

FROM WHERE ARE THEY CASTING STONES? – DETERMINING JURISDICTION IN ONLINE DEFAMATION CLAIMS

by

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The question of international jurisdiction in defamation cases is long running. On the EU level, Regulation 44/2001 provides that in matters relating to defamation, the court where the defendant is domiciled, as well as the court for the place where the harmful event occurred or may occur, are competent to hear the case. However, national courts struggled to apply traditional concepts that exist in the offline world to online matters. In its recent judgment in C-509/09 (eDate Advertising GmbH) and C-161/10 (Martinez) on the interpretation of place of the harmful event, the ECJ held that a multiplicity of possible fora exists for online defamation. Besides the connecting factors developed in C-68/93 (Shevill), the Court adapted a supplementary connecting factor: the centre of interests. Based on the opinion of the AG in joined cases C-509/07 and C-161/10 and an analysis of national case law, this paper calls for a test of objective relevance rather than a mere subjective interpretation of forum conveniens.

KEYWORDS

online defamation cases, jurisdiction, place of damage, Germany, forum conveniens, centre of interests, Regulation 44/2001

1. INTRODUCTION

Determining jurisdiction in online defamation cases is first of all, not just problematic as regards defamatory statements but also as regards other types of personality rights infringements. Also true statements may have an adverse effect on the reputation of an individual. The latter is closely con-

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nected to the recently developed concept of a right to be forgotten (online).¹ Claimants taking legal action against true statements have recently in particular been convicts that have served their sentence and now seek judicial action to have earlier reports removed from the web.² Suspected criminals that have been cleared find themselves in a similar situation. Their daily life is likely to be affected by old or even out-dated news reports: the former suspect of a rape who was later cleared of the charges; future employers are likely to turn down his job application after 'googling' his name and the first search results linking to out-dated reports about the investigations. The issue of old news stories always being out there is not a new one, but the ease by which these stories are accessible in no time and the way they may be ranked in search result lists, adds a new quality. Accordingly, the issue of jurisdiction for defamation has to be seen in a wider context, generally referred to as personality rights infringements.

The common question victims of such infringements face, beside the question whether their claim is justified in terms of substantial law, is which court they have to or can address in terms of procedural law. Due to the ubiquitous nature of the Internet, there is not ONE place of jurisdiction. Worldwide publication may lead to worldwide harm. A defamatory statement posted by an anonymous user in the virtual guestbook on a website run by a Czech national might cause harm to a French national's reputation in numerous jurisdictions.

The global reach of the Internet may lead to parties bringing the case in a jurisdiction which they presume most likely to rule in their favour – a phenomenon commonly referred to as “forum shopping” or with regard to defamation as “libel tourism”.³ Although the case law in relation to Art. 8 ECHR sets forth a common denominator for the interpretation of privacy laws, the principles of material protection of personality rights differ within the European Union. Jurisdictions with a reputation as claimant-friendly

¹ On a European level the EU Commission demands in the context of the ongoing revision of the Data Protection Directive 95/46 the clarification of 'the so-called 'right to be forgotten', see European Commission, COM (2010) 609 final of 4 November 2010. In France, a legislative project envisaged the creation of such a right, see *Charte du droit à l'oubli dans les sites collaboratifs et les moteurs de recherche* of 13 October 2010, available online at http://www.aidh.org/Actualite/Act_2010/Images/Charte_oubli_La_Charte.pdf (last accessed 13 January 2012). In Spain, a plastic surgeon is suing Google in order to have certain search results linking to outdated reports on him deleted from the result lists, see Hedgcock. Cf. also Weber (2011).

² Cf. for example C-509/09 *eDate Advertising GmbH v X* [2011].

³ For a recent outline of the matter cf. Kuipers (2011), pp.1682 et seq.

like for example England in respect to defamation claims risk to become litigation magnets even though there might be little actual connection between the legal issues and the jurisdiction then involved. In terms of personality rights infringements Germany and France may be attractive fora for claimants as their scope of protection in certain areas is broad. Conflict may arise where there is lesser connection to the state of the court seised than to another forum especially since rules of jurisdiction must be predictable.⁴

There is a widespread conception that English courts are chosen by those who wish to sue for libel.⁵ Although research does not show a significant number of actual cases involving foreign litigant, the Ministry of Justice saw a need to address the issue of libel tourism in its Draft Defamation Bill Consultation Paper in 2011.⁶ As of now, under English and Welsh common law⁷ the multiple publication rule implies that every single hit on a webpage amounts to a new publication and gives rise to a separate cause of action.⁸ Hence, the one year limitation for defamation claims⁹ is basically abolished. Accordingly, defamation claims may be filed long after the initial publication and irrespective whether or not proceedings have already been brought in relation to the initial publication.¹⁰ The multiple publication rule of course may – in theory – attract defendants that are elsewhere time-barred from defamation claims.

