The conflict-of-laws rules in the new EC Regulation on the Law Applicable to Non-Contractual Obligations (Regulation Rome II), adopted in 2007, are highly relevant in the Internet context, but some of them may give rise to problems concerning Internet-related torts. For example, the main conflict rule leading to the application of the law of the country in which the direct and immediate damage occurred (lex loci damni) may be difficult to use when the damage is inflicted on a server whose location may be unknown and fortuitous, for example by virus contamination or some other manipulation of the victim’s site. Another weakness of the new Regulation is that the most interesting torts committed through the Internet, namely violations of privacy and rights relating to personality (e.g. defamation), are totally excluded from its scope.

KEYWORDS
Conflict of law, Rome II, torts

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The borderless nature of the Internet may frequently lead to situations where an Internet-related tort is connected with more than one country and thereby with more than one legal system. For example, a defamation or infringement of intellectual or industrial rights may be committed by a
wrongdoer acting in one country but causing damage in another country, or the act and damage may occur in the same country while the parties or one of them reside habitually elsewhere. In view of the substantial differences between various national systems of tort law, the designation of the law to be applied to a particular tort is of great practical importance.

After more than three decades of efforts,¹ the EC Regulation No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (the so-called Rome II Regulation) was finally adopted on 11 July 2007.² The new Regulation is intended to complement both the Brussels I Regulation³ (which deals merely with the jurisdiction of courts and recognition/enforcement of judgments, but not with the question of applicable law) and the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations⁴ (which deals with applicable law, but not concerning non-contractual obligations).

The new Regulation Rome II deals not only with torts/delicts but also with other non-contractual obligations such as obligations resulting from unjust enrichment, culpa in contrahendo and negotiorum gestio (agency without authority), even though they are subject to a few separate Articles containing special conflict rules.⁵ Furthermore, the new Regulation applies not only to compensation for damage that has already arisen but also to actions to prevent future damage, such as injunctions and other prohibitions.⁶ Like the Rome Convention, the Regulation’s conflict rules do not require reciprocity and any law specified by the Regulation will be applied regardless of whether or not it is the law of a Member State (Article 3).

¹ The 1972 draft of what became in 1980 the Rome Convention on the Law Applicable to Contractual Obligations dealt also with the law applicable to non-contractual obligations, but that part of the project was abandoned. See W. Posch in von Hoffmann (ed.), European Private International Law, Nijmegen 1998, pp. 87-90.
² Official Journal of the European Union 2007 L 199 p. 40. Pursuant to its Articles 31 and 32, the Regulation will apply starting 11 January 2009 and shall only apply to events giving rise to damage which occur after its entry into force on 20 August 2007 (according to the general rules on the application in time of EC legislation, it enters into force 20 days following its publication in the Official Journal).
⁵ See Articles 10-12 of the Rome II Regulation.
⁶ See Article 2(2-3) of the Rome II Regulation and cf. Article 5(3) of the Brussels I Regulation.
Pursuant to its Article 1, the new Regulation applies to conflicts of law regarding non-contractual obligations in civil and commercial matters, excluding matters of revenue, customs or administrative law. Within civil matters, there are a number of general exclusions partially similar to those in the Rome Convention (issues of family law, negotiable instruments, liability under company law, trusts etc.). Issues of procedure and evidence are in principle also excluded, as such matters are more suitably governed by the law of the country where the proceedings take place (the lex fori).

Of direct importance for Internet-related torts is that Article 1(2)(g) of the Rome II Regulation regrettably excludes non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. This issue was simply too controversial; some Member States (including Sweden) were concerned about situations where their courts might become obliged to give judgment against local publishers pursuant to foreign law even when the publication in dispute was perfectly in conformity with the local law and, in fact, enjoyed the protection of the constitutional rules of the lex fori about the freedom of expression. The Commission’s draft of 22 July 2003 dealt also with violations of privacy and rights relating to the personality, but the subsequently amended draft presented on 21 February 2006 excluded in its Article 1(2)(h) obligations arising out of violations of privacy and personal rights by the media, while continuing to cover violations carried out by other means, such as phone calls or letters. The 2006 draft could have caused certain interpretation problems on this point, as it is debatable whether, for example, defamatory statements on a private individual’s website on the Internet or distributed by sending a large number of identical e-mail messages amounts to using “the media”, but that problem is avoided in the final text which excludes all violations of privacy and rights relating to the personality from the scope of the Rome II Regulation. However, Article 30(2) contains a “review clause”, pursuant to which

