer to the question how these attempts can be effectively coordinated in international cases.

3. Accommodating Private Ordering

393 The core argument underlying the above proposal regarding the challenge of *horizontal* coordination between different national regulators also holds potential for addressing what has been described as a challenge of *vertical* coordination between public regulators and private actors.[1161] It has been argued above, first, that parties acting online generally have

1157 See, eg, the much higher degree of concentration of jurisdiction and choice of law that applies in the case of infringements of uniform IP rights, as opposed to other IP rights: see above, [206]–[207], [209].

1158 See also Beckstein (n 996), 318–19.

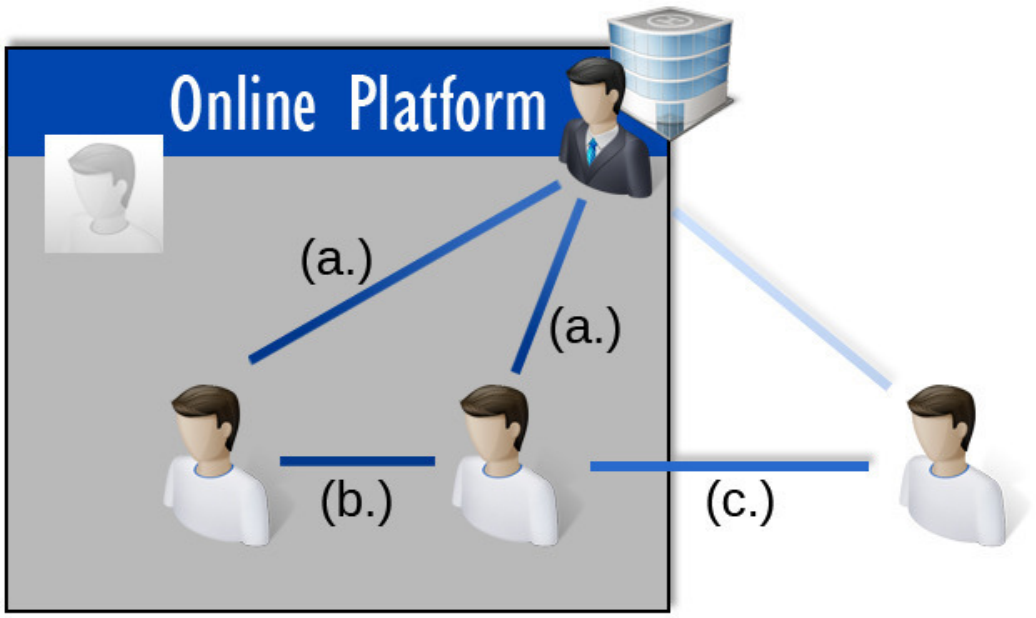
1159 See Art 18(1) Brussels Ia, the scope of which was extended in the Recast Regulation: see Bonomi, in Dickinson/Lein (n 93), [6.12].

1160 Such as in the area of IP rights, and copyright in particular.

1161 See also generally Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort' (1995) 251 Recueil des cours, 269, 294–96, who draws a strong parallel between party expectations and party autonomy.

the same expectation to be subject to their local law (and to be sued in their local courts) as parties acting offline and, second, that this expectation should be a weighty factor in formulating rules of private international law. In the context of the internet, these expectations are no longer limited to domestic courts and national laws; as shown above,[1162] the emergence of online platforms that have reshaped the internet into a network of extensive, privately regulated communities, has created an expectation of their users that their interactions on the platform will be governed primarily by the rules, standards, and dispute-resolution mechanisms provided by the platform hosts.[1163]

394 The modified country-of-origin approach advocated above would increase the ability of EU private international law to give effect to this expectation in several ways. With regard to the relationship between the users and the host of an online platform (a.), it would provide greater certainty as to the effects of the different terms of the platform contract, including its choice of law clause, by greatly reducing the number of competent



1162 At [118].

1163 See also the reference to 'community' by Rheinstein (n 29), 25–26 (quoted above at [340]).

courts and applicable law; the benefits of this simplification raise the question whether the proposed rules should not be supplemented by an escape clause similar to Art 4(3) Rome I and Art 4(3) Rome II in order to create an even greater alignment between the regulatory framework of the platform contract and the rules of private international law. The benefits of this alignment are even more obvious with regard to the relationship between individual platform users (b.); while there are numerous ways in which the selection of the applicable law to this relationship might take the normative framework of a platform into account, it will be shown that a general escape clause appears as a particularly interesting option. In a final step, it will then be discussed to what extent this or other devices could even be used to take elements of the platform contract into account with regard to the relationship between platform users and other parties outside the platform environment (c.).

a. The Host-User Relationship: A Clearer Legal Framework for the Platform Contract

395 The rules that have been proposed above present the advantage of offering a small, reasonably identifiable set of possible fora with full jurisdiction and identifying a single applicable law for each legal relationship that involves an information society service. Regarding the relationship between the host and individual users of an online platform, this not only avoids the potentially difficult question of how to identify the place of performance of the platform contract[1164] but also increases legal certainty with regard to the effectiveness and scope of its terms.

396 This effect is particularly significant in the (admittedly unusual) case that the platform contract does not contain a choice-of-law clause. As has been shown above,[1165] the effect of substantive clauses in the contract between platform user and host, especially on non-contractual situations, often depends on several national laws. Under the rules that

1164 See above, [224].

1165 At [260].

have been proposed above, only two laws could possibly apply: the law of the host's habitual residence (for all contractual claims and for non-contractual claims brought against the host) and the law of the user's habitual residence (for non-contractual claims brought against the user and in all consumer cases (provided that the targeting requirement is fulfilled)).[1166] While this will still require the hosts to assess the effects of their clauses (and potentially adapt their wording)[1167] in light of several national laws as long as they address consumers, the possibility of the application of these laws is predictable from the start and can be reduced or avoided through selective targeting.

397 If the platform contract contains a choice-of-law clause, its effects on *contractual* situations will generally remain unaffected by the rules advocated above. Its validity will continue to be governed by the chosen law (Art 3(5), 10(1) Rome I), with the same safeguards (including Art 6(2) Rome I) applying as before.[1168] The only noticeable change might be that the lower number of available fora would reduce the risk of the forum's mandatory rules and public policy (Art 9(2), 21 Rome I) reducing the effectiveness of the platform contract.

398 For the (presumably narrow)[1169] category of *non-contractual* claims however, the host will usually not be able (and thus not even attempt) to select the applicable law, given the limitations of Art 14(1) Rome II. As explained above,[1170] while the existing escape clause in Art 4(3) Rome II could theoretically be used to extend the law thus chosen – considering, in particular, that it expressly anticipates the situation of a pre-existing relationship between the parties – it is unavailable in many of the most relevant cases.

1166 See above, [370].

1167 See above, [262].

1168 See above, [378].

1169 See above, [260].

1170 At [261].

Accordingly, an act of unfair competition will be subject to the same national law, regardless of whether or not the parties are contractually bound to each other; even where the act takes place within the closed ecosystem of an online platform and where both have agreed that all uses of the platform would be governed by a certain law, the applicable competition law will not change.

399 It is submitted that in this and similar cases involving the increasingly closed ecosystems of online platforms, it would be desirable if contractual and non-contractual claims were governed by the same (chosen) law, to provide greater legal certainty for both internet users and platform hosts. In the context of the proposed instrument on jurisdiction and applicable law for claims involving information society services, this could be achieved in two ways. The instrument could either carve out more room for party autonomy and allow even non-commercial parties to select the applicable law to such non-contractual claims before the event giving rise to the damage occurred, or it could introduce a general escape clause similar to Art 4(3) Rome II that applies to all claims covered by the instrument. Although one might assume that there is indeed at least an implicit agreement between the parties as to the applicable law in the aforementioned cases, it might not necessarily be appropriate to always give effect to it; instead, the appropriateness of submitting different claims to the law chosen in the platform contract depends primarily on the degree of connection between the claim and the platform contract, to which an escape clause would be much more sensitive. Generally speaking, the main argument for such a clause is its flexibility – which will be particularly important with regard to the relationship between two individual users, who will usually not have chosen any law to apply between them[1171] but may still have an expectation as to the

1171 See above, [264].

normative framework of the platform in the context of which they are acting; the potential of a general escape clause for this scenario will be further discussed in the next section.[1172]

400 Meanwhile, this flexibility might also be seen as an argument against an escape clause, which could undermine the legal certainty for which the proposed rules otherwise aim. However, this legal certainty has been claimed to result primarily from putting an end to the present fragmentation of jurisdiction and choice of law, which such a clause would not reintroduce as long as it is only applied in specific situations, eg where a particular claim is closely linked to the normative environment of an online platform or in other cases of a pre-existing relationship. Besides, one might argue that the proposed rules that rely on few, easily identifiable connections lead to a rather rigid system that lends itself particularly well to an element of flexibility. Either way, Art 4(3) Rome I and Art 4(3) Rome II do not seem to have greatly reduced the legal certainty provided by either of the two instruments so far.[1173] Emulating these provisions, an escape clause might take the following form:

> **Where it is clear from all the circumstances of the case that the contract or tort underlying the claim in question is manifestly more closely connected with a country other than that indicated in [the general rule], the law of that other country shall apply.**

401 Somewhat unfortunately, the ECJ has recently cast doubt on whether Art 4(3) Rome II can be used to extend a choice-of-law clause to non-contractual claims between the contracting parties where these parties would have been unable to select the applicable law pursuant to Art 14(1)(b) Rome II.[1174] If Art 4(3) were indeed to be understood as being subject to the requirements of Art 14(1)(b), the use of the escape clause proposed above would be equally limited to those cases in which Art 14(1)(b) does not prevent a choice of

---

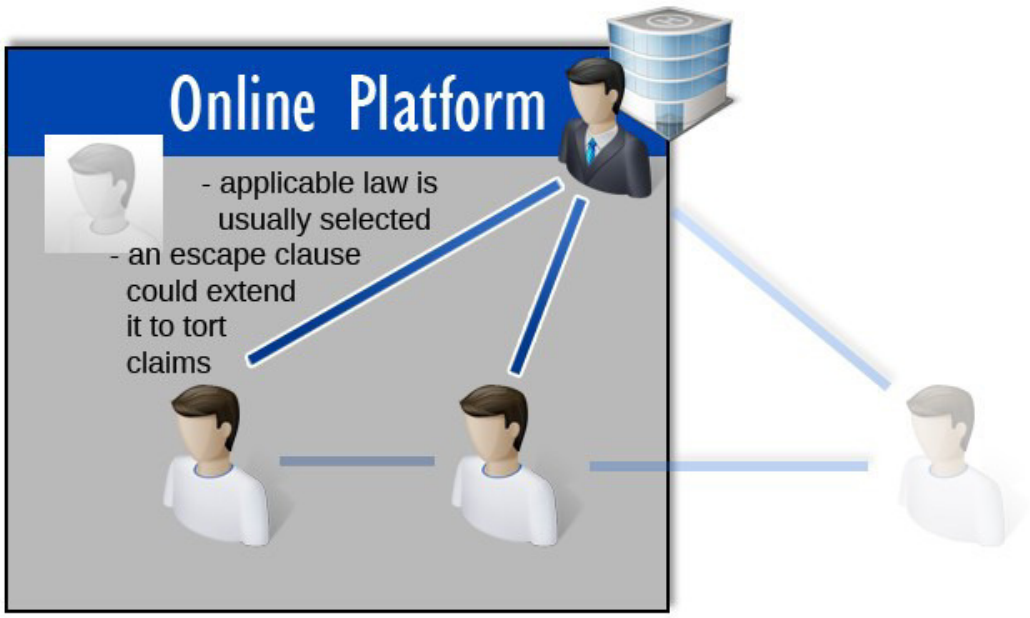
1172 Under IV.C.3.b.(2).

1173 See Leible (n 530), [71], and Lehmann, in Hüßtege/Mansel (n 435), Artikel 4 Rom II, [138], [153].

1174 See *VKI* (n 111), [46]–[47]; see also above, [261].

law, ie cases in which both parties are professionals. Of course, it is not yet clear whether the Court's *obiter dictum* must indeed be understood as a general limitation of Art 4(3) Rome II; considering the facts of the decision in *VKI*, it might only apply to the situation in which a platform host (or other professional) tries to invoke a choice-of-law clause that they have themselves stipulated to a non-contractual claim by a consumer, without also preventing the consumer from relying on the law selected in the clause were it is manifestly more closely connected to their claim.

402 In any event, the proposed escape clause will be limited by the general consumer exception. Just like its counterparts in the Rome Regulations, it should be inserted after the general rule but before this exception. This way, it is made sure that a consumer does not lose the privilege of having the law of the country of their habitual residence applied to all claims against a professional platform host who has directed the activity in question to this country.



b. User-User Relationships: Shifting the Focus Towards the Parties' Environment

403 A central argument for the country-of-origin approach developed above was its potential to better give effect to the legitimate expectations of individuals using the internet.[1175] Focusing on these expectations has been shown to not only be a central objective for private international law in general but also to be of particular importance to increase the acceptance of legal norms in the online context.[1176]

404 Private international law traditionally equates expectations as to a particular regulatory framework with expectations as to the application of a particular national law.[1177] As has been demonstrated above,[1178] the internet challenges this equation by widening the scope of legitimate expectations, which are no longer confined to national legal systems. As the regulation of online communities by the hosts has become more and more sophisticated, and often much more effective than any form of public governance,[1179] the expectations of individual users will often be influenced much more strongly by the private sets of rules and standards that govern a particular platform than by any rules of national law. Accordingly, if the argument above was to focus on the laws and courts of the country in which the defendant is resident or has acted (as only these places are regularly predictable), the question arises to what extent the platform on which the defendant has acted can take the place of this country as the environment in which the user

1175 See above, [340]–[343].

1176 See also C Reed (n 245), 13–15.

1177 See Berman (n 6), 441–42. But see the emphasis put on community by Rheinstein (n 29), 26: 'Once we have recognized that […], in general, our society allows the shifting of a loss to its author only when that author has failed to live up to the standard of the community, we know that […] the standard can, at least as a general rule, be furnished only by that community with the application of whose standard the actor could reckon when he carried on his conduct […].'

1178 At [118].

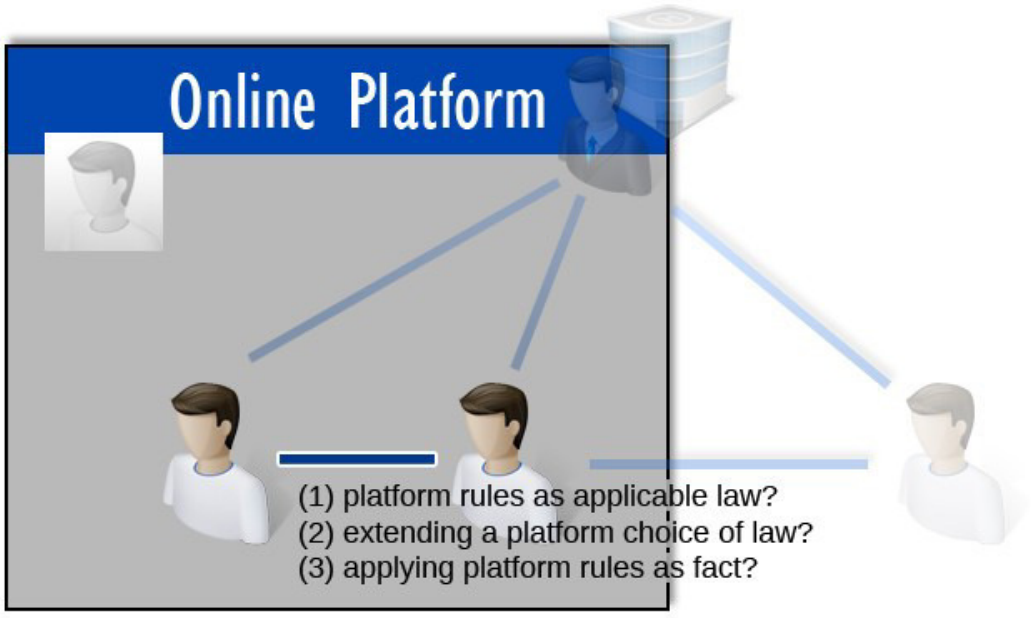
1179 See above, [116].

has knowingly and evidently acted, and the rules and standards of which the user arguably expects to govern their actions.