The major concern of all the stakeholders involved is in the end, beside the adverse effects on investigative journalism, the ‘foreseeability’ in terms of where, when and why one may be sued. Clear and understandable rules on jurisdiction are the first step to clarify the situation of publishers. The next steps are then conflict of law rules and rules on recognition and enforcement.

⁴ Cf. Recital 11 of the Brussels I Regulation.

⁵ Ministry of Justice (2011), para.79.

⁶ Ministry of Justice (2011), para. 80.

⁷ The following only refers to England and Wales as the Draft Defamation Bill relates to the law of England and Wales only.

⁸ Murray (2010), pp.141 et seq. ; for a critical evaluation of the multiple publication rule with regard to defamation in an online environment see Ministry of Justice (2009) and Ministry of Justice (2010).

⁹ Cf. Section 4A of the Limitation Act 1980.

¹⁰ Ministry of Justice (2011), paras. 70–72.

2. THE RULES ON JURISDICTION FOR TORTS AND QUASI-TORTS

2.1. THE RULES WITHIN THE EUROPEAN UNION IN GENERAL

In the European Union there has been substantial harmonisation of rules on jurisdiction in civil matters in the Brussels I Regulation¹¹. A judgement given in one Member State is to be recognised without special proceedings in any other Member State. The basic principle on jurisdiction under the Regulation is that jurisdiction is to be exercised by the member state in which the defendant is domiciled (Art. 2 (1)).¹² Thus, where a defendant is domiciled in e.g. Germany, German courts have no discretion to refuse to hear the case.

However, in matters relating to tort, delict or quasi-delict, a person may also be sued in another Member State before the courts for the place where the harmful event occurred or may occur (Art.5 (3)).

The place where the harmful event occurred refers to either the jurisdiction where the event giving rise to the damage occurred and to the jurisdiction where the damage itself occurred.¹³ Accordingly, the claimant can choose the forum according to one of the connecting factors: the place of commission of the wrongful act or the place of damage.

However, this applies in a dispute between an EU domiciliary and a defendant domiciled elsewhere in the EU (Art. 4 (2) of the Regulation). If the defendant is not domiciled in an EU/EEA state, the respective national rules on jurisdiction have to be applied e.g. in a lawsuit relating to a wrongful act between a German domiciliary and a non-EU/EEA-domiciled defendant § 32 of the German Civil Procedure Code, or between a UK domiciliary and a EU-/EEA-domiciled defendant the common law rules as stated in the Civil Procedure Rules 6.20 (8)(a) and (b). Accordingly, the respective national court enjoys international jurisdiction if in the specific case a national court enjoys local jurisdiction in a purely national case.

¹¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, [2001] OJ L12/1. In the following referred to as 'the Regulation'.

¹² Domicile is determined by the law of the national court hearing the case, so that a person can be domiciled in more than one state simultaneously. Article 4 preserves the traditional rules for defendants who are not domiciled in a member state.

¹³ Case C-21/76 *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace* [1976] ECR 1735; C-68/93 *Shevill v Press Alliance SA* [1995] ECR I-415.

Rules on jurisdiction for torts under European domestic laws are similar to the ones under the Regulation: For example under German law the place of jurisdiction is the “place of infringement” – i.e. the place of commission of the wrongful act as well as the place where the result occurred¹⁴; under English law, “there exists an initial presumption that the natural or appropriate forum for trial of the dispute will be the courts of the place where the tort is committed”¹⁵ – i.e. the court of the place where the wrongful act was committed or where the damage was sustained will have jurisdiction.