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7 See Article 1(3), but also Articles 21 and 22 of the Rome II Regulation.
9 See, in particular, Article 6(1) of the 2003 draft, which provided for the application of the lex fori to non-contractual obligations arising out of a violation of privacy or rights relating to the personality where the application of the law designated by the main conflict rule would be contrary to the fundamental principles of the forum as regards freedom of expression and information. See further M. Bogdan in A. Beater & S. Habermeier (eds.), Verletzungen von Persönlichkeitsrechten durch die Medien, Tübingen 2005, pp. 146-149.
the Commission shall, not later than on 31 December 2008, 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, taking into account rules relating to freedom of the press and freedom of expression in the media, as well as conflict-of-law issues related with Directive No 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data

The core of the Rome II Regulation consists, of course, of the conflict rules designating the applicable national legal system. In contrast to contractual obligations, parties to a non-contractual liability dispute did not normally have the opportunity to agree on applicable law in advance. The parties may, however, wish to agree on a law of their choice after the damage occurred, for example in order to avoid the high costs of procuring information about the otherwise applicable foreign law. According to Article 14 of the Regulation, such choice will normally be respected, provided that the choice is expressed or demonstrated with reasonable certainty by the circumstances of the case. The choice must not prejudice the rights of third parties and, except in relations between parties pursuing a commercial activity (i.e. between businessmen), it can be made only after the event giving rise to the damage. Furthermore, if all the elements of the situation were at the time of the harmful event located in one single country other than that whose law was chosen, the choice of the parties must not affect the application of mandatory rules of that country, and the parties’ choice of the law of a non-member state must not affect the application of Community law where all the other elements of the situation were at the time of the harmful event located in the Community (even if not in one single Member State). In so far as the application of Community law is concerned, the whole Community is thus treated as one single country.

Presumably it will be rather rare that the parties agree on the law governing a non-contractual obligation. In respect of situations where the parties have not reached a valid agreement on the law to be applied, Article 4(1) prescribes that the law applicable is the law of the country in which the damage occurs (or is likely to occur), irrespective of the country in which the event giving rise to the damage occurred or the indirect consequences of

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that event arose. This means that the Regulation prefers the law of the country of the immediate damage (*lex loci damni*) to the law of the country of the harmful act, probably because it pays more attention to compensating the victim than to influencing the behavior of the wrongdoer. It is noteworthy that the Regulation does not allow the victim of the tort to choose one-sidedly between the law of the place of the harmful act and the law of the place of the resulting damage. As far as jurisdiction is concerned, pursuant to Article 5(3) of the Brussels I Regulation, the claimant is free to choose between the courts of these two countries, but such unilateral freedom of choice is not considered appropriate for the determination of the applicable law. If the same harmful act causes damage in several countries, or if it is likely that damage caused by the same harmful act will arise in several countries, then the main rule in Article 4(1) means in principle that the laws of all the countries concerned have to be applied in a parallel manner to the various parts of the damage. Thus, the combined result of the Brussels I Regulation and the Rome II Regulation will be that if the victim decides to bring the action in the country where a part of the damage arose, the court will have jurisdiction regarding that part of the damage and it will apply its own law. If, on the other hand, the victim brings the action in the home country of the wrongdoer or in the country where the wrongful act was committed, then the court will have jurisdiction regarding the whole damage, but it will have to apply the laws of all the countries where some part of the resulting damage arose. Nevertheless, if the same wrongful act causes harm over the Internet in several countries at the same time, but the damage in one of them is dominant while the rest is subordinate, it can perhaps be argued that the whole situation is “manifestly most closely connected” (see *infra*) with the country of the dominant damage according to the principle of *accessorium sequitur principale*.12

Article 4 contains two exceptions to the application of the law of the country of the immediate damage. The first exception in Article 4(2) stipulates that if both the person claimed to be liable (the alleged wrongdoer) and the person sustaining damage (the alleged victim) have their habitual residence in the same country at the time of the damage, the law of that

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12 Cf. point 19 in the judgment of the ECJ in the case of *Shevanai v. Kreischer*, case 266/85, [1987] European Court Reports 239, dealing with jurisdiction pursuant to Article 5(1) of the Brussels Convention.
country will be applied. Habitual residence of companies and other legal persons is defined in Article 23(1) as the place of their central administration, unless the event giving rise to the damage occurs or the damage arises in the course of operation of a branch, agency or another establishment (in which case that establishment takes the place of the habitual residence of the company or other legal person). This exception is Internet-neutral, unless one accepts my rather controversial idea that under certain circumstances an Internet site can constitute an establishment for the purposes of private international law.\textsuperscript{13} If the damage has arisen in the course of the business activity of a natural person, the principal place of business of that person will be treated as his habitual residence pursuant to Article 23(2).

