THE APPLICATION OF THE GENERAL RULE OF THE ROME II REGULATION TO INTERNET TORTS

by

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Regulation No. 864/2007 on the law applicable to non-contractual obligations (Rome II) establishes the regime that governs the applicable law concerning torts situations involving a conflict of laws. The Rome II Regulation doesn't have a specific rule regarding the Internet, however, many different types of torts occur online, and an effort to adapt the Rome II Regulation rules is crucial, due to the specific features of the Internet. This study addresses the adaptation of Article 4 (general rule applicable in the absence of a choice-of-law agreement), so it can be applied to Internet torts, especially Section 1 that determines the application of the law of the place of the damage. The main problem that arises from this rule is the concept of damage, specifically where the Internet is concerned: the concept of damage online; how can damage online be located; how can we solve those situations where it is difficult to locate the damage or the damage is spread across several countries.

KEYWORDS

Rome II Regulation; Internet torts; online damage; conflict-of-laws

1. REGULATION NO 864/2007 OF THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

Regulation No 864/2007 of the law applicable to non-contractual obligations (Rome II) establishes the regime that governs the applicable law to torts situations involving a conflict of laws. The Rome II Regulation defines its material scope in Article 1, stating that it applies to non-contractual obligations in civil and commercial matters involving a conflict of laws. From its

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scope area are excluded the revenue, customs or administrative matters or the liability of the State for acts or omissions in the exercise of State authority. Apart from these matters, Article 1, Section 2 and 3, filters further the scope of Rome II, excluding certain non-contractual obligations from its range. The spatial scope of Rome II is defined by Article 3 which determines that the Regulation's scope is universal: Rome II will be applied even if the law designated is that of a non-Member State. Therefore, Rome II does not distinguish between cases involving Member States and cases involving third countries. As to its temporal scope, Article 32 clarifies that the regulation applies to all events that have given rise to any damage taken place after 11 January 2009[1].

Rome II Regulation doesn't have a specific rule which applies to the Internet, however, many different types of torts occur online, and an effort to adapt the Rome II Regulation rules is indispensable, due to the specific features of the Internet[2]. Apart from the cases of infringement of intellectual property rights, product liability, unfair competition and acts restricting free competition, for which there are special rules, Rome II has general rules for the types of torts that do not fall in that category: Article 14 (freedom of choice) and Article 4 (general rule applicable in the absence of a choice-of-law agreement). These would be, for example, situations where the Internet is used as a way to share malicious data and spread damages, like worms, virus and malicious programs that can destroy restricted networks or personal computers, or is used either to steal information or spread false information.

The application of Article 4 raises several complex issues, especially in section 1. In those situations of a non-contractual obligation arising out of a tort, in which the tortfeasor and the victim don´t have their habitual residence in the same country (Article 4, Section 2), the applicable law is the law of the country in which the damage occurs. The main problem that arises from this rule is the concept of damage and, specifically where the Internet is concerned: the concept of damage online; how can damage online be located; how can we solve those situations when it is difficult to locate the damage or the damage is spread across several countries. These difficulties

[1] The ECJ clarified the doubts that were raised regarding the date of application of the Regulation: 17.11.2011, Deo Antoine v. GMF Assurances SA, C-412/10, ECR I-11603.

[2] As demonstrated by Gonçalves, A.S.S. 2013, 'The application of the Rome II Regulation on the Internet Torts', *Masaryk University Journal of Law and Technology*, vol. 7, no 1, pp. 35-47.

in applying the general rule of the Rome II Regulation to Internet torts are the focus of this study.

2. THE APPLICATION OF THE GENERAL RULE OF ROME II REGULATION TO INTERNET TORTS

2.1 THE CONCEPT OF DAMAGE

Article 4, Section 1, determines the traditional connection of the *lex loci delicti commissi*, materialized by the connecting factor place of damage. Thus, it is applicable the law of the place of damage, regardless of the place where the event which gave rise to the damage occurred and of the place where the indirect consequences of the damage occurred. What we need to analyze first is the concept of damage. Article 4, Section 1, establishes the criteria of the direct or immediate damage: the first impact rule and the ECJ have clarified the concept of direct damage and consequential damage for the purpose of article 5, Section 3, of the Brussels Convention[3] and the Brussels Regulation. Between the Rome II Regulation[4,5], the Rome I Regulation and the Brussels I Regulation there must be a natural articulation which was recognized by the European Commission due to the nature of the issues which these instruments address and due to the common objectives that they share[6]: as part of the EU policy of judicial cooperation in civil and commercial matters. This is also acknowledged in Recital 7 of the Rome II and the Rome I Regulation and by the ECJ[7], and justifies a cautious use of the abundant jurisprudence about the Brussels I Regulation in the interpretation of Rome II.