2.2. THE PROBLEM: HOW TO APPLY A TRADITIONAL CONCEPT TO CYBERSPACE

One may argue that if someone publishes in a multiplicity of jurisdictions he should understand and must accept that he runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage. However, this broad interpretation of the place where the damage occurred leads to an unforeseeable number of competent courts. Jurisdiction far more requires a close link between the court and the action. The problem with internet related torts and the determination of the place of commitment is the variety of available connecting factors: There are, inter alia, the place where the information was generated, where it was uploaded, where it was downloaded, where the information was read or where the server hosting the information is located.

In the offline world i.e. with regard to printed works the place where the tort was committed is the place of publication – regularly held to be the place of the publisher’s establishment¹⁶ or the place of distribution¹⁷. Jurisdiction will regularly not be established by the mere fact that the claimant had ordered a copy of a newspaper outside its original sales area and actually received it.¹⁸ In the *Shevill* case¹⁹ the ECJ had to clarify the meaning of the ‘place of the harmful event’ under Art. 5 (3) of the Brussels Convention of 1968²⁰ in relation to a defamatory article in a newspaper distributed in several contracting states. The Court held that if damage had been spread over several contracting states, the claimant could sue in each and every jurisdiction in which damage occurred, but only for the damage suffered in

¹⁴ Cf. Patzina (2008), § 32 ZPO para.20 with further references.

¹⁵ *Don King v Lewis Lennox* [2004] EWCA Civ 1329 (CA) para. 24.

¹⁶ Case C-21/76 *Handelskwekerij G J Bier BV v Mines de Potasse d’Alsace* [1976] ECR 1735, para.15; Case C-68/93 *Shevill v Press Alliance SA* [1995] ECR I-415, para. 20.

¹⁷ BGH, Decision of 03 May 1977 - VI ZR 24/75 (“profil”), GRUR 1978, 194.

that particular jurisdiction (mosaic theory). If the claimant wants to sue for the whole damage in only one jurisdiction, he has to file an action at the place where the defendant carried out the tort or where the defendant is domiciled or established.²¹ In the case of an international libel through a newspaper, the injury was held to occur where the publication was distributed, if the person was known in those places.²²

This concept is however difficult to apply in an online world, where there is no distribution in the traditional sense but information is instantly accessible from all over the world. A specific feature of the Internet is, that content is stored in order to be accessed by users. Thus, the place of the harmful event can hardly be determined by identifying a place of distribution.

Also, the criteria that have been applied in consumer contract cases to determine whether a trader whose activity is presented on a website can be considered to be 'directing' its activity to the Member State of the consumer's domicile,²³ cannot be applied to determine jurisdiction. In particular, they may not serve to determine an intended area of distribution of an online publication and exclude jurisdiction of courts elsewhere. Harm may occur everywhere where the information is accessible.

¹⁸ A similar conclusion has been drawn with regard to the notion of "directed" in Art.15 (1) lit. c) of the Regulation. Pursuant to Art. 15 (1) lit. c) "in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if [...]in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities". In order to satisfy the criterion of "directed" it is not sufficient that a contract has been concluded by a merchant and a consumer as this would contravene the requirement of foreseeability of place of jurisdiction. Cf. Clausnitzer (2010) at 375 with further references. For an analysis of French cases on the issue of so called „trap purchases“ (i.e. online order of goods to places outside the original sales area) discussing whether the mere delivery of a good that has been ordered via the internet constitutes jurisdiction. cf. Ancel (2010).

¹⁹ Case C-68/93 Shevill v Press Alliance SA [1995] ECR I-415.

²⁰ The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has largely been supplanted by the **Brussels I Regulation**. The Regulation makes some changes to the Brussels Convention, but is generally very similar. The Convention remains in force in relation to the oversea territories of the Member States which fall within the territorial scope of the Convention and which are excluded from the Regulation pursuant to Art. 299 of the TEC (now Art.355 TFEU). Art. 5 (3) of the Brussels Convention of 1968 and Art.5 (3) of the Brussels I Regulation are almost identical, the mere difference being that the Convention speaks of Contracting States and the Regulation of Member States.

²¹ Case C-68/93 Shevill v Press Alliance SA [1995] ECR I-415, paras 24–33.

²² Case C-68/93 Shevill v Press Alliance SA [1995] ECR I-415, para 29.

²³ Joined cases C-585/08 Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and C-144/09 Hotel Alpenhof GesmbH v Oliver Heller [2010]. For an analysis of the criterion of direction see Fields (2011) and Sujeccki (2011).