405 Taking into account the underlying expectation of platform users that their legal relationships *inter se* will be governed by the specific rules and standards of the platform, and that disputes between them will be primarily resolved by the platform host, is desirable not only because it conceptually aligns with the arguments made earlier. It could also supplement the modified country-of-origin approach advocated above, under which the law applicable to the legal relationships that are formed on an online platform will still differ widely, depending on where the parties are physically located and whether they are consumers or professionals. Supporting the hosts' attempts to create uniform regulatory frameworks on their platforms could reduce the number of applicable laws on a given platform and enhance legal certainty.

406 For this purpose, a number of different mechanisms must be considered. The most ambitious (not to say, revolutionary) approach would be to treat the platform as an (equivalent to a) physical place that has its own legal system. Such an understanding would raise the question of how the proposed instrument could refer to this system, given that it has made a point of not relying on physical connecting factors (other than the location of the parties) like the 'place of the tort'; but in any case, it will be argued that this approach, although intriguing, is subject to several important counter-arguments that strongly militate against such a far-reaching change of paradigms (1). Instead, it is submitted that the platform contract should be taken into account through the escape clause that has just been proposed in the context of the host-user relationship; this way, the platform contract would influence the selection of the applicable law, but it would depend on this law how much room is given to substantive platform rules and standards (2). This approach could then also be supplemented by a rule similar to Art 17 Rome II, which

allows to consider specific substantive rules and standards as fact even though they are not part of the applicable law (3).



(1) The Platform as a Legal System?

407 Ever since the internet has first been identified as a problem for private international law, commentators have suggested that a possible way to sidestep the limitations of national law and geographically-defined connecting factors might consist in a radical change of approach. Instead of trying to identify the national law to which a dispute involving internet users from different states, arising on a platform that is hosted in yet another one, is most closely connected, the dispute should be governed by a new, a-national set of rules, the 'law of cyberspace'.[1180] Although this proposition seems to have fallen more and more out of favour,[1181] the emergence of sophisticated online communities might have the potential to revive it. Finally, one might say, cyberspace has become a sufficiently well-

1180 See above, [86].

1181 ibid.

defined 'place' (or, rather, numerous places), and developed a sufficiently sophisticated 'law' (or, rather, numerous laws) to govern it.[1182] Indeed, this idea has recently been (tentatively) proposed in the context of defamation through social media.[1183] As rules of private international law in this area often focus on the place in which the victim's reputation is most strongly affected by the allegedly defamatory publication,[1184] and as a growing number of people seem to have distinct reputations in different environments and online communities, it has been suggested that the online community itself might be considered the place of the tort. Thus, where a user's reputation on a specific platform is more strongly affected than their reputation in any particular country,[1185] the alleged defamation could be judged according to the rules and standards governing said platform.

408 Leaving aside, for a moment, the question of how such an approach could possibly be reconciled with the instrument proposed above, which does not refer to the place of the tort (or, indeed, any physical place other than the location of the parties), the underlying idea could be seen as giving effect to the expectations of both parties. It would align with the expectations of the claimant because the platform might be seen as the place in which their reputation is affected and with the expectations of the defendant because the platform might be considered the place from which the allegedly defamatory statement originates and/or the place at which it is directed.

1182 See also Ryngaert/Zoetekouw (n 356), 192–93.

1183 See Mills (n 325), 29–34.

1184 See, eg, *Bolagsupplysningen* (n 589), [33]: '[T]he alleged infringement is usually felt most keenly at the centre of interests of the relevant person, given the reputation enjoyed by him in that place. Thus, the criterion of the 'victim's centre of interests' reflects the place where, in principle, the damage caused by online material occurs most significantly […].'

1185 See Mills (n 325), 29–30.

409 In a more general perspective, such an approach could give effect to the proposition that, especially in the online context,[1186] a stronger focus should be put on the particular community in which a person acts, and that this community does not have to be a country. In his seminal paper on 'The Globalization of Jurisdiction',[1187] which critically discusses 'the relationship between jurisdiction and social understandings of space, border, and community',[1188] Paul Schiff Berman famously argued that the often assumed link between communities and physical locations may be overstated[1189] and that there may be other meaningful ways to define and delineate communities than the sovereign nation-state that exists within fixed territorial boundaries.[1190] Based on this reconceptualisation of community, and its close link to the exercise of jurisdiction,[1191] Berman ultimately proposed a 'cosmopolitan pluralist conception of jurisdiction',[1192] which could be used to better justify and delineate assertions of international jurisdiction by state courts in online cases[1193] as well as, potentially, open the door for a wider recognition for the resolution of disputes through an online platform itself.[1194]

410 Similarly, it might allow to bridge the gap between public norms and private ordering. Applying the substantive rules and standards established on an online platform – rather than the national law of a country in which a particular use of the platform has been

1186 See Lessig, 'The Path of Cyberlaw' (n 250), 1745–47.

1187 Berman (n 6).

1188 ibid, 441.

1189 ibid, 442–51.

1190 ibid, 472–90.

1191 See, eg, ibid, 435: 'the exercise of jurisdiction functions in part as a symbolic assertion of community dominion. […] [It] also symbolically extends a form of community membership.'

1192 ibid, 490–542.

1193 See ibid, 512–26; see also Slane (n 6), 143–44.

1194 See Ryngaert/Zoetekouw (n 356), 192–93, with specific reference to Berman's essay.

considered harmful – could give effect to the observation that in many cases, these platform rules and standards constitute 'the' law for the user.[1195]

411 Still, several important arguments militate strongly against an approach that would defer to the rules or dispute-resolution mechanisms of an online platform and give them a status similar to national laws or court proceedings.

412 First, platform rules and standards (or platform dispute resolution) rarely purport – at present[1196] – to replace state law (or the court system).[1197] Accordingly, applying them *instead* of the applicable law would not only give them greater weight than they claim themselves but also conflict with their inherently limited material scope. Generally speaking, platform rules and standards are not designed to answer comprehensively all legal questions that may arise in connection with the online platform, but to guide the behaviour of the platform users and to supplement the applicable law where it is too unspecific or otherwise unsuited for the purposes of the platform. Thus, a platform will rarely be supposed to be governed exclusively by its own rules and standards but rather by a combination of those rules, specific contractual terms, and national law.

413 Second, treating an online platform as a legal system for the purposes of private international law would create many new uncertainties. While it might solve the problem of overlapping and potentially contradictory national laws in cases that are clearly linked to a particular platform that is governed by a sophisticated framework of substantive rules, it would raise new questions in many other cases. At what point is a community organised enough to be considered a legal system? Are platforms that are widely accessible to everyone (such as *Twitter*) a community in this sense? What level of sophistication is

1195 See above, [118]

1196 Cf Gardner (n 553), 13.

1197 See above, [117] and [177].

required before the rules of a platform can be considered the applicable law?[1198] What kind of claims and relationships could be considered to be governed by them?[1199] Can we extend rules that have been drafted in view of the 'vertical' relationship between host and user[1200] to the 'horizontal' relationships between different users at all?

414 Third, an approach that would elevate privately drafted rules to the level of state law would require a complete reconsideration of the state paradigm of private international law. Private international law traditionally understands its role to be limited to the coordination between legal systems, a category that is more or less limited to national laws and most certainly does not extend to individual sets of rules having their basis in private contracts.[1201] Treating platform rules and standards as the applicable law would require either a reconsideration of this limited scope or a much wider understanding of what can be considered a legal system. A number of reasons why this would be problematic have been indicated above.[1202] In the present context, it may also be worth mentioning that such an approach would inevitably blur the dividing line between private international law and substantive law, which division is not only useful for the horizontal coordination between different legal systems[1203] but also facilitates the vertical coordination between public regulators and private parties by identifying the competent (national) legal system that will in turn determine the scope and effectiveness of the substantive rules applying on a given

1198 For a possible approach to this question, see Hague Principles on Choice of Law in International Commercial Contracts (n 73), Art 3; in an attempt to 'broaden the scope of party autonomy' (ibid, Commentary, [3.1]), the Principles allow the selection of 'rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules'.

1199 Mills (n 325), 32, for instance, points out that as long as the application of community rules is based on consent, they may only apply between users of the same platform.

1200 See Katsh/Rabinovich-Einy (n 347), 69, on the user agreement for *Airbnb*: 'The main thrust of the user agreement is to limit the potential liability of Airbnb and limit the recourse available to unsatisfied users.'

1201 See above, [165]–[166].

1202 At [172]–[178].

1203 See above, [309]–[311].

platform.[1204] Instead of giving unfettered effect to privately-drafted platform rules, private international law should consider them, and the party intentions they reflect, in more nuanced ways when selecting the applicable law.

415 Finally, any attempt to assign a greater role to privately drafted platform terms at the expense of public regulation would presumably be very difficult to defend politically. This is not only a consequence of the current political climate, which seems to pull into the opposite direction, with legislators discussing new ways to tighten the grip of state law on seemingly unregulated online platforms,[1205] but also linked to a more fundamental concern. Although the models of governance differ between different online platforms,[1206] most platform rules are still set unilaterally by the platform host (usually a private company), with little external input, let alone oversight.[1207] As Alex Mills points out,

> *[i]t is not self-evident that the benefits of recognising non-state community standards (such as avoiding apparently arbitrary or multiple territorial laws) outweigh the seemingly alarming consequences of the fact that this would empower corporations such as Facebook or Twitter to determine the limits of free speech on their platforms (or rather enhance the extent to which they already do so in reality), displacing norms which may be generated through more participatory and democratic processes. It is not just the population of Facebookistan that is comparable to China, but its autocratic governance as well.*[1208]

(2) Extending a Platform Choice of Law

416 Consequently, the better way to take the effective private ordering that happens on online platforms (and the corresponding expectations of their users) into account is through the

---

1204 See by analogy *Halpern v Halpern* (n 530), [36]: 'In my view the effect would be that [the choice of Jewish law] should be ignored for the purposes of identifying the applicable law, but that once the applicable law had been identified it would be for that law to decide the extent to which such a provision incorporated Jewish law as part of the contract' (Waller LJ).

1205 See above, [121].

1206 See above, [117].

1207 Bygrave (n 242), 102–03. Cf the limited reference to non-state law in Art 3 of the Hague Principles on Choice of Law in International Commercial Contracts (n 73); see also above, [167].

1208 Mills (n 325), 33.

escape clause that has been proposed above, in the context of the host-user relationship. It creates a gateway through which elements of private ordering can be considered in the application of rules of private international law referring to state courts and laws. As has been suggested above,[1209] technical rules of private international law such as the ones proposed in this thesis, can accommodate even entirely new challenges such as those raised by the internet, provided that they are applied in awareness of the underlying policy considerations and their regulatory implications. With regard to the problem at hand, this may require taking the platform contract into account through an escape clause when identifying the applicable law whenever this contract creates a particularly strong link to a particular national law, but to leave it to this law to determine the effect that the contract's substantive provisions and the rules and standards it refers to may have.

417 This approach shares some obvious similarities with how private international law deals with other forms of private ordering such as international commercial arbitration.[1210] Of course, this resemblance is hardly surprising. In 1998 already, Jack L Goldsmith openly took inspiration from this area when arguing – in his seminal article 'Against Cyberanarchy' – that it would be possible to 'develop a legal structure that both facilitates private legal ordering of cyberspace transactions and accommodates national mandatory law limitations.'[1211]

418 The most obvious element of the platform contract to take into account when determining the applicable law between users would be the choice-of-law clause that can be found in virtually all sets of platform terms. Theoretically, the parties could just replicate this clause and expressly submit their legal relationships to the same national law

1209 Under IV.C.1.b.

1210 See Mills (n 513), [31.32]–[31.33], and above, [168]–[176].

1211 Goldsmith (n 256), 1245; see also ibid, 1246–50.

that applies between themselves and the platform host; but given their expectation that these relationships will effectively be regulated by the host, such an express choice will be rare – and so will be an implied choice, given the high threshold under Art 3(1) Rome I and, in particular, Art 14 Rome II.[1212] Nevertheless, the law selected in the platform contract may be the most appropriate law to govern a range of relationships that are formed on the platform between individual users. In many cases, applying this law would align very well with the approach advocated above, which aims to shift the focus from the (physical) place in which the effects of a certain online behaviour are felt back to the (physical and virtual) environment in which the individual parties act and are affected. Where all users of an online platform have agreed to the same set of rules and the same choice-of-law clause, it appears justified to take the law chosen in the platform contract into account when identifying the relevant normative environment.

419 While it seems safe to assume that extending a platform choice of law would often align with the users' expectation as to the relevant legal framework, one might question to what extent it would be in the interest of the host. Indeed, although one of the main purposes of many platform contracts seems to be the creation of a uniform framework of substantive norms, choice-of-law clauses are often phrased more cautiously.[1213] However, their wording can usually be explained by (perceived) legal requirements of differentiation. *Facebook*, for instance, has recently reduced the complexity of its choice-of-law clause to what appears to be the bare minimum of consumer protection required under EU law.[1214] Besides, even if most platform hosts might not positively intend to impose their choice of law on individual parties, this is not in itself a reason not to extend

1212 See above, [264].

1213 See above, [262].

1214 ibid.

a choice of law to the relationships between individual users where this appears appropriate.

420 With regard to *contractual* relationships, one might wonder if the ECJ's reasoning in its recent decision in *Kareda*[1215] could provide the basis for such an extension. The Court held that the courts that would have jurisdiction, based on Art 7(1)(b) Brussels Ia, for the obligations arising out of a credit agreement between a bank and its debtor also have jurisdiction for a claim for recourse between two joint debtors in relation to this agreement.[1216] The ECJ thus approximated the vertical relationship between the bank and the debtor and the horizontal relationship between two debtors. Yet, not only would the decision be difficult to extend to questions of choice of law, even by analogy, the two relationships in question also were clearly linked to the (vertical) credit agreement. The relationships between individual users of an online platform on the other hand, even if linked to the legal environment created by the platform contract, will often have a much more tenuous connection to the obligations created by this contract. Accordingly, the decision in *Kareda* offers little more than a welcome reminder of the 'objectives of predictability [and] unification' that European instruments of private international law should aim for.[1217]

421 A proper basis for the extension of a platform choice can however be found in the proposed escape clause. As far as contractual relationships are concerned, the clause merely replicates what should already be possible under Art 4(3) Rome I, which carves out an exception from the default mechanism of Art 4(1), (2) Rome I for cases 'where it is clear from all the circumstances […] that the contract is manifestly more closely

1215 Above, n 824.

1216 ibid, [43]–[44].

1217 ibid, [44].

connected with a country other than that indicated in paragraphs 1 or 2.'[1218] The extension of a platform choice of law requires two things: first, that the platform contract creates, through its choice-of-law clause, a close connection to a particular country; and second, that this connection is manifestly closer than the connection between the contract and the country referred to in the general rule to which the clause constitutes an exception. Under the Rome I Regulation, the first requirement can be fulfilled, in particular, by a close relationship with other contracts;[1219] this should also be the case for the proposed escape clause. Accordingly, the requirement should be considered fulfilled for every clause that submits the platform contract (ie the vertical relationship between host and user) to the law of a certain country, even though the closeness of the particular relationship thus created may depend on additional factors (such as the wording and scope of the clause and whether the country whose law has been selected also has other ties to the contract in question, eg by being the seat of the platform host).[1220] The second requirement may be more difficult to fulfil as it must be 'clear from all circumstances' that the country in question is 'manifestly more closely connected' to the contract.[1221] Both Art 4(1), (2) Rome I and the proposed new rule refer to the habitual residence of the characteristic performer of the contract in question. Although generally highly predictable, this connection can be rather tenuous in certain cases. For instance, where the parties entering into a transaction only know each other through the pseudonym or avatar they are using (eg in a video game[1222] or on an auction platform that allows the use of anonymous accounts[1223]) and, accordingly, have no idea where the other party is habitually resident,

1218 See also above, [263].

1219 See recital (20) Rome I; see also McParland (n 117), [10.382]–[10.387].

1220 See Magnus, in Magnus/Mankowski (n 118), Art 4, [191].

1221 Regarding Art 4(3) Rome I, see McParland (n 117), [10.392]–[10.399]; Magnus (n 1220), Art 4, [186].

1222 See Lutzi (n 480), 2072.

1223 See Leible (n 530), [117].

the connection between the contract and either parties' country of habitual residence may appear completely arbitrary. In such a case, applying the law of the country clearly selected in a platform contract, especially where this country also is otherwise connected to the online platform, may be perfectly in line with the 'proximity principle' underlying both Art 4(3) Rome I[1224] and the proposed escape clause.