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[3] 27th September 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

[4] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[5] Note that in the explanatory memorandum of Rome II Regulation proposal, the European Commission refers to the jurisprudence of the ECJ to define this criterion: European Commission 2003, Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("ROME II"), COM 427 final, Brussels, p. 11.

[6] Proposal for a regulation of the European Parliament and the Council, Cit., p. 2.

[7] This question was put before the ECJ concerning the interpretation of Article 6 of Rome Convention: ECJ 2010, «Request for preliminary ruling from the Cour d' appel (Luxembourg) on January 18, 2010 - Heiko Koelzsch / Grand Duchy of Luxembourg (C-29/10)», OJ C 80. The General Advocate, invoking literal, systematic and teleological arguments, pronounced in this sense, although noting that the use, in general, of the existing case law about international jurisdiction to the interpretation of conflict-of-law rules should be made on a case by case. V. ECJ, Heiko Koelzsch v. Grand Duchy of Luxembourg, C-29/10, Opinion of General Advocate Verica Trstenjak, submitted on 16 December 2010, in http://curia.europa.eu/jurisp acessed in 05.01.2011

The place of occurrence of the direct damage, in the sense of the ECJ´s jurisprudence, will therefore be the place where the direct results from the event, that generates the situation of liability, are produced[8]. Recital 17 of Rome II reinforces the irrelevance of the place where the indirect consequences of the fact occurred, by clearly stating that «[the applicable law should be determined on the basis of where the damage occurred, regardless of the country or countries in which the indirect consequences could occur». Recital 17 also explains that «(...) in cases of personal injury or damages to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively». This supports the idea that the significant damage is the direct damage. To determine the applicable law is relevant the place where the right was injured - where the damage, which results from a causal event, materializes. This does not take into account the place where the victim suffered the financial damage subsequent upon the initial damage arising and suffered by him in other State[9].

2.2 THE LOCATION OF THE ONLINE DELICT

The localization of the online delict is not an easy task, as can be concluded by the analysis of the ECJ jurisprudence. Article 5, Section 3, of the Brussels Regulation establishes an alternative jurisdiction in relation to torts/delicts in favour of the courts of the place where the harmful event occurred or may occur[10]. Called to interpret the concept of *place where the harmful event occurred or may occur*, the ECJ has decided that the plaintiff has the option to sue, either in the courts of the place of the event which gives rise to and is at the origin of that damage, either in the courts of the place where the dam-

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[8] 1995, Antonio Marinari v. Loyd´s Bank and Zubaidi Trading Company, C-364/93, ECR I-2719; 1990, Dumez France SA and Tracoba SARL v. Hessische Landesbank and others, C-220/88, ECR I-49; 2004, Rudolf Kronhofer v. Marianne Maier and others», C-168/02, ECR I-6009; 1998, Réunion européenne SA and o. v. Spliethoff´s Bevrachtingskantoor BV and the Master of the vessel "Alblasgracht", C-51/97, ECR I-6511; 2004, Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket for Service och Kommunikation, C-18/02, ECR I-1417; 2009, Zuid-Chemie BV v. Philippo´s Moneralenfabriek NV/SA, C-189/08, ECR I-06917.

[9] European Commission, Proposal for a regulation of the European Parliament and the Council, Cit., p. 11. So, according to the example of the European Commission, in a traffic accident «(…) the place of the direct damage is the place where the collision occurs, irrespective of financial or non-material damage sustained in another country (…)»: *idem, ibidem.*

[10] This is an alternative jurisdiction which means that the claimant may choose to bring action before the courts of the Member State where the defendant is domiciled (Article 2) or before the courts designated by Article 5, Section 3.

age occurred[11]. According to the ECJ, the relevant damage is only the direct damage[12] as the place where the direct results of the wrongful act or omission occurred. However, the court of the place of the wrongful action has jurisdiction to decide upon the compensation of all the damages, which have resulted from that behavior, whereas the court of the place of the damage has only jurisdiction to decide about the damages that occur in its territory[13].