A criterion based on intent would also be contrary to the explicit wording of Art. 5(3) which in comparison to Art. 15(1)(c) of the Regulation does not require a direction of activities to a Member State.²⁴

Irrespective of a potential criterion of directed distribution area, the dissemination of information via an internet website must be distinguished from the (regional) distribution of traditional print media in that online content can be consulted instantly by an indefinite number of internet users throughout the world. The ubiquity of the Internet reduces the usefulness of a criterion based on distribution.²⁵

That accessibility alone is not sufficient to establish jurisdiction has now been clarified by the ECJ in the joined cases of *eDate Advertising and Martinez*. The German Federal Court of Justice (BGH) and the Paris Regional Court (TGI Paris) have asked the ECJ to clarify the extent to which the *Shevill* principles also apply in the case of an alleged infringement of personality rights by means of content disseminated via a website.

3. DETERMINING THE PLACE OF THE HARMFUL EVENT

3.1. JOINED CASES C-509/09 AND C-161/10

In 1993, X, who is domiciled in Germany, was sentenced, together with his half-brother, by a German court to life imprisonment for the murder of well-known Bavarian actor Walter Sedlmayr. The murder, and the subsequent trial and conviction of the half-brothers, received extensive media coverage in Germany, especially due to controversies surrounding the investigations. Both convicts appealed their convictions and in 1999, even filed a constitutional complaint in an attempt to have them overturned.²⁶ In January 2008, X was released on parole. The company *eDate Advertising*, which is established in Austria, operates the internet portal 'www.rainbow.at', where information about the appeals which X and his brother had lodged against their convictions had been published. Although *eDate Advertising* removed the disputed information from its website, X filed a request before a German court to order the Austrian company to stop using his full name when reporting about him in connection with the crime committed. *eDate Advertising* challenges the international jurisdiction of a court

²⁴ Cf. also Joined cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Martinez v MGN Ltd*, Opinion of AG Pedro Cruz Villalón of 29 March 2011, para.62.

²⁵ See *ibid* para.45 et seq.

²⁶ Further applications for a re-litigation of the case in 1997 and 2004 were also unsuccessful.

in Germany, arguing that only an Austrian court is competent to hear the case.²⁷

The BGH therefore asked the ECJ whether ‘the place where the harmful event may occur’ in Article 5(3) of the Regulation has to be interpreted as meaning, that the person concerned of a (possible) personality right infringement, may also bring an action for an injunction against the operator of the website in the courts of any Member State in which the website may be accessed; or whether jurisdiction of the courts of a Member State – other than the place of establishment of the defendant – requires a special connection between the contested content or website and the State of the court seised that goes beyond mere technical accessibility. If such a special domestic connecting factor is necessary, the BGH wants to know which criteria may determine that connection and whether its determination depends upon the number of times the websites has been accessed from the State of the court seised.²⁸

A similar question was asked by the TGI Paris regarding a 2008 news story and images that had been published on www.sundaymirror.co.uk.²⁹ Olivier Martinez, a French actor, and his father complain that the story, entitled ‘Kylie Minogue is back with Olivier Martinez’ constitutes a violation of their privacy and the accompanying picture, Olivier Martinez’ right to his own image.³⁰ Thus, father and son brought an action before a French court against the British publisher MGN. MGN, like eDate Advertising, challenged the international jurisdiction of a French court, arguing that there is no sufficient connecting factor between the upload of the information in the UK and the alleged damage in France.³¹ Hence, the French court wants to know, whether mere accessibility constitutes a sufficient connecting factor or if further links are required. If a further link between the harmful act the territory of the place of court is required, the court proposes several connecting factors and asks the ECJ to identify whether they may constitute the missing link. Connecting factors may potentially be the number of page hits made from a Member State – as an absolute figure or as a proportion of all hits on that page; the residence, or nationality, of the claimant; the language

²⁷ Joined Cases C-509/09 eDate Advertising GmbH v X and C-161/10 Martinez v MGN Ltd. [2011], para.18.

²⁸ Ibid, para. 24.

²⁹ Ibid, para. 29.

³⁰ Ibid, para. 25.