422 The unifying potential of the clause will be limited by the special provisions for consumer contracts. This seems to create the unfortunate situation in which a professional who enters into a contract on an anonymous online platform may reasonably expect the law selected in the platform contract to apply, unless where the anonymous counter-party happens to be a consumer, in which case the law of the consumer's (entirely unforeseeable) habitual residence will apply. It must be kept in mind, though, that the consumer exception will not automatically submit all consumer contracts to the law of the consumer's habitual residence. First, because as the ECJ has held in *Gruber*,[1225] the exception should not apply where the other party

> *could reasonably have been unaware of the private purpose of the [contract] because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes.*[1226]

Second, and more importantly, because it will only lead to the application of the law of the consumer's country of habitual residence if this country has been targeted. In the virtual environment of an online game, for instance, it would certainly be a stretch to consider a professional seller of items as targeting every country in which a potential buyer could technically be resident.

1224 See McParland (n 117), [10.354].

1225 *Gruber* (n 116), [48]–[53].

1226 ibid, [51].

423 The potential of an escape clause is even larger with regard to *non-contractual* situations. Even though the current rules of EU private international law often rely on a particularly tenuous connection between a country and a given internet case, which is sometimes based on nothing more than the accessibility of online content and could therefore easily be displaced through a 'closer connection' test, Art 4(3) Rome II is unavailable for most of the practically relevant online torts, ie violations of personality rights, infringements of IP rights, and acts of unfair competition.[1227] The proposed escape clause, on the other hand, would apply to all internet cases. It would make it possible to take a pre-existing relationship between the parties into account, even where they are not contractually bound to each other but where they are using the same online platform and have agreed – vis-à-vis the host – to the same choice-of-law clause.[1228] Although the proposed rules would arguably provide a much higher degree of predictability than the existing rules of EU private international law, especially in tort, it should be possible to displace them where a non-contractual claim is particularly closely connected to an online platform and the law chosen by the platform host, eg in the case of acts of unfair competition that only affect other competitors on the same platform.

(3) Applying Platform Rules as Fact

424 With regard to non-contractual claims, individual rules and standards established on an online platform might also be taken into account in a more subtle way. Private international law has long allowed elements of the law of the place of conduct to be taken into account as 'data' when assessing the tortfeasor's conduct even where this law is not

1227 See above, [261]; see also *VKI* (n 111), [45].

1228 Regarding the potential limitation of the escape clause by Art 14(1) Rome II, see above, [401]. It is submitted that no such limitation applies to the extension of the choice-of-law clause of a platform contract to the relationship between two individual platform users; to the extent that one of them is a structurally weaker party, they are adequately protected by the proposed consumer exception.

the *lex causae*.[1229] In cases in which the relevant environment in which the tortfeasor has acted appears to be an online platform, the same principle might be used to take individual norms of conduct established on the platform into account if they are contextually relevant to asses the tortfeasor's behaviour.

425 While the concept of law as 'local data' was originally developed by American scholars,[1230] it has long been welcomed into European doctrine and even found a specific expression in Art 17 Rome II:

> *In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.*

The provision aims to counter-balance the victim-focused default rule in Art 4(1) Rome II[1231] by protecting the defendant's justified expectation that their conduct will be judged according to the rules that apply in the place in which they acted.[1232] Although there may be a smaller need for such a balancing mechanism under the rules that have been proposed above for internet cases, which already focus primarily on the location of the defendant, a similar provision might be used to further bridge the gap between state law and private norms. For instance, where a certain behaviour conforms with well-established standards of behaviour on an online platform but constitutes a tort under the applicable national law, a court should be allowed to consider the rules and standards of the platform in question as contextually relevant facts.

1229 See Dornis (n 970), 307.

1230 See Ehrenzweig, 'Local and Moral Data in the Conflict of Laws: Terra Incognita' (1966) 16 Buffalo LRev 55. See also Dornis, 'Local Data', in Basedow/Rühl/Ferrari/De Miguel Asensio (n 464), 1166–67.

1231 See recital (34) Rome II.

1232 Dornis (n 970), 318; von Hein, 'Die Behandlung von Sicherheits- und Verhaltensregeln nach Art. 17 der Rom II-Verordnung', in Kronke/Thorn (n 85), 139, 139–41, 143, 152.

426 One might inquire whether a provision modelled after Art 17 Rome II would allow this, given the reference to 'rules of safety and conduct'; although this category is not necessarily limited to provisions emanating from public authorities,[1233] it may appear as a bit too narrow to encompass norms that apply only within the environment of an online platform. However, Art 17 ultimately seems to do nothing more than to express the more general principle that the application of a given substantive law does not preclude the consideration of other norms, which are not themselves part of this law, where they are contextually relevant and not specifically excluded by the *lex causae*.[1234] While it may not be necessary to explicitly spell this out, adding a provision of this kind to the rules proposed above would clarify that a court would be free to take account of specific rules and standards established on an online platform when assessing a party's behaviour where this behaviour is clearly linked to said online platform and its normative framework. Modelled after Art 17 Rome II, the provision could take the following form:

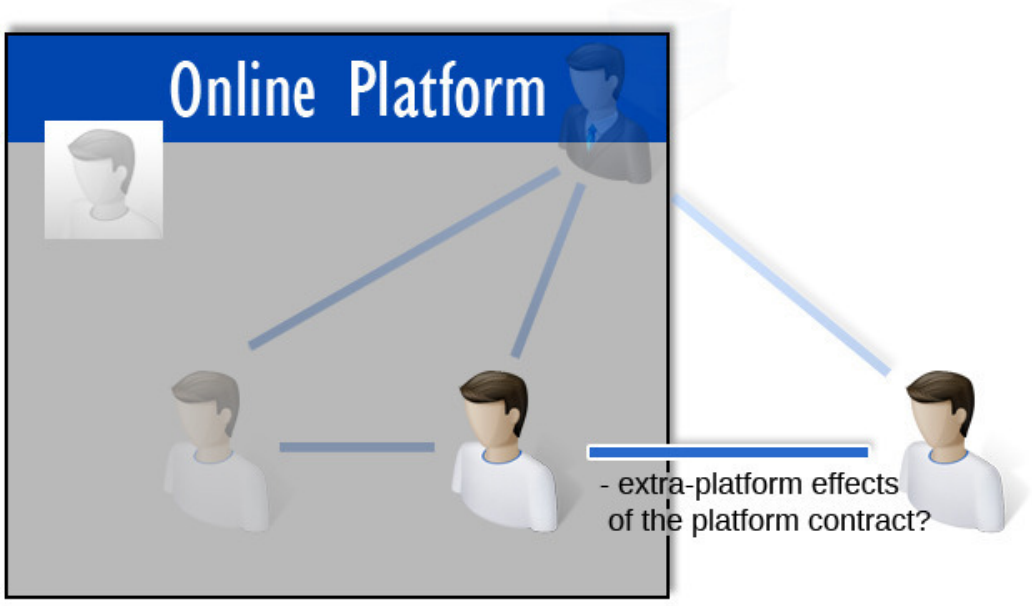
> **In assessing the conduct of the person claimed to be liable in tort, delict or quasi-delict, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of conduct which were in force at the place and time of the event giving rise to the liability. This includes rules and standards established on an online platform where the claim is closely connected to this platform.**

1233 See recital (34) Rome II: 'The term "rules of safety and conduct" should be interpreted as referring to all regulations having any relation to safety and conduct […].' See also Dickinson (n 112), [15.32], referring to case law, customs, and business practices; von Hein (n 1232), 146–47.

1234 See, by analogy, Case C-135/15 *Nikiforidis* ECLI:EU:C:2016:774, [51].

c. Further Extension to Other Relationships?

427 Considering the new rules that have just been proposed, one may wonder if they could also be used to attach any significance to the platform contract within the relationship between platform users and third parties. This question arises, in particular,[1235] with regard to torts (such as defamation) that can be committed via an online platform against a victim that happens to not be a user of this platform.



428 The obvious counter-argument against giving any consideration to the platform contract, its choice-of-law clause, or any specific platform rules and standards in this context is the fact that a third party will not have consented to this contract; in fact, they may even be completely unaware of its existence. From the platform user's point of view however, the situation may be virtually identical to one in which they insult someone who also uses the platform; the normative framework that they expect to govern their

1235 One might also consider the situation in which a tort is committed against another user but only affects them in their offline life, without any relation to the platform; given that in this situation, the victim would nonetheless have agreed to the platform terms (cf [428] below), there would still be a case to consider the application of the mechanisms discussed above, even though they would be very unlikely to actually apply as the claim would clearly lack a particularly close connection to the platform.

behaviour may not depend at all on whether the tort affects users or non-users. Accordingly, there may be a *prima-facie* argument to at least consider the application of the rules just proposed in (some of) these cases – even though any actual application would have to be highly fact-specific and carefully justified.

429 With regard to the proposed escape clause, a platform choice of law can only be reasonably considered to establish a closer connection to a given country and its substantive law if, first, the otherwise applicable law is completely arbitrary or unpredictable and, second, the case is connected particularly closely to an online platform and its regulatory framework. For example, where someone posts misleading information on a social network that is clearly supposed to defraud other participants in this network but which happens to also cause loss to a non-user who reads it and acts accordingly, one might at least consider if the most appropriate law to apply is not the law selected in the platform contract.

430 With regard to substantive rules and standards of which a court may take account as fact, the threshold may be a bit lower, given that the rule does not require their direct application. Still, there will only be room for any consideration of such rules and standards where there is a clear connection between the claim and an online platform, the norms of which must have clearly formed part of the normative environment in which the platform user has acted.

4. Complete Proposal

431 Combining the different considerations and propositions of the previous sections, a separate EU instrument that deals specifically with liability in the context of the pursuit or use of information society services should contain the following provisions.

Article 1. Jurisdiction

(1) In cases relating to the pursuit or use of an information society service, jurisdiction shall be vested in the courts of the member state in which the defendant is domiciled or permanently established.

(2) In matters relating to tort, delict or quasi-delict, jurisdiction shall also be vested in the courts of the member state in which the event giving rise to the damage occurred, provided that the defendant could have reasonably expected to be subject to the jurisdiction of the courts of this country at the time at which this event occurred.

(3) Where the party claiming to be affected by the pursuit or use of the information society service is so affected in their private life, outside his or her trade or profession, he or she may also bring proceedings in the member state of his or her domicile, provided that the defendant

– acted in pursuit of commercial or professional activities; and

– directed the activity in question to this member state.

Violations of privacy and rights relating to personality, including defamation, shall always be considered as affecting the claimant in their private life.

Article 2. Applicable Law

(1) In cases relating to the pursuit or use of an information society service, the applicable law shall be

– in matters relating to tort, delict or quasi-delict, the law of the country in which the person claimed to be liable is habitually resident; and

– in matters relating to a contract, the law of the country in which the party required to effect the characteristic performance of the contract is habitually resident.

(2) Where it is clear from all the circumstances of the case that the contract or tort underlying the claim in question is manifestly more closely connected with a country other than that indicated in paragraph (1), the law of that other country shall apply.

(3) However, where the party claiming to be affected by the pursuit or use of the information society service is so affected in their private life, outside his or her trade or profession, the applicable law shall be the law of the country in which he or she has his or her habitual residence, provided that the defendant

– acted in pursuit of commercial or professional activities; and

– directed the activity in question to this member state.

Violations of privacy and rights relating to personality, including defamation, shall always considered to affect the claimant in their private life.

Article 3. Freedom of Choice

The rules in Articles 1 and 2 are without prejudice to the freedom of the parties to agree that a court or the courts of a member state are to have jurisdiction to settle the dispute in question and to choose the law applicable to it within the limits set by Articles 19 Brussels Ia, 6(2) Rome I, and 14(1) Rome II.

Article 4. Rules of Conduct

In assessing the conduct of the person claimed to be liable in tort, delict or quasi-delict, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of conduct which were in force at the place and time of the event giving rise to the liability. This includes rules and standards established on an online platform where the claim is closely connected to this platform.

Article 5. Scope of Application

These rules shall not apply to infringements of registered intellectual property rights that are committed via an information society service.

5. Application to Exemplary Private-Law Problems

432 It is submitted that these rules would create a better, more predictable legal framework for the different problems that this thesis has addressed, by reducing the number of competent courts and applicable laws and giving greater effect to the parties' legitimate expectations. In this section, this effect will be demonstrated for each of the five specific problems presented above[1236] separately, having regard, in turn, to the operation of the proposed rules in each area and to how they would change the outcome of specific cases that have been decided by the ECJ.

a. Protecting Reputation and Privacy

(1) General Approach

433 Considering their inextricable links to a person's private life, it has been proposed above[1237] that all infringements of personality rights (of a natural person) should be qualified as consumer cases **[Art 1(3), 2(3) of the proposed rules]**. Accordingly, as far as natural persons are concerned, the competent courts and applicable law would primarily depend on whether or not the claimant's[1238] country of domicile (for jurisdiction) and habitual residence (for choice of law) have been targeted by the publication in question. If they have, the courts of this country can be seised and will usually apply their own national law; if they have not, the claimant victim will have to seise the courts of the country in which the defendant has acted or where they are domiciled, which will apply the law of the country in which the defendant is habitually resident **[Art 1(1), (2), 2(1)]**, unless another court and/or law has been validly chosen **[Art 3]**.

1236 Under III.C.

1237 At [364].

1238 Regarding the use of the terms 'claimant' and 'defendant' in this section, see above, n 801.

434 For infringements taking place on an online platform such as *Twitter* or *Facebook*, the proposed escape clause **[Art 2(2)]** will make it possible to apply the law chosen in the platform contract as the law of the country most closely connected to the case. As the consumer exception would still take precedence over the escape clause, this would however only be an option where the claimant victim's country of habitual residence has not been targeted by the publication in question. This may be the case, in particular, where the infringement is closely linked only to the platform, eg where the defendant published private information relating to the claimant's platform use that would be of interest primarily to other platform users.

435 In addition, violations of personality might be an area where platform norms of conduct might be taken into account as fact **[under the proposed Art 4]**, which would be independent from the targeting criterion. In particular, standards that can be shown to be widely agreed on a given platform – such as *Twitter's* notoriously lenient approach to parody accounts[1239] – may come into play where the *lex causae* requires a certain behaviour to be 'unfair' or 'malicious'.

(2) Application to ECJ Cases

436 The benefits of the proposed rules can be demonstrated by applying them to the facts of some of the decisions by the ECJ that have shaped the current framework of EU private international law. In *eDate*,[1240] the ECJ allowed a German domiciliary to seek an injunction against (and damages from) an Austrian internet portal before the German courts because their centre of interests was located in Germany.[1241] Under the approach proposed here, the German courts would maintain jurisdiction, provided that Germany has

1239 See Twitter, 'Impersonation policy' (*twitter.com*, last accessed 1 Sep 2018).

1240 Above, n 180.

1241 See also BGH 8 May 2012 (n 607).

been targeted by the publication in question. Unlike under the ECJ's approach,[1242] though, the only other forum available would be the Austrian courts in their capacity as the courts of the defendant's domicile and place of acting; the courts of other places in which the content can be accessed would not be available, which would eliminate the problem of territorial segmentation of jurisdiction. Moreover, the applicable law would be either German or Austrian law (depending on whether the targeting criterion is satisfied), without the risk of a mosaic of applicable laws pursuant to national choice-of-law rules (and without the consequent need for substantive corrections pursuant to Art 3(2) e-Commerce Directive).