2.2.1. THE EDATE CASE

In the eDate case, the ECJ addressed a situation of online infringement of personality rights and recognized the specificity of the ubiquitous nature of the Internet and its worldwide reach. The ECJ pondered in this case the impact in an individual's personality rights of a content that was shared online on a website and the high extent of the damages that it can cause, while keeping the interpretation of Article 5, Section 3: the claimant can bring an action against all the damages caused in the court of the place of the event (in this case, the place of the establishment of the publisher of the content) or the courts of each Member State where the damage occurred (in this case, each Member State in the territory of which the content placed online is or has been made accessible)[14]. However, the ECJ adapted the interpretation of the rule to the nature of the Internet, noting that a content that is placed online can be accessed all over the world, which increases the impact of the damage, and that «(…) it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State»[15]. Consequently the ECJ considered that another court should have jurisdiction to decide upon the compensation of all the damages caused: the court of the place where the victim has his center of in-

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[11] See, e.g., 1976, Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A., 21/76, ECR 1735. According to the ECJ, the jurisprudence of the court about the provisions of the Brussels Convention should apply to the equivalent rules of Brussels I Regulation: see, e.g., Zuid-Chemie, Cit.; 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, C-167/00, ECR I-08111; 2004, Rudolf Kronhofer v Marianne Maier and Others, C-168/02, ECR I-06009.

[12] Zuid-Chemie, Cit.; Rudolf Kronhofer, Cit.; 1990, Dumez France SA and Tracoba SARL v Hessische Landesbank and others, C-220/88, ECR I-00049.

[13] ECJ 1995, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, C-68/93, ECR I-415.

[14] 2011, eDate Advertising GmbH v X (C-509/09) and Olivier Martinez and Robert Martinez v MGN Limited (C-161/10), C-509/09 and C-161/10, ECR I-10269.

[15] *Idem, ibidem.*

terests[16]. The center of interests of the victim would generally be his habitual residence, but the ECJ admitted that it could also be the place where the victim follows his professional activity if the person has a close connection with that State[17]. The jurisdiction of the court of the place of the victim´s center of interests is justified by the ECJ according to the principle of predictability underlying the rules of jurisdiction: in this case, the publisher of the harmful content is in a position to know where the center of interests of the person, which will suffer the damage, is.

2.2.2. THE WINTERSTEIGER CASE

In the Wintersteiger case[18], it was also at issue an online delict, but in a situation of infringement of an intellectual property right. When called to determine the place where the harmful event occurred, the ECJ did not use the criteria of the center of interests, considering that factor only relevant in the specific context of infringement of personality rights: this factor was justified by the objective of foreseeability of jurisdiction[19] and because the personality rights are protected in all Member States, while «(…) the protection afforded by the registration of a national trade mark is, in principle, limited to the territory of the Member State in which the trade mark is registered , so that, in general, its proprietor cannot rely on that protection outside the territory»[20]. The justification of the application of the center of interest in cases of infringement of personality rights and exclusion of the same factor in the case of infringement of a national trade mark is the foreseeability of jurisdiction according to the geographic range of protection of each right, which allows the claimant and defendant to foresee where one can sue and the other can be sued, respectively.

As to determine the place where the damage occurred, the court decided that «(…) both the objective of foreseeability and that of sound administration of justice militate in favor of conferring jurisdiction, in respect of the damage occurred, in the courts of the Member State in which the right at issue is protected»[21]: those courts could determine all the damages, because

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16 *Idem, ibidem.*

17 *Idem, ibidem.*

18 2012, Wintersteiger AG vs. Producuts 4USondermaschinenbau GmbH, C-523/10, ECR 2012, p. 0000.

19 Allowing the claimant to easily identify in which court he can sue and the defendant to reasonably to foresee in which court he can be sued: *idem, ibidem*, § 22-24.

20 *Idem, ibidem*, § 25.

21 *Idem, ibidem*, § 27.

all the damages against the protected right would occur in the country where the right was protected by registration. This case involved a trade mark registered in a Member State, and the ECJ decided that the plaintiff could sue in the courts of the Member State in which the trade mark was registered.

In the same case-law, the ECJ also addressed the concept of place of event giving rise to the infringement of an intellectual property right and specifically to a trade mark. According to ECJ, «an action relating to alleged infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may also be brought before the courts of the Member State of the place of establishment of the advertiser»[22]. Therefore, the place of the establishment of the infringer is important, as also is where he decided to practice the acts, which gave rise to the damage. The ECJ concluded that the act, which gave rise to the damage (the technical display process), took place on a server belonging to the operator of the search engine that the infringer chose to use[23]. Nevertheless, apart from the uncertainty of the place of establishment of that server, which would be unpredictable[24], its location has little connection with the causal event, which gave rise to the damage. The place of the decision of the act was considered by the ECJ as a definite and an identifiable place, which could also facilitate the presentation of evidence and the organization of the process[25]. Here the criterion was also the foreseeability of the forum, according to the principle of proximity.