³¹ Ibid, para. 26.

in which the information at issue is disseminated or any other indication that demonstrates the publisher's intention to address specifically the public of a Member State; or the place where the events described occurred and/or where uploaded photographs were taken.³²

The ECJ held that a multiplicity of possible fora exists: Under Art.5 (3) of the Regulation the person whose rights have allegedly been infringed has the option to bring an action for liability, in respect of all the damage caused, either (i) before the courts of the Member State in which the publisher of that content is established, or (ii) before the courts of the Member State in which the centre of his interests is based. Instead of bringing an action in respect of all the damage caused, that person may also bring his action (iii) before the courts of each Member State where the contested content is or has been accessible, but only in respect of the damage caused nationally.³³

Whereas the Shevill case-law established dual jurisdiction at the choice of the holder of personality rights, allowing him to choose between the jurisdiction of the defendant in respect of all damages and the jurisdiction of the place or places where the victim is known only in respect of the damage that occurred in the territory of the Member State of the court seised, the second principle in the joined cases formally adapts a supplementary connecting factor.

The idea behind the additional criterion of 'centre of interests' is that a lawsuit may best be assessed by the court of the place where the victim has his centre of interests. According to the Court the centre of interests corresponds in general to the habitual residence of the victim.³⁴ However, the centre of a person's interests may also be outside the Member State of his habitual residence. Other factors may establish a particularly close link to another State than that of residence, for example the pursuit of a professional activity.³⁵ This court shall then have jurisdiction in respect of all damage caused within the territory of the European Union.

The ECJ recognised that the universal distribution of information may increase the seriousness of an infringement of personality rights and makes it difficult to locate the places in which the damage occurred. The Court ar-

³² Ibid, para. 29.

³³ Ibid, para. 52.

³⁴ Ibid, para. 49.

³⁵ Ibid, para. 49.

gued that it is not always technologically possible to quantify the distribution of information with certainty and accuracy in one particular Member State and hence the damage caused exclusively in that State.³⁶ The attribution of jurisdiction to the court at the place of centre of interests thus serves the sound administration of justice.³⁷

According to the ECJ, the centre of interests approach also observes the need to safeguard the sound administration of justice,³⁸ an objective explicitly referred to in the preamble to the Regulation. It is assumed that at the time of publishing information online, the defendant should be in a position to know the centre of interest of the person that is subject of the content, and thus may easily identify the court in which he may be sued.³⁹

3.2. THE 'CENTRE OF INTERESTS' - INTRODUCING A SUBJECTIVE INTERPRETATION OF FORUM CONVENIENS

By introducing the centre of interests as a connecting factor the ECJ paid regard to 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'⁴⁰. The impact that online material may have on an individual's personality rights was key for introducing a third place of jurisdiction.

The centre of interests is a solution halfway between the two jurisdictions established in *Shevill*, and enables a potential victim to bring proceedings in the jurisdiction where his main interests are located. The criterion is specifically attractive for a victim as he is now able to take legal action at his habitual residence in respect of all damages that have been caused within the EU by an online publication. This is specifically advantageous as legal action before a local court may entail less costs and hassle for the victim. Whereas in relation to printed matter, a victim could only choose to take the publisher before a court of the publisher's establishment, this may be a major step forward for the victim.

³⁶ Ibid, para. 46.

³⁷ Ibid, para.48. Recital 12 of the Brussels I Regulation asks for 'alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice'.

³⁸ Ibid, para. 50.

³⁹ Ibid, para. 50.

⁴⁰ Ibid, para. 47. As regards the serious nature of the harm which may be suffered by the holder of the fundamental right to privacy see also C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Martinez v MGN Ltd*, Opinion of AG Pedro Cruz Villalón of 29 March 2011, para. 56.

What is interesting to see, is that by introducing the centre of interests as a connecting factor, the ECJ introduced a rather subjective determination of place of jurisdiction. The centre of interests needs to be identified from the perspective of the victim. Especially in cases, where the victim has more than one place of residence or works and lives in different countries, it will be difficult to determine the centre of interest without judging it from the perspective of the victim.

In most cases, the centre of interests approach however will lead to jurisdiction at the place of habitual residence of the victim and thus, to exactly the opposite of the basic principle in tort cases – the place of establishment of the defendant.

The ECJ did not follow the recommendation of the Advocate General Cruz Villalón to introduce a more distinguished additional connecting factor. In his opinion the AG proposed as *forum conveniens* the centre of gravity of the dispute.