437 In *Oliver Martinez v MGM*, which was decided together with *eDate*, a French domiciliary was allowed to sue an English newspaper in France, again based on the centre-of-interests approach. In contrast to the fact scenario of *eDate*, it is not clear if the rules proposed above would also have allowed the claimant to seise the courts of their own domicile, as it is far from clear from the facts that France had been targeted by the online publication in question.[1243] If it has not, the only available forum would be the English courts, and the applicable law would be English law.

438 In *Bolagsupplysningen*,[1244] the attempt of an Estonian company to sue a Swedish Employers' Association in Estonia with respect to information on its website was denied because its centre of interests was found to be in Sweden and mosaic-approach jurisdiction was held to be unavailable for a claim for a mandatory order for rectification. Again, this result would not necessarily change under the approach advocated here: jurisdiction would be concentrated in the Swedish courts with no targeting-based exception being available

1242 *eDate* (n 180), [51].

1243 See above, [362], for the relevant test.

1244 Above, n 601.

for the claimant company (who would not qualify as a structurally weaker party); the applicable law would exclusively be Swedish law.

439 While the new rules that have been proposed in this thesis would not necessarily change the outcome of these cases, they would drastically change the underlying considerations. For infringements of personality rights, for instance, the courts of the claimant's country of domicile would often remain available. But their availability would no longer be based on this country being the claimant's centre of interests, or on the content being accessible from there. Instead, the availability of the courts of the claimant's country of domicile would depend exclusively on whether or not this country has been targeted by the publication in question, reflecting the protective nature of the approach[1245] – and giving the defendant a genuine chance to avoid it by structuring their activities in a way that it is only directed at audiences in certain member states, eg by using geo-blocking technology or requiring users to register before they can access certain content.

b. Protecting IP Rights

(1) General Approach

440 The application of the proposed rules to infringements of IP rights is slightly more complicated. Registered IP rights have been expressly excluded from their scope **[see Art 5 of the proposed rules]** in light of the strictly territorial operation of their protection.[1246] A similar territoriality is often claimed for unregistered IP rights (such as copyright). If it were true that *all* IP rights are, in fact, inherently territorial, or, alternatively, that their territorial protection is mandated by international conventions, then there would be little room for the application of the proposed new instrument. As the latter aims to submit an

1245 This aim also underlied the ECJ's decision in *eDate* (n 180) (see ibid, [47]), but informed the Court's approach to Art 5 No 3 Brussels I much more indirectly.

1246 See above, [376].

individual online act of infringement to a single law independently of its (perceived) territorial limitation, the holder of an IP right would be prevented from seeking protection under a different law, even if the infringement could legitimately be claimed to have happened (also) on the territory governed by a different law.

441 Accordingly, it has to be shown that the protection of unregistered IP rights is not necessarily territorial, neither by virtue of its nature nor by operation of public international law, before the practical effects of an alternative approach can be sketched out.

— The Territoriality of Unregistered IP Rights

442 It is often pointed out that the protection of unregistered IP rights is only granted by national law for the territory of a specific country.[1247] Accordingly, the only sensible choice-of-law rule would be to apply the *lex loci protectionis*, ie the law of the country for which the claimant seeks protection;[1248] it would then depend on the law of each country whether or not it applies to a given act of alleged infringement, and whether this act actually infringed the claimant's intellectual property rights.[1249]

443 This understanding is however being questioned by a growing number of authors.[1250] They rightly argue that even though applying the *lex loci protectionis* is one

1247 See De Miguel Asensio (n 452), 146; Fentiman (n 455), 137.

1248 See De Miguel Asensio (n 452), 146, 150–51; Goldstein/Hugenholtz, *International Copyright: Principles, Law and Practice* (OUP 2010), 93, 131–33; Torremans (n 654), 394; Nordemann-Schiffel, in Nordemann A and Nordemann JB (eds), *Fromm/Nordemann. Urheberrecht* (Kohlhammer 2014), Vor §§ 120 ff, [2], [59]. See also recital (26) Rome II: 'the universally acknowledged principle of the *lex loci protectionis*'; Art 3:102, 3:601 CLIP Principles (referring to the *lex protectionis* to determine the 'existence, validity, registration, scope and duration' of an IP right, and as a default rule for infringements); § 301(1)(b) ALI Principles (making it the default rule for 'existence, validity, duration, attributes, and infringement').

1249 Fentiman (n 455), 139–43.

1250 See Dinwoodie (n 454), 730–33, 766–74; Hatzimihail (n 306), 307–08; Moura Vicente, 'The Territoriatlity Principle in Intellectual Property Revisited' (2016) 34 NIPR 724, 726–29; Trimble (n 796), 384–90; Van Eechoud (n 174), 97–103, 125; Beckstein (n 996), 168–205; Drexl, in Säcker et al (n 703), Band 12, Teil 8, [9], [12]–[26].

possible approach to choice of law for infringements of IP rights, other approaches are not only possible, but may actually be preferable in light of the difficulties of applying an unlimited number of substantive laws to online infringements of IP rights.[1251] In support of this position, it should be emphasised that even though domestic rules on IP rights might be understood as claiming application only for a limited territory, the same could be said about most, if not all,[1252] provisions of national law;[1253] still, modern rules of private international law commonly submit cases with connections to several countries to a single one of these laws without having regard to whether or not they specifically fall into their territorial scope of application. Unless provisions of national IP law expressly spell out a specific spatial limitation,[1254] there is no compelling reason to assume such limitations and not to apply them to infringements that may also have effects on the territory of other countries.

444 Some support for this proposition can also be found in the proposals made in the CLIP and ALI principles. Both proposals not only make jurisdiction dependent on a targeting test,[1255] but allow for significant deviations from the *lex loci protectionis* in the form of an open-textured closest-connection rule for 'ubiquitous' infringements.[1256]

445 Such deviations are not in conflict with public international law either. Art 5(1) and (2) of the Berne Convention in particular,[1257] which aim to ensure the mutual recognition

1251 See, eg, Beckstein (n 996), 142–44, 205–06.

1252 In fact, John Henry Beale's entire theory of choice of law was built on the assumption that *all* law was territorial: see Symeonides (n 53), 55–56.

1253 See Dinwoodie (n 919), 892; Van Eechoud (n 174), 97–99. Fentiman (n 455), 138, seems to admit this in principle but tries to distinguish it from 'the self-limiting nature of intellectual property law'.

1254 This is more likely to be the case for registered IP rights, which have been excluded from this proposal: see above, [376].

1255 Art 2:202 CLIP Principles; § 204(2) ALI Principles.

1256 Art 3:603 CLIP Principles; § 321(1) ALI Principles.

1257 See also Art 2(1) Paris Convention, Art 3 TRIPS Agreement for registered IP rights.

of differing territorial systems of copyright protection on which the Convention relies[1258] through a principle of national treatment (Art 5(1)) and by submitting the protection of copyright to 'the laws of the country where protection is claimed' (Art 5(2)), have been understood as codifying the *lex loci protectionis* principle.[1259] But this is not the only possible way to read these provisions. Art 5(1) may be understood as only requiring the same choice-of-law rule being applied to all claimants, which may not rely on nationality as a connecting factor.[1260] Art 5(2) can also be read as a requirement as to the *substantive* content of national IP law,[1261] which guarantees the protection of IP rights abroad[1262] by making sure that the protecting law applies as much to foreign holders of IP rights as to nationals.[1263]

— *The Proposed Rules*

446 Recognising that public international law does not prescribe a particular choice-of-law rule, many authors have indeed started to question the appropriateness of the traditional adherence to a strictly territorial understanding of IP rights and to the *lex-loci-protectionis* rule in light of the increasingly international exploitation of IP rights, especially through

1258 Fischer-Lescano/Teubner (n 204), 1019.

1259 See, eg, Austin (n 451), 23–25; Geller (n 908), 106; Drexl (n 1250), [74]. See also Fawcett/Torremans (n 174), [13.45] and [13.50], advocating the use of the *lex loci protectionis* based on the Berne Convention; but see Torremans, 'The Law Applicable to Copyright Infringement on the Internet' (2016) 34 NIPR 687, 690, admitting that there is nonetheless 'limited flexibility that can for example be used to address specific problems created by the rise of the Internet.'

1260 Dickinson (n 112), [8.05]; Dinwoodie (n 454), 716–17; Dinwoodie, Conflicts (n 913), 201; Hatzimihail (n 306), 306; Johnson, 'Which Law Applies: A Reply to Professor Torremans' (2005) 1 J IP L&Pract 71, 72; Van Eechoud (n 174), 106–07. See also Case C-28/04 *Tod's v Heyraud* ECLI:EU:C:2005:418, [32]: 'as is apparent from Article 5(1) of the Berne Convention, the purpose of that convention is not to determine applicable law.'; *Itar-Tass Russian News Agency v Russian Kurier* 153 F3d 82 (2nd Cir 1998), [89] n 8: 'the principle of national treatment is really not a conflicts rule at all […]. It simply requires that the country in which protection is claimed must treat foreign and domestic authors alike.'

1261 See Fentiman (n 455), 133–37; Ginsburg (n 997), 336; Van Eechoud (n 174), 107–10.

1262 Dinwoodie (n 152), 532.

1263 Fentiman (n 455), 134.

the internet.[1264] The approach advocated in this thesis provides a possible answer to these concerns. It gives the claimant access to a small number of readily identifiable fora with competence for all consequences of the alleged infringement of an IP right and, more importantly, submits said infringement to a single applicable law. A claimant would have to seise either the courts of the alleged infringer's country of domicile or permanent establishment **[Art 1(1) of the proposed rules]** or the courts of the country in which the infringer has allegedly acted **[Art 1(2)]** – unless they are a consumer and the defendant professional has targeted their country of domicile, in which case the courts of this country would also have jurisdiction **[Art 1(3)]**. The applicable law would be the law of the defendant's country of habitual residence **[Art 2(1)]**, except for consumer cases, where it would be the law of the consumer's country of habitual residence **[Art 2(3)]**.

447 If the infringement happens on a platform, the platform contract could be taken into account to identify a more closely connected law **[Art 2(2)]** or to give consideration to individual rules and standards as fact **[Art 4]**. In the area of IP rights, this latter option may be particularly appropriate, given that the notorious conflicts between different national IP laws are often resolved, in practical terms, by the hosts of online platforms, who block and delete certain content and allow other. For instance, where a certain understanding of a widely available copyright exception like 'parody' is clearly established and consistently enforced on a platform, there seems to be a good arguable case to consider it as a rule of safety and conduct and to judge a user's against its background.

448 As far as their practical effects are concerned, the proposed rules would arguably have similar advantages as the principles proposed by the Max Planck CLIP Group and

1264 See, eg, Ginsburg (n 493), 283–84; Hugenholtz (n 447), 308; Reindl (n 991), 807, 824–25; Van Eechoud (n 174), 106. Cf Goldstein/Hugenholtz (n 1248), 94; Drexl (n 1250), [337]–[344].

the American Law Institute.[1265] These principles also address the difficulties of coordinating multiple lawsuits regarding the same incident through procedural measures[1266] and by reducing the number of competent courts (through a targeting test) and applicable laws (through a closest-connection rule for 'ubiquituous' infringements).[1267] The main difference to these proposals would be an even more focused (and thus more easily predictable) framework (subject to a rather wide escape clause), as opposed to more flexible criteria and an open-textured closest-connection test.

449 Just as these sets of principles, the proposed rules would eliminate the need for content that is made available in the EU to comply with the IP laws of 28 member states. Evidently, this would not prevent rightholders from selectively licensing protected content for individual countries – which, in fact, has long been one of the main reasons for territorially fragmented exploitation of content.[1268] But rather than treating such territorial segmentation as an unavoidable reality of IP law, the proposed approach would put the onus on the shoulders of rightholders to segment the market themselves through license agreements – which, in turn, would make it easier to regulate this segmentation, eg where it conflicts with the principles of the common market of the European Union.[1269]

1265 CLIP Principles (n 451); ALI Principles (n 451).

1266 See Art 2:701–06 CLIP Principles; § 221–23 ALI Principles.

1267 See above, [444]. See also Kur, in European Max Planck Group on Conflict of Laws in Intellectual Property (ed), *Conflict of Laws in Intellectual Property. The CLIP Principles and Commentary* (OUP 2013), [3:603.C05]–[3:603.C07].

1268 See Ohly (n 335), 943. See also Hugenholtz (n 447), 314 (with regard to similar effects of the Satellite and Cable Directive).

1269 See the Regulation on cross-border portability of online content (n 294); the services offering such content have however been excluded from the Geo-Blocking Regulation (n 295): see its Art 4(1)(b).

(2) Application to ECJ Cases

450 To demonstrate how the proposed solution would change the paradigms of online cases in this area, it can be applied to the facts of the ECJ's decision in *Hejduk*,[1270] where the Court allowed Austrian domiciliary to sue a German entity in Austria based on the accessibility of the allegedly infringing website in Austria. Under the rules proposed here, the claimant professional would however have to seise the German courts as the courts of the country of origin of the infringement, ie the defendant's country of domicile and relevant establishment (and, presumably, the place of the event giving rise to the damage). While the ECJ did not have to decide on the applicable law, Art 8(1) Rome II would have allowed the claimant to rely on Austrian law for the part of the infringement that allegedly violated this law. Under the approach advocated here, the applicable law would however be identified following the same country-of-origin logic already applied to the question of jurisdiction, leading to the application of German law to all aspects of the infringement.

451 This result can be contrasted to the ECJ's earlier decision in *Pinckney*.[1271] There, the Court allowed a French domiciliary to seise the French courts based on the sale of CDs allegedly containing reproductions of protected works to buyers in France, through a website that could be accessed there. The application of the new instrument proposed above, which is a reaction to the problems created by the ubiquitous effects of online communication, would depend on whether or not the alleged infringement involved the pursuit or use of an information society service (a question that the ECJ could leave open)[1272]. If the infringement consisted in advertising the CDs or entering into sales contracts through the homepage in question, then the proposed rules would apply and only

1270 Above, n 447.

1271 Above, n 635.

1272 See ibid, [20], [44].

the courts of the defendant's domicile in Austria (and, potentially, the courts in the United Kingdom as the place of the event giving rise to the damage) would have jurisdiction. If the infringement consisted however in physically delivering the CDs to French buyers, the proposed rules would not apply, leaving the outcome of the case unaffected. While this might appear problematic as it reinforces the dividing line between online cases (in which a claimant professional has to seise the courts of the infringer's country of domicile) and offline cases (in which the claimant can just seise their home courts),[1273] it would still be in line with the core argument underlying the proposed approach. Whereas it is indeed *possible* to infringe the copyright laws of multiple countries by delivering CDs to customers who live in them, such multi-state effects are *automatic* when publishing content online. The fact that the reach and accessibility of online content need to be actively limited[1274] to avoid liability under countless national IP laws justifies the shift towards a single applicable law in non-consumer cases.

452 It should be noted that within their scope of application, the proposed rules would also often lead to similar practical results as the *status quo*. In light of the high number of applicable IP laws, the Court of Justice has, on numerous occasions, subjected the *substantive* scope of application of national legislation (giving effect to EU directives) to a targeting requirement.[1275] In practical terms, the ultimately applicable law will thus often be the law of a single EU member state that has been targeted by the content in question. Under the proposed rules however, infringements committed through information society services will always be subject to a single national law, which will be either the law of defendant's or the law of the claimant's habitual residence. In addition, the proposed rules

1273 As to this distinction see also above, under IV.C.1.e.(1).

1274 Note that in many cases, such limitations would defy the very purpose of the online project in question: see above, [321].

1275 See above, [211].

would concentrate litigation in a single, easily identifiable court that would have jurisdiction for the entire infringement claim.

c. Ensuring Fair Competition

(1) General Approach

453 Applying the proposed rules to acts of unfair competition may seem, at the same time, easier and more difficult. On the one hand, reducing the number of applicable laws seems easier because competition law traditionally focuses on markets rather than on countries[1276] – although markets are still widely understood as national markets.[1277] On the other hand, applying connecting factors that focus on the parties (and not on the effects of their actions) seems more difficult because one would expect the same competition law to apply to all participants in a single market[1278] – although existing rules of EU private international law show that this does not necessarily have to be the case.