The second exception to the application of the law of the country of the damage is found in Article 4(3) and pertains to those cases where it is clear from all the circumstances that the non-contractual obligation is manifestly more closely connected with some other country. Under such circumstances, the law of that other country is to be applied, notwithstanding the first two paragraphs of Article 4. Such manifestly closer connection may in particular be based on some pre-existing relationship between the parties, for example a contractual or family relationship closely connected with the non-contractual obligation under scrutiny. Account must reasonably also be taken of the expectations of the parties regarding the applicable law. Article 4(3) may be useful also when the immediate damage is difficult to localize. The localization of the immediate damage may, for example, be problematic when it has arisen or is likely to arise on the Web itself, for example when someone has inserted a virus into a server or manipulated somebody else’s website. While indirect damage, such as a loss of business, arises in such cases usually in the country of the victim’s habitual residence, the immediate damage arises in principle in the country where the server accommodating the website is located. However, the server may be situated almost anywhere in the world and its localization is probably unknown to and unpredictable for the parties. It is possible to argue that in such situations the obligation is manifestly more closely connected with another country and that the situation of the server should be merely one of the many factors to be

taken into account, including the Internet address of the damaged site if it contains a national top domain.

The Regulation contains in Articles 5-9 a number of conflict rules pertaining to some special types of torts, ranging from product liability and unfair competition to environmental damage and industrial actions. In accordance with the maxim *lex specialis derogat legi generali*, these special rules have in principle precedence in relation to the Regulation’s general conflict rules in Article 4. Two of the special rules are of particular importance from the Internet point of view. The first one is Article 8, dealing with non-contractual obligations arising from an infringement of an intellectual property right (copyright, patent, trademark, *etc*). Such obligations will be governed by the law of the country for which protection is claimed. This application of the *lex loci protectionis* appears to reflect the principle of territoriality, according to which intellectual property rights in individual countries are independent of each other. The country of the protection will in any case normally be identical to the country of the immediate damage. A trademark infringement on the Internet, violating trademark protection in many countries at the same time, will thus in the same proceedings be subject in a parallel manner to various legal systems regarding various parts of the damage. Infringements of a unitary Community industrial property right, such as a Community trademark, will however be governed, with regard to the whole Community, in the first place by Community law itself and, in the second place, by the legal system of the country in which the act of infringement was committed. In the case of a Community trade mark infringement through the Internet, this seems to mean that the fortuitous place from where the wrongdoer acted may become decisive. The Regulation does not here provide any escape clause for cases where the infringement of intellectual property rights has a manifestly closer connection with another country and it makes no difference either whether the infringer and the person sustaining damage both have their habitual residence in the same country. It is also important that Article 8 may not be derogated from by an agreement pursuant to Article 14 (see *supra*).

The second special conflict rule of particular interest in the Internet context is Article 5 on product liability. Pursuant to the principal rule in Article 5(1)(a), the law applicable to a non-contractual obligation arising out of
damage caused by a product shall be the law of the country in which the person sustaining the damage had his habitual residence when the damage occurred, provided that the product “was marketed in that country”. Is there no such country, the governing law will be the law of the country in which the product was acquired or, in the last resort, the law of the country in which the damage occurred, but it is even in these cases required that the product was marketed in the country in question. Furthermore, it is required that the person claimed to be liable could reasonably foresee that the product, or a product of the same type, was marketed there. All this means that the place of marketing is of crucial importance for the application of Article 5. In the case of marketing through the Internet it is far from clear how it should be localized. Can the simple fact that the product was offered on the World-Wide Web, and thus made available to all potential customers in the whole world, amount to marketing in all countries for the purposes of Article 5? And when can the person claimed to be liable (who, in the cases of product liability, is normally the producer rather than the seller carrying out the marketing activities) reasonably foresee such marketing? As product liability, in the sense of EC law, can in principle arise merely if the product is a movable chattel,\textsuperscript{14} which may be ordered and sold on the Internet but has to be delivered to the buyer’s physical address, it can be argued that accepting orders for such deliveries on the basis of advertising on the Internet is a proof of marketing directed to the customer’s country and should be treated as marketing there. A producer knowingly selling to a distributor engaged in world-wide Internet marketing would, according to the same logic, hardly be able to claim that he could not reasonably foresee the marketing in a particular country. These answers are, however, far from certain.