The place of the centre of gravity of the dispute is the one ‘where a court is able to adjudicate on a dispute between freedom of information and the right to one’s own image under the most favourable conditions’.⁴¹ These conditions shall be given ‘where the potential for an infringement of the right to one’s own reputation or the right to privacy and the value inherent in the dissemination of certain information or a particular opinion, as the case may be, may be visualised or are more evident’.⁴² At this place, the victim will presumably suffer the most extensive and serious harm. In order to determine the place of the centre of gravity of a dispute, it was considered necessary to identify the centre of interests and the objective relevance of the infringing information in that particular territory.⁴³

The centre of interest criterion is similar to the one laid down in *Shevill* and subsequently by the ECJ in this case, namely that the victim has a reputation at that place and that the alleged victim essentially carries out his life plan (if such exists) at that place.⁴⁴

The second criterion, the nature of the information, requires that the information giving rise to the dispute must raise the interest of the local read-

⁴¹ C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Martinez v MGN Ltd*, Opinion of AG Pedro Cruz Villalón of 29 March 2011, para.58.

⁴² *Ibid*, para. 58.

⁴³ *Ibid*, paras. 59 et seq.

⁴⁴ *Ibid*, para. 59.

ership and, consequently, actively encourages local readers to access it.⁴⁵ This shall not be confused with voluntary direction of the information to a particular Member State by the defendant.⁴⁶

Competence is attributed to the court where the potential infringement of personality rights and the quality of the content in question are most apparent or strongest.⁴⁷ There, it is assumed that the damage that occurred or may occur will be particularly comprehensive and intensive.⁴⁸

According to the AG the court at the centre of gravity of dispute is best placed to analyse the tension between the interests involved and is therefore able to hear an action concerning all the damage suffered.⁴⁹

In comparison to the centre of interests the centre of gravity of the dispute constitutes a more objective criterion, taking into account the appropriateness of a court to hear a case. This two-step test considers that the allegedly infringing information may be of particular interest in one particular place and that the harm may be best assessed in that place. The centre of interests alone is not sufficient to establish a domestic connecting factor. Thus, this solution excludes jurisdiction where the victim has a reputation to defend but the information may not raise particular interest of the local readership for example because it is published in a language that is commonly used only by a small number of people in the territory of the court seised.

Case-law deriving from cases under national rules, helps to identify the deficits and advantages of a third place of jurisdiction which takes into consideration the centre of interests and/or the objective relevance of the information in a particular territory.

3.3. NATIONAL APPROACHES TO DETERMINE THE FORUM CONVENIENS: GERMANY AND THE PLACE OF COLLISION OF CONFLICTING INTERESTS

In Germany, there have recently been several cases on the interpretation of place of the harmful event for information distributed online. In specific,

⁴⁵ Ibid, paras. 60 and 63.

⁴⁶ Ibid, para. 62.

⁴⁷ Ibid, para. 58.

⁴⁸ Idem.

⁴⁹ Ibid, para. 57.

there have been two cases before the Federal Court of Justice (BGH) dealing with defamatory statements published on a website.⁵⁰

As already stated before, the German domestic provision determining jurisdiction for torts, as the Regulation, sets forth that the court at the place where the harmful event occurred or may occur has jurisdiction.

In March 2010, the BGH had to deal for the first time with the determination of the forum delicti in an online context. In the NY Times case⁵¹ the Court established under which conditions a German court could claim jurisdiction for online personality rights infringements. The claimant had addressed a German court in order to obtain injunctive relief, barring the NY Times from publishing or distributing certain statements, which had been published in a news article in the New York metro section of the print edition on June 12, 2001 and then had been moved to the NY Times online archive on the same day. The article cited a 1994 FBI report describing the claimant *inter alia* 'as a gold smuggler and embezzler'.⁵²

Although the article was contained in the local section, the BGH held that there was a significant domestic connection, since the contested information was capable of raising a significant interest within German users.⁵³ The Court introduced a test to determine jurisdiction: jurisdiction will be established where the content in question contains a clear reference to a location; This reference must be in the sense that a collision of conflicting interests (the interest of the claimant to protect his personality rights on the one hand, and the interest of the defendant to provide the content in question on the other hand) may have occurred or may occur in the location due to the specific circumstances of the case.⁵⁴ Accordingly, taking notice of the content at the location of the court seized must be considerably more likely than it is from the mere availability on the internet, and an interference with the personality rights of the claimant occurs because the information was taken notice of. It is however not necessary that the contested content addresses or is directed at users at the place of the court seized.