454 In fact, Art 6(3)(b) Rome II already allows the claimant to opt for the application of a single national law (the *lex fori*) in a case affecting the markets in multiple member states, provided that one of the markets affected is in the law of the defendant's country of domicile and that the claimant has brought the claim before the courts of this country.[1279] Under the rules proposed above, this would become the default position in all cases not involving consumers, which would be adjudicated by the courts, and under the substantive competition law of, the country in which the defendant is established **[see Art 1(1), 2(1) of the proposed rules]**. While it might appear to put the claimant at a disadvantage,[1280] it must

1276 See above, [142].

1277 ibid.

1278 See De Miguel Asensio (n 452), 152–54, 161–62.

1279 See ibid, 162–63.

1280 Under the proposed rules, the claimant would also lose the option to sue co-defendants under the same applicable law (also provided by Art 6(3)(b) Rome II) to the extent that the escape clause does not lead to this result.

be kept in mind that this solution would only apply to cases in which the relevant act of alleged unfair competition itself has taken place online and where the fact that it can be received in numerous countries regularly creates little to no meaningful connection between the claim and these countries.

455 In consumer cases, the Court of Justice has recently interpreted Art 6(1) Rome II as referring to 'the country of residence of the consumers to whom the [defendant] directs its activities'.[1281] Consequently, the proposed new rules would change the legal framework for consumer cases only with regard to jurisdiction by giving consumers whose country of domicile has been targeted access to the courts of this country **[Art 1(3)]**.

456 In practical terms, the relevant market will increasingly often be an online platform such as *Apple's App Store* or *Google's Play Store*. In these cases, the proposed escape clause **[Art 2(2)]** would theoretically make it possible to submit all relationships on these platforms to a single applicable where this law has been selected in all contracts between the platform host and everyone using the platform. Alternatively, individual platform norms or standards might be taken into account as fact **[Art 4]**.

(2) Application to ECJ Cases

457 As the reasons given by the ECJ in its decision in *Concurrence*[1282] are particularly inconclusive (even by the Court's own standards),[1283] it is hard to predict if the outcome of the case would change under the proposed new rules. In *Concurrence*, a French company had asked the French courts for an injunction against a Luxembourg company to prevent the sales of certain products through websites that were aimed at customers outside of

1281 *VKI* (n 111), [43].

1282 Above, n 385.

1283 See also Lutzi, 'Gerichtsstand am Schadensort und Mosaikbetrachtung bei Wettbewerbsverletzungen im Internet', IPRax 2017, 552, 556.

France, but could be accessed from France. The ECJ held that the French courts had jurisdiction based on what is now Art 7(2) Brussels Ia with regard to 'the reduction in the volume of its sales resulting from sales made in breach of [the agreement]'[1284] but left open whether such a claim could be based on the accessibility of the website alone or whether it required proof of actual sales or even delivery to customers in France. Just as with regard to the decision in *Pickney*,[1285] the proposed rules would only apply if jurisdiction in this case was based on the accessibility of, or the possibility to enter into contracts through, the website in question for buyers in France. Jurisdiction (or, indeed, the applicable law) for physical delivery that was infringing competition law would however be unaffected.

d. Regulating Agreements

458 The extent and practical effects of the new instrument that has been proposed in this thesis would be more limited in the area of contract law. With regard to jurisdiction, the most noticeable change would be the elimination of the forum at the place of contract performance; instead, a party (other than a structurally weaker party) wanting to bring a claim based on a contract that is performed through an information society service would have to seise the courts of the defendant's country of domicile **[Art 1(1) of the proposed rules]**. With regard to the applicable law, the proposed rules emulate Art 4(1)–(3) Rome I and would not lead to different results **[see Art 2(1), (2)]**. Moreover, they explicitly leave the existing rules on party autonomy (both for jurisdiction and choice of law) unaffected **[Art 3]**.

459 With regard to contractual transactions, there would be a particularly strong argument for using the general escape clause **[Art 2(2)]** to give effect to a platform choice

1284 *Concurrence SARL* (n 385), [33].

1285 See above, [451].

of law in certain platform-related cases. For instance, where two users of an auction platform or virtual environment only know each other by a pseudonym and/or avatar enter into a contract, the country most closely connected to the transaction may legitimately be considered to be the country whose law is chosen in the platform contract, especially where this country also has other connections to the platform, eg by being the place of establishment of the host.[1286]

e. Protecting Structurally Weaker Contract Parties

460 Also with regard to structurally weaker contract parties, the proposed new instrument would appear to leave the status quo of EU private international law unaffected. The existing instruments already protect structurally weaker parties such as consumers through targeting-based exceptions in Art 6 Rome I and Art 17–19 Brussels Ia, which allow them to seise the courts of the member state of their domicile and rely on the law of their country of habitual residence if the activity in question has been directed at this country. The proposed rules mirror these exceptions **[in Art 1(3), 2(3)]** and extend them beyond the area of contract law, while also leaving the safeguards against detrimental choice-of-forum and choice-of-law clauses intact **[Art 3]**.

1286 See above, [420].

V. Results and Perspectives

461 This thesis has taken a look at how private international law can react to challenges raised by the internet, such as the multiplication of connections caused by its independence from national borders and the unique prevalence of private ordering. Although existing solutions have been found wanting, this thesis has shown that private international law does not have to capitulate to these challenges but can effectively address them without radically changing its shape.

462 This analysis may be found insightful with regard to two questions: First, what contribution can private international law make to the regulation of internet cases? (A.) Secondly, what kind of private international law is needed to realise the discipline's regulatory potential with regard to the manifold new challenges brought about by globalisation? (B.)

A. The Potential of Private International Law for Internet Regulation

463 This thesis has focused on two particular challenges that the internet has created for private law, and private international law in particular: first, the internet's independence from state borders, which drastically increases the number of connections to different countries in internet cases but noticeably reduces their usefulness; and second, the reality of private platform hosts fulfilling many of the functions that are traditionally exercised by the state. They have been conceptualised as a challenge of horizontal coordination (between different courts and legislators) and a challenge of vertical coordination (between public regulators and private parties).

464 Using EU private international law as an example, it has been argued that the answers that have been found in reaction to these two challenges are often unsatisfying. Arguably driven by a fear of leaving potential claimants exposed to the dangers of an

unregulated cyberspace, the ECJ in particular has repeatedly opted for a wide interpretation of existing rules, often requiring nothing more than accessibility of online content and thus attaching significance to virtually every connection to which an internet case gives rise. This has exposed defendants to a risk of worldwide liability and increased the likelihood of irreconcilable court decisions.

465 In light of these problems, this thesis has argued that private international law should aim for a much higher degree of concentration in internet cases, reducing the overwhelming number of connections to few, meaningful ones. It has proposed the introduction of new rules of private international law via a new instrument on jurisdiction and choice of law for claims involving information society services. These rules would rely on a country-of-origin default rule and a targeting-based exception for consumer cases. It has been argued that such rules would make a positive contribution to the existing private-law framework for internet cases and, in particular, contribute to the realisation of a Digital Single Market

> *in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.*[1287]

466 First of all, the rules that have been proposed in this thesis would facilitate such online activities by aligning the legal framework for internet cases with the expectations of internet users. Internet users would be right to assume that they will be sued only in the member state in which they are domiciled (or established), or in the member state in which they have acted; only where they (are alleged to) have violated personality rights or where they, in their capacity as professionals, interacted with consumers will they risk being sued

1287 EU Digital Single Market Strategy (n 230), 3.

elsewhere, and only in member states to which they have directed the relevant activity. Similarly, internet users would only have to comply (as regards non-contractual liability) with the laws of the member states in which they are habitually resident – with the same exception as mentioned before and unless the claim in question is manifestly (and therefore predictably) more closely connected to another country. While individual internet users may often be unaware of the existing risk of worldwide liability, the increased legal certainty would certainly be appreciated by non-profit projects, internet start-ups and journalists, who would be able to predict the normative framework for their online activities much more easily, allowing them to avoid significant liability risks.

467 But the increased legal certainty would also have benefits for potential claimants. Not only would the level of consumer protection be higher in a range of tort cases, in which consumers currently have to rely on mosaic-approach jurisdiction to bring a claim at home, it would also simplify the ways in which redress can be achieved internationally. Litigation over international jurisdiction can be a major impediment to effective redress. In *Concurrence*,[1288] for instance, the claimant had already gone out of business when the ECJ finally held that the claim in question could indeed be brought in France; in *Bolagsupplysningen*,[1289] the claimant had to go through several instances to find out that even though Estonia was *one* place of the damage, the remedy in which they were primarily interested was not available there.[1290] Under the rules that have been proposed in this thesis, it would have been clear that both claims could only be brought at the

1288 Above, n 385.

1289 Above, n 589.

1290 See also Kubis, 'Zum Tatortgerichtsstand bei grenzüberschreitenden Äußerungsdelikten zu Lasten von Unternehmen' WRP 2018, 139, 144.

defendant's domicile (unless the claim in *Concurrence* could be based on actual sales to costumers in France).[1291]

468 A higher degree of concentration at the levels of jurisdiction and choice of law would also have benefits for the administration of justice within the European Union. Competences would no longer be split territorially but would be concentrated in particular, easily identifiable courts, which would apply a single, equally easily identifiable law, with little risk of different courts rendering contradictory decisions. This reallocation of competences would extend the scope of the approach underlying the e-Commerce Directive, according to which each member state is responsible for the regulation of information society service providers established on their territory, while avoiding the difficulties of the Directive's approach layering country-of-origin rules over the otherwise applicable law. As far as home-country regulation is concerned, the effectiveness of domestic law would be further increased by reduced opportunities for claimants to rely on other substantive laws that would undermine it.

469 Finally, while a country-of-origin approach may appear as an invitation for jurisdiction shopping to likely defendants, which would in turn trigger a regulatory race to the bottom, it is submitted that within the single market of the EU, it would rather lead to the kind of contained regulatory competition that many directives (such as the Information Society Directive)[1292] are actually happy to encourage by leaving the member states some room to manoeuvre.

470 In light of these different positive effects, it is indeed surprising that the EU Commission has so far excluded any reform of private international law from its efforts to

1291 See above, [438] and [457].

1292 See Art 5(2), (3) Information Society Directive.

create the 'Digital Single Market' mentioned above, even though it recently reiterated that the realisation of such a market requires

> *a clear and stable legal environment to stimulate innovation, tackle market fragmentation and allow all players to tap into the new market dynamics under fair and balanced conditions.*[1293]

The proposal for new copyright directive, for instance, makes repeated reference to the need to address the increase in cross-border uses of protected content 'in the digital environment'[1294] and to 'avoid fragmentation in the internal market'[1295] but leaves the mosaic approach to cross-border copyright infringements entirely unaddressed.

471 The proposed instrument also contains rules that might contribute to bridging the gap between national regulation and private ordering. It has been shown that it would be problematic to defer completely to this kind of private regulation even with regard to sophisticated, highly self-regulated online platforms and to treat their rules, or their means of dispute resolution, as equivalent to their public counterparts. Instead, private international law should retain its position as a coordinating law that organises the interplay between public and private norms. Rules of jurisdiction and choice of law that clearly identify the competent courts and applicable law facilitate this coordination. They can be combined with mechanisms such as an escape clause for choice of law and a gateway to consider certain rules and standards as fact to give consideration to specific elements of a platform environment such as the choice-of-law clauses that can be found in most platform contracts without undermining the authority of state law.

472 It may be interesting to note that, to a certain degree, the benefits that a better private-international-law approach to internet cases may have with regard to each of the

---

1293 Mid-Term Review on the implementation of the Digital Single Market Strategy (n 302), 2.

1294 Commission Proposal for a Directive on copyright in the Digital Single Market' (n 301), Art 1(1), 3–5, 8, recitals (3), (5), (44), and Explanatory Memorandum, 2, 6.

1295 ibid, Explanatory Memorandum, 2.

two aforementioned challenges are interlinked. Private ordering may be particularly prevalent within regulatory environments in which the authority of national courts and domestic laws appears as particularly weak, evasive, or arbitrary;[1296] global online communities such as social networks may appear to their users as escaping the authority of public institutions to a degree that any reliance on them would seem futile. A clear and predictable legal framework for all private-law relationships that are formed online (at least within the EU) might thus also help to put national law back on the table in online environments in which it currently plays a problematically small role.

B. The Potential of Regulatory Considerations in Private International Law

473 The solution that has been proposed in this thesis relies on orthodox, technical rules and methods of private international law and does not compromise its commitment to substantive neutrality. Instead, it is based on what has been defined above as 'conflict' considerations,[1297] ie political and regulatory aims that inform the allocation of adjudicatory and prescriptive jurisdiction but are independent from specific substantive results.

474 The present proposal aims to give effect to a number of these considerations. First and foremost, it is based on the aim of respecting the parties' legitimate expectations as to the relevant legal framework. It has been argued that existing solutions such as the unqualified *forum actoris* for infringements of personality rights and extensive mosaics of competent courts and applicable laws make it difficult for internet users to predict this framework and consequently frustrate their legitimate expectations. A clear country-of-

1296 See also Kohl (n 330), 30–31.

1297 See above, under II.B.1.a.

origin rule combined with easily identifiable exceptions for specific groups of cases, on the other hand, respects these expectations to a much higher degree.

475 Additionally, the proposed approach tries to achieve a better coordination of lawsuits by abandoning the concept of 'partial' jurisdiction for a single claim that can be vested in numerous courts at once, which the ECJ has introduced in *Bolagsupplysningen*,[1298] and by concentrating 'full' jurisdiction in a small number of clearly identifiable courts. It also aims to increase the protection of structurally weaker parties by extending the existing privilege of home-country jurisdiction and choice of law in consumer-contract cases to all consumer cases. Again, this protection is realised at the level of the selection process, by giving the weaker party access to a court and a law that will regularly be more accessible to them and that they will often be more familiar with, independently of whether they are actually better protected by this court under this law.

476 This shows that many regulatory aims can be realised by orthodox rules of private international law that are combined and applied in light of the particular challenges they are supposed to address. Even with regard to the relatively new phenomenon of highly self-regulated online platforms, the existing toolkit of private international law provides mechanisms through which this private ordering can be taken into account when determining the applicable (state) law.

477 With regard to this last question, and the potential reliance on 'local data' thinking in particular,[1299] some propositions made in this thesis have admittedly come close to substantive-law territory. Yet, neither the theory nor the provisions that give effect to it depend on the content of the rules of conduct to which they refer; they can be taken into

1298 See above, [248].

1299 See also Dornis (n 970), 321–25.

account as fact, independently of whether they establish the defendant's liability or provide an additional defence.

478 This is not to deny that private international law is inevitably influenced by the rules of substantive law with which it engages. The country-of-origin approach advocated in this thesis, for instance, is hardly conceivable without harmonised minimum standards of protection. Given the absence of such standards in most areas of private law outside of the EU, it has been proposed to limit the rules advocated here to parties located within the EU – an acknowledgement of the link between substantive and private international law that can also be found in similar propositions.[1300]

479 Still, with regard to the specific rules and criteria proposed in reaction to these substantive conflicts, this thesis has arguably shown that the traditional mechanisms of private international law have the potential to give effect to a considerable range of regulatory aims. But in order to do so, they need constantly to be re-evaluated, rearranged, and refined in view of new phenomena and of the effects of their application, especially on those individuals who are confronted with these phenomena. The growing awareness for this necessity may be seen as proof for the conclusion reached by Symeon C Symeonides in his 2016 Hague Lecture:

> *If indeed PIL is unshaken, it has been stirred and has 're-shaped itself to the vessel that contains it'. It is not 'on its deathbed'. It is less idealistic and less 'pure' than the classical model, but it is richer and more pragmatic, vibrant, sophisticated, flexible, and pluralistic than ever before.*[1301]

Using the tools of this discipline, this thesis offers a way forward for the EU in its regulation of private-law aspects of the internet.