Article 15 of the Regulation contains a non-exhaustive list of issues that are governed by the law applicable to a non-contractual obligation, \textit{inter alia} the basis and extent of liability, the grounds for exemption from liability, any limitation of liability and any division of liability, the existence, the nature and the assessment of damage, the question whether a right to compensation may be assigned or inherited, the liability for the acts of another

person and the manner in which an obligation may be extinguished including time limitation.

Some general problems of tort law are dealt with by separate conflict rules, for example direct action against the wrongdoer’s insurer (Article 18), subrogation (Article 19), and multiple liability (Article 20). A number of other articles deal with some general questions of private international law, such as overriding mandatory rules (Article 16), exclusion of renvoi (Article 24), states with more than one legal system (Article 25), and public policy (Article 26). As these matters are rather special and are not particularly Internet-related, there is no reason to discuss them here in detail. A mention should, however, be made of the issue of non-compensatory (punitive or exemplary) damages that are common in, for example, the United States and can be used to punish the perpetrators of, for instance, copyright or trademark infringements. In some European countries, such damages are considered contrary to public policy (ordre public) and the Commission’s draft from 2003 stated in Article 24 that the application of such damages “shall be contrary to Community public policy”. This formulation must reasonably be interpreted to mean that the draft practically forbade the Member States to apply foreign (i.e. American) law in this respect. However, the amended draft from 2006 was substantially more tolerant and declared in Article 23 that the application of rules awarding excessive non-compensatory damages “may” be considered incompatible with the public policy of the forum. The practical value of this declaration was merely that the Court of Justice of the European Communities in Luxembourg would not be allowed to find the use of the public policy exception in such cases to be abusive. The final text of the Regulation mentions non-compensatory damages merely in Recital 32 of the Preamble, stating that such damages may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy of the forum.

The Regulation’s relationship with other provisions of Community law is dealt with in Article 27, which in principle gives priority to rules in other Community instruments which, in relation to particular matters, lay down

conflict-of-law rules relating to non-contractual obligations. Recital 35 of the Preamble is more far-reaching, as it declares that the Regulation should not prejudice the application of other instruments designed to contribute to the proper functioning of the internal market. In particular, the applicable law designated by the Regulation should not restrict the free movement of goods and services as regulated by Community instruments, “such as Directive 2000/31” (Directive on Electronic Commerce).\textsuperscript{16}

The Rome II Regulation constitutes an important step towards the creation of a comprehensive European private international law. A true uniformity of results would, however, require more than the unification of the conflict rules themselves, namely a unified approach to such issues as whether foreign law is applied at the court’s own initiative or merely upon request by a party or whether it is the court or the parties who must investigate and prove the contents of the applicable foreign law. The Rome II Regulation represents an important novelty in this respect as well, as its Article 30(1) requires the Commission to submit, within four years after the entry into force of the Regulation, a report on its application including a study on the effects of the way in which foreign law is treated by the courts of the different Member States in civil and commercial matters.

\begin{thebibliography}{9}
\bibitem{16} The practical effects of the precedence granted to the Directive on Electronic Commerce are far from clear, mainly because of the notorious ambiguity of that Directive, which declares, in its Article 1(4), that it does not establish rules of private international law, see e.g. M. Bogdan, Concise Introduction to EU Private International Law, Groningen 2006, pp. 159-161; M. Hellner in A. Fuchs et al. (eds.), Les conflits de lois et le système juridique communautaire, Paris 2004, pp. 205-224. In any case, the Directive on Electronic Commerce applies merely to electronic commerce between the Member States, while the Rome II Regulation applies in relation to all legal systems in the world (see \textit{supra} about Article 3).
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