⁵⁰ BGH, Decision of 2 March 2010 – VI ZR 23/09 (New York Times), ZUM 2010, 524.

⁵¹ *Idem*.

⁵² For the facts of the case see LG Düsseldorf, Decision of 9 January 2008 – case no. 12 O 393/02, ZUM-RD 2008, 482.

⁵³ The Regional Court of Düsseldorf (LG Düsseldorf, Decision of 9 January 2008 – case no. 12 O 393/02, ZUM-RD 2008, 482), as well as the Higher Regional Court of Düsseldorf (OLG Düsseldorf, Decision of 30 December 2008 – case no. 15 U 17/08, NJW-RR 2009, 701), on appeal from first instance, denied jurisdiction on the grounds that the article originally appeared in the metro section of the paper and was directed at a New York audience.

⁵⁴ BGH, Decision of 2 March 2010 – VI ZR 23/09 (New York Times), ZUM 2010, 524, 526.

Hence, a German court can claim jurisdiction over a news article in the local section of the online archive of the NY Times newspaper. The BGH established the required link by identifying that the news article was likely to be accessed from Germany: the claimant resides and does business in Germany, the NY Times is a globally renowned publication that addresses a worldwide readership and within the registration process of its online portal, users could select Germany as 'country of residence'. Also, the NY Times online edition had more than 14,000 registered users from Germany. How often the news story was actually accessed from Germany was irrelevant.⁵⁵ The Court stressed that an international readership can be a proof of a substantial connection to a forum but cannot be the sole connecting factor.

The BGH did not discuss concepts that also take into account the intentions on the part of the publisher from the perspective of an objective bystander. Further, the impact of the language in which the website is provided was left out. The Court did not differentiate between the local news section and national or international news section. Accordingly, a website that restricts its information to a specific region and thus, only addresses a regional readership, might still face an unforeseeable number of competent courts. The direction of the website towards a specific geographical area does not constitute a means to limit jurisdiction to that specific area.

Almost exactly one year after the NY Times case, the BGH had to apply the test of collision of conflicting interest in a similar case. The claimant in the Seven Days in Moscow or www.womaneurope.com case⁵⁶ was a Russian national with residences in Germany and Russia. The defendant, a Russian national with residence in the US, published an article on an internet portal run by a German provider mocking about the lifestyle and appearance of the claimant at a class reunion in Moscow which both parties attended. The article was in Russian and Cyrillic font. The BGH denied jurisdiction of a German court in this case, arguing that there was no sufficient link to Germany, as the contested content could not lead to a domestic collision of conflicting interests. It held that the content in question was only of interest for the participants of the class reunion but did not raise a particular

⁵⁵ The Court concluded that it was also not technically possible to determine a correct number and data protection issues made it difficult to determine.

⁵⁶ BGH, Decision of 29 March 2011 – VI ZR 111/10 (Seven Days in Moscow), NJW 2011, 2059.

interest of users in Germany to access it.⁵⁷ Although more than 2 million German citizens migrated from the former Soviet Union to Germany⁵⁸ and more than 190.000 inhabitants in Germany are of Russian nationality⁵⁹, the Court argued that the language of the publication and the usage of Cyrillic font exclude a particular link to Germany.

The case highlights that a German domestic court may deny its jurisdiction, although a victim may have his centre of interests in Germany, based on the language of the contested publication. Similarly to the centre of gravity of conflict approach, the court asks for objective relevance of the contested information and such relevance also being dependent on the accessibility of information language-wise.

Additionally, an indicator for relevance of infringing information within the German territory is the direction of the publication (also) at German users. However, none of these criteria alone does establish jurisdiction, it is also required that harm occurs or may occur in Germany, thus the victim must have a reputation to protect in Germany.

In summary, whether Germany is the appropriate forum to hear the case is determined by assessing the connection of the claimant with the forum and the objective interest of local residents to access the information; whereby the latter may be achieved because the information is of particular relevance or specifically addressed at domestic readers.

4. BALANCING THE RIGHTS AND INTERESTS AT ISSUE – WHICH WAY TO GO?

Like the test suggested by the AG, the German test sets forth objective criteria in addition to the mere centre of interests approach employed by the European Court of Justice.