1300 See § 204(3) ALI Principles.

1301 Symeonides (n 53), 351.

VI. Conclusion

480 This thesis has discussed the different challenges the internet has created for private international law and the coordination of legal systems. Some of these challenges, which concern the horizontal coordination between different national legal systems, may be considered as consequences of the *web 1.0*, a global network of interlinked resources; others, which concern the coordination between national legal systems and private actors, seem to result from the emergence of the so-called *web 2.0*, which may be more accurately described as a network of networks.[1302]

481 No one knows what shape the *web 3.0* will take, or if it already exists. It is clear, though, that the technology underlying it (and all other types of internet use), linking data and devices to a global network, is unlikely to go away anytime soon. Innovative new uses like the 'semantic web' or blockchain technology will keep changing the ways in which we interact with each other, do business, and spend our time. If anything, the internet is likely to play an even bigger part in our lives in the future.

482 As long as laws and regulation remain national (or supra-national), the internet and related technologies will continue to raise questions as to the allocation of prescriptive and adjudicatory jurisdiction in private-law cases. In this thesis, an attempt has been made to show how private international law may answer some of these questions. The proposed new instrument, which focuses on the individual parties involved in internet cases, may be flexible enough to accommodate even entirely new challenges that have not been considered here. But even where it is not, it is hoped that the underlying analysis will be useful to further develop existing rules and mechanisms in reaction to such new challenges.

1302 See above, [114].

Bibliography

Ahn A, 'How we fought bad apps and malicious developers in 2017' (Android Developers Blog, 30 Jan 2018) <android-developers.googleblog.com/2018/01/how-we-fought-bad-apps-and-malicious.html> accessed 1 Aug 2018

Allen R, 'What happens online in 60 seconds?' (*smartinsights.com*, 6 Feb 2017) <www.smartinsights.com/internet-marketing-statistics/happens-online-60-seconds/> accessed 1 Aug 2018

Ancel B and d'Avout L, *Droit international privé* (6th edn, Economica 2010)

Andrews DC and Newman JM, 'Personal Jurisdiction and Choice of Law in the Cloud' (2013) 73 Maryland Law Review 313

Austin GW, 'Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation' (1999–2000) 23 Columbia-VLA Journal of Law & the Arts 1

von Bar C and Mankowksi P, *Internationales Privatrecht* (2nd edn, Beck 2003)

Barlow JP, 'Declaration of the Independence of Cyberspace' (*eff.org*, 8 Feb 1996), reprinted in Fitzgerald B (ed), *Cyberlaw* (Ashgate/Dartmouth 2006), Vol I, 129 <www.eff.org/de/cyberspace-independence> accessed 1 Aug 2018

Basedow J, 'The Law of Open Societies. Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des cours 9

Battifol H and Lagarde P, *Traité de droit international privé, Tome 1* (8th edn, LGDJ 1993)

Baxter WF, 'Choice of Law and the Federal System' (1963–64) 16 Stanford Law Review 1

Beale N, Bateman H, and McAdam K, *Dictionary of Law* (5th edn, A&C Black 2007)

Beale JH, *A Treatise on the Conflict of Laws or Private International Law. Vol 1.1* (Harvard University Press 1916)

Beckstein F, *Einschränkungen des Schutzlandprinzips* (Mohr Siebeck 2010)

Bell E, 'The truth about Brexit didn't stand a chance in the online bubble' (*theguardian.com*, 3 July 2016) <www.theguardian.com/media/2016/jul/03/facebook-bubble-brexit-filter> accessed 1 Aug 2018

Berman PS, 'The Globalization of Jurisdiction' (2002) 151 University of Pennsylvania Law Review 311

——, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 485

——, ‘Non-State Law Making Through the Lens of Global Legal Pluralism’, in Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (CUP 2015), 15

Bettinger T and Thum D, ‘Territorial Trademark Rights in the Global Village – International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet [Part II]’ (2000) 31 International Review of Industrial Property and Copyright Law 285

Bickert M, ‘Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process’ (*newsroom.fb.com*, 24 April 2018) <newsroom.fb.com/news/2018/04/comprehensive-community-standards/> accessed 1 Aug 2018

Bigos O, ‘Jurisdiction over cross-border wrongs on the internet’ (2005) 54 International & Comparative Law Quarterly 585

Bing J, ‘Building Cyberspace: a brief history of Internet’, in Bygrave LA and Bing J (eds), *Internet Governance: Infrastructure and Institutions* (OUP 2009), 8

Blom J, ‘Public Policy in Private International Law and its Evolution in Time’ (2003) 50 Netherlands International Law Review 373

Blum A, *Tubes. Behind the Scenes at the Internet* (Penguin 2012)

Bogdan M, ‘Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation’ (2011) 5 Masaryk University Journal Law & Technology 1

——, ‘Jurisdiction in Disputes about Infringements of the Intellectual Property Rights on the Internet in View of Recent ECJ Case Law’ (2013) 7 Masaryk University Journal Law & Technology 193

Bollée S and Haftel B, ‘Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l’arrêt eDate Advertising et Martinez’ Recueil Dalloz 2012, 1285

Bomhoff J, ‘The Constitution of the Conflict of Laws’, in Muir Watt H and Fernández Arroyo DP (eds), *Private International Law and Global Governance* (OUP 2014), 262

—— and Meuwese A, ‘The Meta-regulation of Transnational Private Regulation’ (2011) 38 Journal of Law & Society 138

Bone SA, ‘Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by *Gutnick v. Dow Jones & Co.*’ (2005) 62 Washington & Lee Law Review 279

Bonomi A, ‘Jurisdiction over Consumer Contracts’, in Dickinson A and Lein E (eds), *The Brussels I Regulation recast* (OUP 2015), ch 6

Booth R and Grierson J, 'Publication of hacked David Beckham emails renders injunction worthless' (*theguardian.com*, 6 Feb 2017) <www.theguardian.com/football/2017/feb/06/hacked-david-beckham-emails-renders-injunction-worthless> accessed 1 Aug 2018

Born GB, *International Commercial Arbitration* (2nd edn, Kluwer 2014)

Brand PA, 'Persönlichkeitsrechtsverletzungen im Internet, E-Commerce und „Fliegender Gerichtsstand"' Neue Juristische Wochenschrift 2012, 127

Briggs A, 'The Brussels Convention' 15 (1995) Yearbook of European Law 487

——, *Private International Law in English Courts* (OUP 2014)

Bright-Staath C and Wray B, 'Corporations and Social Environmental Justice: The Role of Private International Law' EUI LAW Working Paper No 2012/02 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2207317> accessed 1 Aug 2018

Brüggemeier G, Colombi Ciacchi A, and O'Callaghan P, *Personality Rights in European Tort Law* (CUP 2010)

Brodkin J, 'FCC votes for net neutrality, a ban on paid fast lanes, and Title II' (*arstechnica.com*, 26 Feb 2015) <arstechnica.com/business/2015/02/fcc-votes-for-net-neutrality-a-ban-on-paid-fast-lanes-and-title-ii/> accessed 1 Aug 2018

——, 'FCC must defend net neutrality repeal in court against dozens of litigants' (*arstechnica.com*, 12 Mar 2018) <arstechnica.com/tech-policy/2018/03/fcc-must-defend-net-neutrality-repeal-in-court-against-dozens-of-litigants/> accessed 1 Sep 2018

Bucher A, 'La dimension sociale du droit international privé' (2009) 330 Recueil des cours 1

Byassee WS, 'Jurisdiction of cyberspace: Applying real world precedent to the virtual community' (1995) 30 Wake Forest Law Review 197

Bygrave LA, *Internet Governance by Contract* (OUP 2015)

Carrascosa González J, 'The Internet – Privacy and Rights Relating to Personality' (2016) 378 Recueil des cours 263

Carruthers JM, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 International & Comparative Law Quarterly 691

Castells M, 'The Impact of the Internet on Society: A Global Perspective', in Benkler et al (eds), *19 Key Essays on How Internet is Changing our Lives* (BBVA 2013), 127

Cavers DF, 'A Critique of the Choice-of-Law Problem' (1933) 47 Harvard Law Review 137

——, *The Choice of Law Process* (University of Michigan Press 1965)

——, 'Legislative Choice of Law: Some European Examples'
(1971) 44 Southern California Law Review 340

Cheatham EE and Reese WLM, 'Choice of the Applicable Law'
(1952) 52 Columbia Law Review 959

Clinton WJ, 'A Framework for Global Electronic Commerce',
reprinted in Fitzgerald B (ed), *Cyberlaw* (Ashgate/Dartmouth 2006), Vol I, 133

Lord Collins et al, *Dicey, Morris & Collins. The Conflict of Laws*
(15th edn, Sweet & Maxwell 2012)

Collins M, *The Law of Defamation and the Internet* (2nd ed, OUP 2005)

Cook WW, 'The Logical and Legal Bases of the Conflict of Law'
(1924) 33 Yale Law Journal 457

Crawford EB and Carruthers JM, 'Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations'
(2014) 63 International & Comparative Law Quarterly 1

Currie B, 'Notes on Methods and Objectives in the Conflict of Laws'
[1959] Duke Law Journal 171

Dash A, 'Tech and the Fake Market tactic' (*medium.com*, 10 Feb 2017)
<medium.com/humane-tech/tech-and-the-fake-market-tactic-8bd386e3d382>
accessed 1 Aug 2018

Dasser F, 'Mouse or Monster? Some Facts and Figures on the lex mercatoria', in Zimmermann R (ed), *Globalisierung und Entstaatlichung des Rechts* (Mohr Siebeck 2008), 129

Davis PA, 'The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier'
(2001/02) 54 Federal Communications Law Journal 339

De Franceschi A, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', in De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016), 1

Del Duca LF, 'Ebay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers'
(2014) 6 Yearbook on Arbitration & Mediation 204

De Miguel Asensio PA, 'The Private International Law of Intellectual Property and of Unfair Commercial Practices: Convergence or Divergence?', in Leible S and Ohly A (eds), *Intellectual Property and Private International Law* (Mohr Siebeck 2009), 137

DeNardis L, *The Global War for Internet Governance* (Yale University Press 2014)

De Nova R, 'Glancing at the Content of Substantive Rules under the Jurisdiction-Selecting Approach' (1977) 41 Law & Contemporary Problems 1

Depreeuw S and Hubin JB, 'Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU'
(2014) 9 Journal of Intellectual Property Law & Practice 750

Dickinson A, 'Legal Certainty and the Brussels Convention—Too Much of a Good Thing?' in de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart 2007), 115

——, 'Towards an Agreement on the Concept of "Contract" in EU Private International Law?' [2014] Lloyd's Maritime and Commercial Law Quarterly 466

——, 'Cryptocurrencies and the Conflict of Laws', in Fox D and Green S (eds), *Private Law Implications of Cryptocurrencies* (OUP 2019) [forthcoming]

Dinwoodie GB, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 University of Pennsylvania Law Review 469

——, 'International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought' (2001) 49 American Journal Comparative Law 429

——, 'The Development and Incorporation of International Norms in the Formation of Copyright Law' (2001) 62 Ohio State Law Journal 733

——, 'Trademarks and Territory: Detaching Trademark Law from the Nation State' (2004–05) 41 Houston Law Review 885

——, 'Conflicts in International Copyright Litigation: The Role of International Norms', in Basedow J, Drexl J, Kur A, and Metzger A (eds), *Intellectual Property in the Conflict of Laws* (Mohr Siebeck 2005), 195

——, 'Developing a Private International Intellectual Property Law: The Demise of Territoriality?' (2009) 51 William & Mary Law Review 711

Dogauchi M, 'Law Applicable to Torts and Copyright Infringement through the Internet' in Basedow J and Kono T (eds), *Legal Aspects of Globalization* (Kluwer 2000), 49

Dornis TW, 'Local Data in European Choice of Law: A Trojan Horse from across the Atlantic' (2016) 44 Georgia Journal International & Comparative Law 305

——, 'Comity', in Basedow J, Rühl G, Ferrari F, and De Miguel Asensio PA (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

——, 'Local Data', in Basedow J, Rühl G, Ferrari F, and De Miguel Asensio PA (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

——, *Trademark and Unfair Competition Conflicts – Historical-Comparative, Doctrinal, and Economic Perspectives* (CUP 2017)

Dessemontet F, 'Internet, le droit d'auteur et le droit international privé' Schweizerische Juristen-Zeitung 1996, 285

Drexl J, in Säcker FJ et al (eds), *Münchener Kommentar zum BGB* (7th edn, Beck 2018), Band 12, Teil 9

—— and Kur A (eds), *Intellectual Property and Private International Law* (Hart 2005)

Droz GA and Gaudemet-Tallon H, 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en Reglèment' (2001) Revue critique de droit international privé 601

Düsterhaus D, in Gössl SL et al (eds), *Politik und Internationales Privatrecht (?)* (Mohr Siebeck 2017), 73

Easterbrook FH, 'Cyberspace and the Law of the Horse' [1996] University of Chicago Legal Forum 207

Edwards L, 'The Fall and Rise of Intermediary Liability Online', in Edwards L and Waelde C (eds), *Law and the Internet* (3rd edn, Hart 2009), 47

van Eechoud M, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis* (Kluwer 2003)

van den Eeckhout V, 'The Instrumentalisation of Private International Law: quo vadis?', 1 July 2014 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2485779> accessed 1 Aug 2018

——, 'Choice and regulatory competition: rules on choice of law and forum' in Cauffman C and Smits J (ed), *The citizen in European private law: norm-setting, enforcement and choice* (Intersentia 2016), 9

Ehrenzweig AA, 'Local and Moral Data in the Conflict of Laws: Terra Incognita' (1966) 16 Buffalo Law Review 55

Enigmax, 'Pirate Bay Trial Day 5: Peter's "Political Trial"' (*torrentfreak.com*, 20 Feb 2009) <torrentfreak.com/pirate-bay-trial-day-5-peters-political-trial-090220/> accessed 1 Sep 2018

Faucher JD, 'Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases' (1992/93) 26 UC Davis Law Review 1045

Fauvarque-Cosson D, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple' (2001) 49 American Journal of Comparative Law 407

Fawcett JJ and Torremans P, *Intellectual property and private international law* (OUP, 2nd edn 2011)

Feld H, 'Structured to Fail: ICANN and the ''Privatization'' Experiment', in Thierer A and Crews W (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003), 333

Fentiman R, 'Choice of Law and Intellectual Property', in Kur A and Drexl J (eds), *Intellectual Property and Private International Law* (Hart 2005), 129

Ferrari F, 'Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts"' (1995) 69 Tulane Law Review 1225

Finley K, 'The FCC's Net Neutrality Rules are Dead, but the Fight isn't' (*wired.com*, 11 Jun 2018) </www.wired.com/story/the-fccs-net-neutrality-rules-are-dead-but-the-fight-isnt/> accessed 1 Sep 2018

Fischer-Lescano A and Teubner G, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law'
(2003–04) 25 Michigan Journal of International Law 999

Flessner A, *Interessenjurisprudenz im internationalen Privatrecht* (Mohr Siebeck 1990)

Foss M and Bygrave LA, 'International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law'
(2000) 8(2) International Journal of Law & Information Technology 99

Franzina P, 'Jurisdiction Regarding Claims for the Infringement of Privacy Rights under the General Data Protection Regulation', in De Franceschi A (ed), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution* (Intersentia 2016), 81

Garcimartín Alférez FJ, 'The Rome I Regulation: Much ado about nothing?'
[2008] European Legal Forum I-61

Gardner J, 'The Twilight of Legality' Oxford Legal Studies Research Paper No 4/2018 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3109517> accessed 26 Aug 2018

Gaudemet-Tallon H, 'Le pluralisme en droit international privé'
(2005) 312 Recueil des cours 1

Geist M, 'The Shift Toward "Targeting" for Internet Jurisdiction', in Thierer A and Crews W (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003), 91

Geller PE, 'Conflicts of Laws in Cyberspace: Rethinking International Copyright'
(1996–97) 44 Journal of the Copyright Society of the USA 103

Ginsburg JC, 'Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure'
(1995) 42 Journal of the Copyright Society of the USA 318

——, 'Private International Law and of Copyright in an Era of Technological Change'
(1998) 273 Recueil des cours 239

——, 'International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?' (2000) 47 Journal of the Copyright Society of the USA 265

Goldsmith JL, 'Against Cyberanarchy'
(1998) 65 University of Chicago Law Review 1199

Goldstein P and Hugenholtz PB, *International Copyright: Principles, Law and Practice* (OUP 2010)

Gössl SL, *Internetspezifisches Kollisionsrecht?* (Nomos 2014)