Arguably, the centre of interests approach leads to predictability for media outlets, and hence, legal certainty. However, this may only seem so at

⁵⁷ According to the Court the forum had a 'private character', meaning that it only concerned the private life of the claimant and that further potentially interested persons are all residents of Russia.

⁵⁸ Cf. Bundesministerium des Inneren, Migrationsbericht 2009, pp.53 et seqq., available online at http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2011/Migrationsbericht_2009_de.pdf?__blob=publicationFile (last accessed 13 January 2012).

⁵⁹ According to the Ausländerzentralregister, the Russian population in Germany amounted to 195.310 persons (excl. those with double citizenship German-Russian) on 31 December 2011, Cf. Statistisches Bundesamt, Ausländische Bevölkerung, <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/MigrationIntegration/AuslaendischeBevoelkerung/Tabellen/StaatsangehoerigkeitJahre.html> (last accessed 25 April 2012).

a first glance. Particularly international celebrities tend to have residences in more than one state and may work and have a reputation in different countries. German footballer working and living in Italy, who also plays for the German national team and has his family living in Germany, may consider his centre of interests rather in Germany than in Italy and thus, is more likely to seek legal protection and damages in Germany. Accordingly, there may be constellations, in which more than one centre of interests exists. A publisher of information online thus has to consider the effects of his publication in several jurisdictions, basically those to which the individual concerned has specific ties to. Where more than one potential centre of interests exists, it is finally the claimant that factually determines the appropriate forum. He is in the position to argue why in particular he addressed a specific court and bring forward evidence to support his assumption. In any other case, the centre of interests leads to jurisdiction at the place of habitual residence - in opposition to the common place of jurisdiction at the place of the defendant's establishment. One may argue, that the ECJ factually annulled the place of establishment as the common place of jurisdiction in tort cases.

The addition of an objective relevance criterion would allow for a more balanced and fair assessment of the place of jurisdiction, taking into account all the rights and interests at issue – those of the media outlet and those of the individuals concerned. Taking the example of the Seven days in Moscow case, under the sole centre of interests approach, a court in Germany would have had jurisdiction. Under the further condition of objective relevance of the content, jurisdiction could be denied. The private nature of the forum and the language used did not render the information particular interesting - or objectively relevant – within Germany. The centre of gravity takes into account where the conflict between the interests involved could best be assessed. It pays regard to the fact that certain information may be of interest in one territory but be completely devoid of interest in another although the individual concerned has a strong interest in protecting his name there. Information may be of no relevance at the centre of interests but severely insulting and damaging in another Member State for example due to different cultural differences.

A test of objective relevance may also take into consideration subjective intent on the part of the publisher to direct information at a particular Mem-

ber State and thereby objectively creating a link to the territory.⁶⁰ It has also been argued that the top level domain and the language of a website aid to delimit the territory where the information is of particular interest.⁶¹ There are numerous further factors that could be consulted to determine whether or not certain information has an impact in a particular territory. All these factors have to be accessed on a case-by-case basis. It is hardly possible to present an exhaustive list. And exactly this may have been the reason for the ECJ to introduce the sole centre of interests test. From the point of view of legal certainty, the sheer number of potential criteria to consider may render it difficult to define the appropriate forum a priori. However, in the field of consumer contracts, also numerous criteria have to be considered following the decision in *Pammer and Alpenhof*.

Unfortunately, the centre of interests approach does not take into account that many websites – due to language or content – may address a more or less regional audience. It would have been interesting to see the ECJ discussing these issues. It remains to be seen, how the centre of interests approach will be applied by domestic courts and under which circumstances defendants will be successful in challenging the jurisdiction of a court seised. The one thing that is for certain by now, is that the centre of interests is not necessarily the most appropriate forum to hear a case.

Although the ECJ has ruled on the determination of place of the harmful event in online disputes, how the concept will be applied is hard to predict. The German case law shows that although a test exists, the potential places of jurisdiction remain difficult to predict for publishers. Defining the place of the harmful event is dependent on the individual circumstances of a case. Only future case law will give directions and lead to more predictability in terms of jurisdiction.

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⁶⁰ Joined cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Martinez v MGN Ltd*, Opinion of AG Pedro Cruz Villalón of 29 March 2011, para. 65.

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