Gottwald P, in Krüger W and Rauscher T (eds), *Münchener Kommentar zur ZPO* (5th edn, Beck 2017), Band 3

Greenstein S, 'Internet Infrastructure' in Peitz M and Waldfogel J (eds), *The Oxford Handbook of the Digital Economy* (OUP 2012), 3

Groom J, 'The Pirate Bay: CJEU rules that operating a torrent file indexing site is a communication to the public'
(2017) 12 Journal of Intellectual Property Law & Practice 965

Grünberger M, 'Zuständigkeitsbegründender Erfolgsort bei Urheberrechtsverletzungen'
Praxis des Internationalen Privat- und Verfahrensrechts 2015, 56

Gutmann D, *Droit international privé* (5th edn, Dalloz 2007)

Hafner K and Lyon M, *Where Wizards Stay Up Late* (Pocket Books 2003)

Haibach G, 'Cloud computing and European Union private international law'
(2015) 11 Journal Private International Law 252

Hardy IT, 'The Proper Legal Regime for "Cyberspace"'
(1994) 55 University of Pittsburgh Law Review 993

Hartley TC, 'Libel Tourism and Conflict of Laws'
(2010) 59 International & Comparative Law Quarterly 25

Hatzimihail N, 'Concluding Remarks: Territoriality, International Governance and Cross-Border Litigation of Intellectual Property Claims', in Nuyts A (ed), *International Litigation in Intellectual Property and Information Technology* (Kluwer 2008), 303

Hay P, 'Flexibility versus predictability and uniformity in choice of law : reflections on current European and United States conflicts law' (1991) 226 Recueil des cours 282

Hayakawa S, 'Private Law in the Era of the Internet', in Basedow J and Kono T (eds), *Legal Aspects of Globalization* (Kluwer 2000), 27

von Hein J, 'Die Behandlung von Sicherheits- und Verhaltensregeln nach Art. 17 der Rom II-Verordnung', in Kronke H and Thorn K (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann* (Gieseking 2011), 139

——, 'Geo-blocking and the conflict of laws: ships that pass in the night?' (*conflictoflaws.net*, 31 May 2016) <conflictoflaws.net/2016/geo-blocking-and-the-conflict-of-laws-ships-that-pass-in-the-night/> accessed 1 Aug 2018

Hess B, 'Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht'
JuristenZeitung 2012, 189

——, 'The Protection of Privacy in the Case Law of the CJEU' in Hess B and Mariottini CM (eds), *Protecting Privacy in Private International and Procedural Law by Data Protection* (Nomos 2015), 81

——, 'The Private-Public Divide in International Dispute Resolution'
(2018) 388 Recueil des cours 49

Heymann J, 'Importing Proportionality to the Conflict of Laws', in Muir Watt H and Fernández Arroyo DP (eds), *Private International Law and Global Governance* (OUP 2014), 277

Lord Hoffmann, 'The Libel Tourism Myth' (*indexoncensorship.org*, 6 Feb 2010) <www.indexoncensorship.org/2010/02/the-libel-tourism-myth/> accessed 1 Aug 2018

Honorati C, 'The Law Applicable to Unfair Competition' in Malatesta A (ed), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM 2006), 127

Höning N, 'The European Directive on e-Commerce and its Consequences on the Conflict of Laws' (2005) 5 Global Jurist Topics, Art 2

Hörnle J, 'Country of Origin Regulation in Cross-Border Media: One Step Beyond the Freedom to Provide Services?'
(2005) 54 International & Comparative Law Quarterly 89

——, 'The Jurisdictional Challenge of the Internet', in Edwards L and Waelde C (eds), *Law and the Internet* (3rd edn, Hart 2009), 121

Hugenholtz PB, 'The Last Frontier: Territoriality', in van Eechoud M et al (eds), Harmonizing European Copyright Law – The Challenge of Better Lawmaking (Kluwer 2009), 307

Illmer M, 'Scope and Definitions', in Dickinson A and Lein E (eds), *The Brussels I Regulation recast* (OUP 2015), ch 2

Ince D, *A Dictionary of the Internet* (3rd edn, OUP 2013)

James J, 'Data Never Sleeps 3.0' (*domo.com*, 13 Aug 2015) <www.domo.com/blog/2015/08/data-never-sleeps-3-0/> accessed 1 Aug 2018

——, 'Data Never Sleeps 4.0' (*domo.com*, 28 June 2016) <www.domo.com/blog/2016/06/data-never-sleeps-4-0/> accessed 1 Aug 2018

——, 'Data Never Sleeps 5.0' (*domo.com*, 25 July 2017) <www.domo.com/blog/data-never-sleeps-5/> accessed 1 Aug 2018

Jiménez WG and Lodder AR, 'Analyzing approaches to internet jurisdiction based on a model of harbors and the high seas'
(2015) 29 International Review of Law, Computers and Technology 266

Joerges C, 'On the Legitimacy of Europeanising Private Law' (2003) 7.3 EJCL art 3 <www.ejcl.org//73/art73-3.html> accessed 1 Aug 2018

——, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Discipline' (2004) 14 Duke Journal of Comparative & International Law 149

Johnson P, 'Which Law Applies: A Reply to Professor Torremans'
(2005) 1 Journal of Intellectual Property Law & Practice 71

Johnson DR and Post DG, 'Law And Borders – The Rise of Law in Cyberspace' (1995–96) 48 Stanford Law Review 1367

Jooris E, 'Infringement of foreign copyright and the jurisdiction of English courts' [1996] EIPR 127

Joubert N, 'Cyber-Torts and Personal Jurisdiction: The Paris Court of Appeal Makes a Stand' (2009) 58 International & Comparative Law Quarterly 476

Juenger FK, 'General Course on Private International Law' (1983) 193 Recueil des cours 119

——, *Choice of Law and Multistate Justice* (Nijhoff 1993)

——, 'American Conflicts Scholarship and the New Law Merchant' (1995) 28 Vanderbilt Journal of Transnational Law 487

——, 'The Need for a Comparative Approach to Choice-of-Law Problems' (1998–99) 73 Tulane Law Review 1309

Kang C, 'F.C.C. Repeals Net Neutrality Rules' (*nytimes.com*, 14 Dec 2017) <www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html> accessed 1 Sep 2018

Katsh E and Rabinovich-Einy O, *Digital Justice* (OUP 2017)

Kegel G, 'Begriffs- und Interessenjurisprudenz im internationalen Privatrecht', in: Gerwig et al (eds), *Festschrift Lewald* (Helbing & Lichtenhahn 1953) 259

——, 'The Crisis of Conflict of Laws' (1964) 112 Recueil des Cours 95

——, 'Introduction', in Lipstein K (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 1 (1985)

Kelly C, 'From Playboy to Pirate Bay: copyright and communication to the public in the digital age' (2017) 24 Commercial Law Practitioner 127

Kightlinger MF, 'A Solution to the Yahoo! Problem? The EC e-Commerce Directive as a Model for International Cooperation on Internet Choice of Law' (2002–03) 24 Michigan Journal of International Law 719

Knöfel OL, 'Artikel 1–3 Rom I-VO', in Hüßtege R and Mansel HP (eds), *NomosKommentar BGB. Rom-Verordnungen* (2nd edn, Nomos 2016)

Kohl U, 'Eggs, Jurisdiction, and the Internet' (2002) 51 International & Comparative Law Quarterly 555

——, *Jurisdiction and the Internet* (CUP 2007)

——, 'Jurisdiction in Cyberspace', in Tsagourias N and Buchan R (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015), 30

Kozyris PJ, 'Interest Analysis Facing Its Critics – And, Incidentally, What Should Be Done About Choice of Law for Products Liability?'
(1985) 46 Ohio State Law Journal 569

Kreuzer K and Klötgen P, 'Die Shevill-Entscheidung des EuGH'
Praxis des Internationalen Privat- und Verfahrensrechts 1997, 90

Krotoszynski RJ, 'Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village' (2005) 62 Washington & Lee Law Review 339

Kubis S, 'Zum Tatortgerichtsstand bei grenzüberschreitenden Äußerungsdelikten zu Lasten von Unternehmen' Wettbewerb in Recht und Praxis 2018, 139

Kühne G, 'Internationales Privatrecht im Ausgang des 20. Jahrhunderts'
Rabels Zeitschrift für ausländisches und internationales Privatrecht 43 (1979), 290

Kulesza J and Balleste R, 'Signs and Portents in Cyberspace: The Rise of Jus Internet as a New Order in International Law'
(2003) 23 Fordham Intellectual Property, Media & Entertainment Law Journal 1311

Kur A, 'Trademark Conflicts on the Internet: Territoriality Redefined?', in Basedow J, Drexl J, Kur A, and Metzger A (eds), *Intellectual Property in the Conflict of Laws* (Mohr Siebeck 2005), 175

——, 'Section 6: Infringement and remedies', in European Max Planck Group on Conflict of Laws in Intellectual Property (ed), *Conflict of Laws in Intellectual Property. The CLIP Principles and Commentary* (OUP 2013)

Lagarde P, 'Public Policy', in Lipstein K (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 11 (1991)

——, 'Remarques sur la proposition de règlement de la Commission européenne'
Revue critique de droit international privé 2006, 331

Lando O and Nielsen PA, 'The Rome I Regulation'
(2008) 45 Common Market Law Review 1687

Lange B, 'Regulation', in Cane/Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008), 996

Laningham S, 'developerWorks Interviews: Tim Berners-Lee' (*ibm.com*, 22 Aug 2006) <www.ibm.com/developerworks/podcast/dwi/cm-int082206txt.html>
accessed 1 Sep 2018

Lapowsky I, 'Here's how Facebook actually won Trump the presidency' (*wired.com*, 15 Nov 2016) <www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/> accessed 1 Aug 2018

Leflar RA, 'Choice-Influencing Considerations in Conflicts Law'
(1966) 41 NYU Law Review 267

——, ‘More on Choice-Influencing Considerations’ (1966) 54 California Law Review 1584

Lehmann M, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ (2008) 41 Vanderbilt Journal of Transnational Law 381

——, ‘Auf der Suche nach dem Sitz des Rechtsverhältnisses: Savigny und die Rom I-Verordnung’, in *Festschrift Spellenberg* (sellier 2010), 245

——, ‘Exclusive Jurisdiction’, in Dickinson A and Lein E (eds), *The Brussels I Regulation recast* (OUP 2015), ch 8

——, ‘Artikel 4–5 Rom II-VO’, in Hüßtege R and Mansel HP (eds), *NomosKommentar BGB. Rom-Verordnungen* (2nd edn, Nomos 2016)

——, ‘Recognition as a Substitute for Conflict of Laws?’, in Leible S (ed), *General Principles of European Private International Law* (Kluwer 2016), 11

Leible S, ‘Außenhandel und Rechtssicherheit’ Zeitschrift für Vergleichende Rechtswissenschaft 97 (1998), 286

——, ‘Artikel 1–7 Rom I-VO’, in Hüßtege R and Mansel HP (eds), *NomosKommentar BGB. Rom-Verordnungen* (2nd edn, Nomos 2016)

Leistner M, ‘The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights’ in Leible S and Ohly A (eds), *Intellectual Property and Private International Law* (Mohr Siebeck 2009), 97

Lein E, ‘Special Jurisdiction’, in Dickinson A and Lein E (eds), The Brussels I Regulation recast (OUP 2015), ch 4

Lequette Y, ‘De la “proximité” au “fait accompli”’, in Heuzé V et al (eds), *Mélanges en l’honneur du Professeur Pierre Mayer* (LGDJ 2015), 481

Lessig L, ‘The Zones of Cyberspace’ (1996) 48 Stanford Law Review 1403

——, ‘The Law of the Horse: What Cyberlaw May Teach’ (1999) 113 Harvard Law Review 501

——, *Code: And Other Laws of Cyberspace* (2nd edn, Basic Books 2006)

Lobel O, ‘New Governance as Regulatory Governance’, in Levi-Faur D (ed), *Oxford Handbook of Governance* (OUP 2012), 68

Lüttringhaus JD, ‘Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts’ Zeitschrift für Vergleichende Rechtswissenschaft 117 (2018), 50

Lutzi T, ‘Aktuelle Rechtsfragen zum Handel mit virtuellen Gegenständen in Computerspielen’ Neue Juristische Wochenschrift 2012, 2070

——, ‘“Cross-border Defamation” auf Wikipedia’, Recht der Internationalen Wirtschaft 2014, 810

——, ‘Gerichtsstand am Schadensort und Mosaikbetrachtung bei Wettbewerbsverletzungen im Internet’ Praxis des Internationalen Privat- und Verfahrensrechts 2017, 552

——, ‘Internet Cases in EU Private International Law – Developing a Coherent Approach’ (2017) 66 International & Comparative Law Quarterly 687

——, ‘Shevill is dead, long live Shevill!’ (2018) 134 Law Quarterly Review 208

——, ‘What’s a consumer? (Some) Clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation’ (2018) 25 Maastricht Journal of European and Comparative Law 374

MacQueen H, ‘“Appropriate for the Digital Age?” Copyright and the Internet’ in Edwards L and Waelde C (eds), *Law and the Internet* (3rd edn, Hart 2009), 183

Maier B, ‘How Has the Law Attempted to Tackle the Borderless Nature of the Internet?’ (2010) 18 International Journal of Law and Information Technology 142

Mankowski P, ‘Herkunftslandprinzip und deutsches Umsetzungsgesetz zur e-commerce Richtlinie’ Praxis des Internationalen Privat- und Verfahrensrechts 2002, 258

——, ‘Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge’ Internationales Handelsrecht 2008, 133

——, ‘Article 7’, in Magnus U and Mankowski P (eds), *Brussels Ibis Regulation* (otto schmidt 2017)

——, ‘Der Deliktsgerichtsstand am Handlungsort – die unterschätzte Option’, in Schütze RA (ed), *Fairness Justice Equity. Festschrift für Reinhold Geimer* (Beck 2017), 429

Mansel HP, ‘Anerkennung als Grundprinzip des Europäischen Rechtsraums’ Rabels Zeitschrift für ausländisches und internationales Privatrecht 70 (2006), 651

Mariottini CM, ‘Freedom of Speech and Foreign Defamation Judgments’ in Hess B and Mariottini CM (eds), *Protecting Privacy in Private International and Procedural Law by Data Protection* (Nomos 2015), 115

Martinek MG, ‘Look back before you leap? Fateful tendencies of materialization and of parallelism in modern private international law theory’ [2007] Journal of South African Law 277

Márton E, *Violations of Personality Rights through the Internet: Jurisdictional Issues under European Law* (Nomos 2016)

Mayer P, ‘Le phénomène de la coordination des ordres juridiques étatiques en droit privé’ (2007) 327 Recueil des cours 1

McClean D and Ruiz Abou-Nigm V, *Morris. The Conflict of Laws* (9th edn, Sweet & Maxwell 2016)

McGregor H, ‘Law on a Boundless Frontier: The Internet and International Law’ (2000) 88 Kentucky Law Journal 967

McParland M, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP 2015)

von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 Harvard Law Review 347

——, 'Choice of Law and the Problem of Justice' (1977) 41 Law & Contemporary Problems 27

Michaels R, 'The Re-state-ment of Non-State-Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 Wayne Law Review 1209

——, 'EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006) 2 Journal of Private International Law 195

——, 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization', in Stolleis M and Streeck W (eds), *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung* (Nomos 2007)

——, 'Globalization and Law: Law Beyond the State', in Banakar R and Travers M (eds), *Law and Social Theory* (2nd edn, Hart 2013), 289

——, 'Post-critical Private International Law. From Politics to Technique', in Muir Watt H and Fernández Arroyo DP (eds), *Private International Law and Global Governance* (OUP 2014) 54

—— and Jansen N, 'Private Law Beyond the State?: Europeanization, Globalization, Privatization' (2006) 54 American Journal Comparative Law 843

Mills A, 'Rethinking Jurisdiction in International Law' (2004) 84 British Yearbook of International Law 187

——, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201

——, *The Confluence of Public and Private International Law* (CUP 2009)

——, 'Rediscovering the Public Dimension of Private International Law' (2011) 24 Hague Yearbook of International Law 11

——, 'The Identities of Private International Law: Lessons from the US and EU Revolutions' (2013) 23 Duke Journal of Comparative & International Law 445

——, 'Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law' in Muir Watt H and Fernández Arroyo DP (eds), *Private International Law and Global Governance* (OUP 2014), 245

——, 'The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' [2015] Journal of Media Law 1

——, ‘The Principled English Ambivalence to Law and Dispute Resolution Beyond the State’, in Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), 341

Moura Vicente D, ‘The Territoriality Principle in Intellectual Property Revisited’ (2016) 34 Nederlands Internationaal Privaatrecht 724

Muggah R, ‘Countries are so last-century. Enter the “net state”’ (*weforum.org*, 9 Nov 2017) <www.weforum.org/agenda/2017/11/countries-nations-net-states-globalization-populism/> accessed 1 Aug 2018

Muir Watt H, ‘Globalisation des marchés et économie politique du droit international privé’ (2003) 47 Archives de philosophie du droit 243

——, ‘Integration and Diversity: The Conflict of Laws as a Regulatory Tool’, in Cafaggi (ed), *The Institutional Framework of European Private Law* (OUP 2006), 107

——, ‘Reshaping Private International Law in a Changing World’ (*conflictoflaws.net*, 2 Apr 2008) <conflictoflaws.net/2008/guesteditorialmuirwattonreshapingprivateinternationallawinachangingworld/> accessed 1 Aug 2018

——, ‘Party Autonomy in International Contracts’ (2010) 6 European Review of Contract Law 250

——, ‘The role of the conflict of laws in European private law’ in Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010), 44

——, ‘Private International Law Beyond the Schism’ (2011) 2 Transnational Legal Theory 347

——, ‘The Relevance of Private International Law to the Global Governance Debate’, in Muir Watt H and Fernández Arroyo DP (eds), *Private International Law and Global Governance* (OUP 2014), 2

——, ‘La globalisation et le droit international privé’, in Heuzé V et al (eds), *Mélanges en l’honneur du Professeur Pierre Mayer* (LGDJ 2015), 591

——, *Private International Law and Public Law. Vol I* (Edward Elgar 2015)

Murray AD, ‘Nodes and Gravity in Virtual Space’ (2011) 5 Legisprudence 195

Naylor B, ‘As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments’ (14 Dec 2017) <www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments> accessed Aug 1 2018

Neuhaus PH, ‘Savigny und die Rechtsfindung aus der Natur der Sache’ Rabels Zeitschrift für ausländisches und internationales Privatrecht 15 (1949/50), 364

——, ‘Legal Equity Versus Certainty in the Conflict of Laws’ (1963) 28 Law & Contemporary Problems 795

Neuner R, 'Policy Considerations in the Conflict of Laws'
(1942) 20 Canadian Bar Review 479

Nicas J, 'Google Uses Its Search Engine to Hawk Its Products' (*wsj.com*, 19 Jan 2017)
<www.wsj.com/articles/google-uses-its-search-engine-to-hawk-its-products-1484827203> accessed 1 Aug 2018

Nordemann-Schiffel A, in Nordemann A and Nordemann JB (eds), *Fromm/Nordemann. Urheberrecht* (Kohlhammer 2014), Teil 5

Nordmeier CF, 'Cloud Computing und Internationales Privatrecht'
MultiMedia und Recht 2010, 151

Nygh PE, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort' (1995) 251 Recueil des Cours 269

O'Hara K and Hall W, 'Web Science', in Dutton WH (ed), *The Oxford Handbook of Internet Studies* (OUP 2013), 48

Ohly A, 'Geoblocking zwischen Wirtschafts-, Kultur- und Verbraucher- und Europapolitik' Zeitschrift für Urheber- und Medienrecht 2015, 942

Oppermann JP, *Die kollisionsrechtliche Anknüpfung internationaler Urheberrechtsverletzungen* (Nomos 2011)

Øren JS, 'International jurisdiction over consumer contracts in e-Europe'
(2003) 52 International & Comparative Law Quarterly 665

Oster J, 'Rethinking Shevill. Conceptualising the EU private international law of Internet torts against personality rights'
(2012) 26 International Review of Law, Computers & Technology, 113

Von Overbeck, 'Persons', in Lipstein (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 15 (1970)

Parléani G, Recueil Dalloz 1996, 61

Paul JR, 'The Isolation of Private International Law'
(1988–89) 7 Wisconsin International Law Journal 149

Peifer KN, 'Internationale Zuständigkeit nach Art. 5 Nr. 3 EuGVVO und anwendbares Recht auf Markenverletzungen'
Praxis des Internationalen Privat- und Verfahrensrechts 2013, 228

Peterson CH, 'United States Report', in Symeonides SC (ed), *Private International Law at the End of the Century: Progress or Regress?* (Kluwer 2000), 413

Picht P, 'Von eDate zu Wintersteiger'
Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil 2013, 19

Post DG, 'Governing Cyberspace' (1996) 43 Wayne Law Review 155

——, ‘Against “Against Cyberanarchy”’
(2002) 17 Berkeley Technology Law Journal 1365

Queirolo I, ‘Article 13’, in Magnus/Mankowski (eds), *Rome I Regulation* (otto schmidt 2017)

Raape L, *Internationales Privatrecht* (Franz Vahlen, 5th edn 1961)

Reed C, *Internet Law. Text and Materials* (CUP 2004)

——, *Making Laws for Cyberspace* (OUP 2012)

Reed L, ‘Mixed Private and Public Law Solutions to International Cases’
(2003) 306 Recueil des cours 177

Reese WLM, ‘Choice of Law: Rules or Approach’ (1972) 57 Cornell LRev 315

Reindl AP, ‘Choosing Law in Cyberspace: Copyright Conflicts on Global Networks’
(1998) 19 Michigan Journal of International Law 799

Reymond M, ‘Jurisdiction in Case of Personality Torts Committed over the Internet’
(2012/13) 14 Yearbook of Private International Law 205

Rheinstein M, ‘The Place of the Wrong: A Study in the Method of Case Law’
(1944) 19 Tulane Law Review 4

Ricketson S, *The Berne Convention for the protection of literary and artistic works: 1886–1986* (Kluwer 1987)

Rosati E, ‘International jurisdiction in online EU trade mark infringement cases: where is the place of infringement located?’ (2016) European Intellectual Property Review 482

Rosenberg M, ‘The Comeback of Choice-of-Law Rules’
(1981) 81 Columbia Law Review 946

Roth WH, ‘Zur Wählbarkeit nichtstaatlichen Rechts’, in Mansel et al (eds), *Festschrift für Erik Jayme* (Sellier 2004), 757

——, ‘Savigny, Eingriffsnormen und die Rom I-Verordnung’, in Baur JF, Sandrock O, Scholtka, B, and Shapira A (eds), *Festschrift für Gunther Kühne zum 70. Geburtstag* (Recht und Wirtschaft 2009), 859

Rühl G, *Statut und Effizienz* (Mohr Siebeck 2011)

——, ‘The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy’
(2014) 10 Journal of Private International Law 335

——, ‘The Unfairness of Choice-of-Law Clauses, or: The (unclear) Relationship of Art. 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive’
(2018) 55 Common Market Law Review 201

Ryngaert C and Zoetekouw M, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era' in Kohl U (ed), *The Net and the Nation State. Multidisciplinary Perspectives on Internet Governance* (CUP 2017), 185

Saumier G, 'PILAGG in Practice: Two Examples of Concrete Steps', PILAGG e-series GG/1

Savigny FC, *Private International Law. A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (Guthrie translat, T & T Clark 1869)

Savin A, *EU Internet Law* (Edward Elgar 2013)

Schack H, 'The Law Applicable to (Unregistered) IP Rights After Rome II', in Leible/ Ohly (eds), *Intellectual Property and Private International Law* (Mohr Siebeck 2009), 79

——, 'Anm. zu EuGH, 3.10.2013, C-170/12 – Pinckney'
Neue Juristische Wochenschrift 2013, 3629

Schinkels B, 'Das internationalprivatrechtliche Interesse – Gedanken zur Zweckmäßigkeit eines Begriffs', in Kronke H and Thorn K (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann* (Gieseking 2011), 390

Schultz T, 'Carving up the internet: jurisdiction, legal orders, and the private/public international law interface' (2008) 19(4) European Journal of International Law 799

——, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014)

Schurig K, *Kollisionsnorm und Sachrecht* (1981)

——, 'Das Fundament trägt noch', in Mansel (ed), *Internationales Privatrecht im 20. Jahrhundert* (Mohr Siebeck 2014), 5

Shreve GR, 'Choice of Law and the Forgiving Constitution'
(1996) 71 Indiana Law Journal 271

—— and Buxbaum H, *A Conflict-of-Laws Anthology* (LexisNexis, 2nd edn 2012)

Siehr K, 'Wechselwirkungen zwischen Kollisionsrecht und Sachrecht'
Rabels Zeitschrift für ausländisches und internationales Privatrecht 37 (1973), 466

Slane A, 'Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet'
(2008) 71 Law & Contemporary Problem 129

Smith G, 'The Electronic Commerce Directive – a phantom demon?' (*cyberleagle.com*, 30 April 2018) <www.cyberleagle.com/2018/04/the-electronic-commerce-directive.html> accessed 1 Aug 2018

Spindler G, 'EU Internet policy' in Savin A (ed), *Research Handbook on EU Internet Law* (Edward Elgar 2015), 3

Šrámek M, 'Brussels I: Recent Developments in the Interpretation of Special Jurisdiction Provisions for Internet Torts'
(2015) 9 Masaryk University Journal Law & Technology 165

Staltz A, 'The Web Began Dying in 2014, Here's How' (*staltz.com*, 30 Oct 2017) <staltz.com/the-web-began-dying-in-2014-heres-how.html> accessed 1 Aug 2018

Stein AR, 'The Unexceptional Problem of Jurisdiction in Cyberspace'
(1998) 32 The International Lawyer 1167

Stepanova E, 'The Role of Information Communication Technologies in the "Arab Spring"', PONARS Eurasia Policy Memo No 159 (*pircenter.org*, May 2011) <pircenter.org/kosdata/page_doc/p2594_2.pdf> accessed 1 Aug 2018

Stone P, 'Territorial targeting in EU private law'
(2013) 22 Information & Communications Technology Law 14

Strauss AL, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts'
(1995) 36 Harvard International Law Journal 373

Sujecki B, 'Zur Bestimmung des Erfolgsortes nach Art. 7 Nr. 2 EuGVVO bei Internet-delikten' Kommunikation & Recht 2015, 305

Svantesson DJB, 'Between a Rock and a Hard Place – An International Law Perspective of the Difficult Position of Globally Active Internet Intermediaries'
(2014) 30 CompLSecRev 348

——, 'The Holy Trinity of Legal Fictions Undermining the Application of Law to the Global Internet' (2015) 23 IntJLInfoTech 219

——, Private International Law and the Internet (3rd edn, Kluwer 2016)

——, Solving the Internet Jurisdiction Puzzle (OUP 2017)

Sweney M, 'Film and TV streaming and downloads overtake DVD sales for first time' (*guardian.com*, 5 Jan 2017) <www.theguardian.com/media/2017/jan/05/film-and-tv-streaming-and-downloads-overtake-dvd-sales-for-first-time-netflix-amazon-uk> accessed 1 Aug 2018

Symeonides SC, 'General Report', in Symeonides SC (ed), *Private International Law at the End of the Century: Progress or Regress?* (Kluwer 2000), 3

——, 'Material Justice and Conflicts Justice in Choice of Law', in Borchers PJ and Zekoll J (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers 2001), 125

——, *The American Choice-of-Law Revolution: Past, Present and Future* (Nijhoff 2006)

——, 'Private International Law: Idealism, Pragmatism, Eclecticism',
(2017) 384 Recueil des Cours 1

Synodinou TE, 'Copyright law: an ancient history, a contemporary challenge', in Savin A (ed), Research Handbook on EU Internet Law (Edward Elgar 2015), 81

Tallon D, 'Comparative Law: Expanding Horizon'
(1968/69) 10 Journal of the Society of Public Teachers of Law 265

Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart 2015)

Taubman, 'International Governance and the Internet',
in Edwards L and Waelde C (eds), *Law and the Internet* (3rd edn, Hart 2009), 8

Thiede T, 'Zum Anwendungsbereich der Rom II-Verordnung auf Persönlichkeitsrechts-verletzungen', ecolex 2017, 774

Thomale C, 'Private International Law sans frontières'
(2012) 92 Hague Yearbook of International Law 3

Thomson M, 'Method or Madness?: The Leflar Approach to Choice of Law as Practiced in Five States' (2013–14) Rutgers Law Review 81

Thünken A, 'Multi-State Advertising over the Internet and the Private International Law of Unfair Competition' (2002) 51 International & Comparative Law Quarterly 909

Torremans P, *Intellectual property and private international law* (Edward Elgar 2015)

——, 'Private International Law Issues on the Internet', in Stamatoudi A (ed), *New Developments in EU and International Copyright Law* (Wolters Kluwer 2016), 379

——, 'The Law Applicable to Copyright Infringement on the Internet'
(2016) 34 NIPR 687

Trimble M, 'The Multiplicity of Copyright Laws on the Internet'
(2015) 25 Fordham Intellectual Property, Media & Entertainment Law Journal 339

——, 'Conflict of Laws Has Caught Up With Silicon Valley. Now Silicon Valley Needs to Catch Up on Conflict of Laws' (Technology & Marketing Law Blog, 16 Nov 2016) <blog. ericgoldman.org/archives/2016/11/conflict-of-laws-has-caught-up-with-silicon-valley-now-silicon-valley-needs-to-catch-up-on-conflict-of-laws-guest-blog-post.htm> accessed 1 Aug 2018

Tsagourias N, 'The Legal Status of Cyberspace', in Tsagourias N and Buchan R (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015), 13

Van Loo R, 'The Corporation as Courthouse' (2018) 33 Yale Journal on Regulation 54

Venturini GC, 'Property', in Lipstein K (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 21 (1974)

Vilà Costa B, 'How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: A Coherent Approach', in Basedow J, Francq S, and Idot L (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart 2012), 17

Vischer F, 'General course on private international law' (1992) 232 Recueil des cours 1

——, 'Connecting Factors', in Lipstein K (ed), *International Encyclopedia of Comparative Law. Vol III* (Mohr Siebeck/Nijhoff 2011), ch 4 (1998)

Velásquez Posada OS, 'Jurisdictional Problems in Cyberspace Defamation' (2005) International Law. Revista Colombiana de Derecho Internacional 247

Waelde C and MacQueen H, 'From entertainment to education: the scope of copyright?' [2004] Intellectual Property Quarterly 259

Wai R, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia Journal Transnational Law 209

Wang FF, *Internet Jurisdiction and Choice of Law* (CUP 2010)

Weber RH, 'Contractual Duties and Allocation of Liability in Automated Digital Contracts', in Schulze/Staudenmeyer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016), 163

Weller/Nordmeier, 'Art 6 Rom II', in Spindler/Schuster (eds), *Recht der elektronischen Medien* (3rd edn, Beck 2015)

Wichowski A, 'Net States Rule the World: We Need to Recognize Their Power' (*wired.com*, 11 Apr 2017) <www.wired.com/story/net-states-rule-the-world-we-need-to-recognize-their-power/> accessed 1 Aug 2018

Wimmer K, 'International Liability for Internet Content: Publish Locally, Defend Globally', in Thierer A and Crews W (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003), 239

Wright A and De Filippi P, 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia' <papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664> accessed 1 Sep 2018

Wu T, 'Network Neutrality, Broadband Discrimination' (2003) 2 Journal on Telecommunications & High Technology Law 141

Wurmnest W and Gömann M, 'Die Konturierung des Lauterkeits- und Marken-kollisionsrechts durch "Buddy-Bots"' Praxis des Internationalen Privat- und Verfahrensrechts 2018, 480

Zittrain JL, 'Be Careful What You Ask For: Reconciling a Global Internet and Local Law', in Thierer A and Crews W (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003), 13

Zweigert K, 'Zur Armut des Internationalen Privatrechts an sozialen Werten' Rabels Zeitschrift für ausländisches und internationales Privatrecht 37 (1973), 435