2.2.3. THE PETER PINCKNEY CASE

In the Peter Pinckney case[26] there was an infringement of copyrights committed by means of a content placed online on a website. The author of a music work, domiciled in France, claimed damages in the French courts,

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[22] §38. Note that for ECJ the infringer is «(…) the advertiser choosing a keyword identical to the trade mark, and not the provider of the referencing service, who uses it in the course of trade (…). The event giving rise to a possible infringement of trade mark law therefore lies in the actions of the advertiser using the referencing service for its own commercial communications».

[23] Also in the 2012, Football Dataco Ltd and Others v Sportradar GmbH et Sportradar AG, C-173/11, ECR 00000, the ECJ stated the irrelevance of the territory of the State where is situated the web server from which the data in question is sent.

[24] Wintersteiger AG, Cit., § 36.

[25] *Idem, ibidem*, § 37.

[26] 2013, Peter Pinckney vs KDG Mediatech AG, C-170/12, ECR 00000.

against a company established in Austria, which reproduced the work there, on a material support that was afterwards marketed, through the internet, by companies (working in the United Kingdom), using a website that was made accessible in France (place of the court seized). So, in this case, it was necessary to locate the place of the damage to determine if the French courts had jurisdiction.

Following, what we call the delict analysis approach, the ECJ analysed the infringed right and noted that copyrights are subject to the principle of territoriality, but they are protected in all Member States, especially because of the Directive 2001/29, thus «(…) they may be infringed in each one in accordance with the applicable substantive law»[27]. As a consequence, the ECJ concluded, that the damage may occur in the jurisdiction of the court that was seized because the copyrights were protected in that territory, and the risk of infringement arises «(…) 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 of the court seized (…)[28]. In this case, the seized court could only know that the damage occurred in its territory.

3. LESSONS WITHDRAWN FROM THE ECJ JURISPRUDENCE CONCERNING THE APPLICATION OF ROME II TO ONLINE TORTS

It´s time to ascertain if it´s possible to get any lessons from the ECJ jurisprudence to the application of Article 4 to Internet torts. The first lesson, is the concept of direct damage used in Article 4, Section 1, of the Rome II Regulation as the place where the first impact damage (direct damage) as a result of the harmful event was produced: place where the right was injured; where the damage that results from the causal event materializes. So, in the case of a virus, malicious program that attacks a specific computer or network, or hacker that steals information stored in a certain computer or network, the place of the significant damage will be the one where the computer is located or network affected by the virus, malicious program or the theft. However, situations of infringements of rights through the Internet, by the diffuse nature of the World Wide Web, may produce effects in numerous places.

[27] *Idem, ibidem*, § 39.
[28] *Idem, ibidem*, § 44.

The place where the damage occurred may be different according to the nature of the infringed right[29] (as decided in Wintersteiger and Peter Pinckney cases). So, the determination of the place of damage may require a delict analysis approach, as the ECJ has already done to the infringement of personality rights, trademarks and copyrights. In this analysis, it must be taken into account that the occurrence of damage in a place is subject to the condition, that the right in respect of which such alleged infringement is protected by that State (as decided in Wintersteiger and Peter Pinckney cases)[30].

The second lesson refers to damages spread across several countries. In the case of scattered torts ('Streudelikt') in which one wrongful action may give rise to damages located in several States, i.e., on computers or networks placed on different countries, according to the mosaic approach ('Mosaikbetrachtung') to each damage it will be applicable a different law. Something similar was decided in *Shevill*, a case involving the infringement of personality rights, namely a situation of libel by a newspaper article distributed in several Member States[31] (confirmed on eDate). The place of the event which gave rise to the damage was considered to be the place where the publisher of the newspaper was established, because it was in that place where the harmful event was originated and «(…) from which the libel was issued and put into circulation»[32]. The place of the damage (that would only have jurisdiction to award the damages produced in its own territory) was the place where the harmful effects upon the victim were produced, which was, in that case, the Member States «(…) in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation (…)»[33].

As a consequence, there could be situations where the same harmful event generates damages in two countries, A and B, and the damages are compensated only in country A and not in B, by the application to each one of the damages of the law of the place where the damage occurred. This is the result of the natural differences existing between substantive laws, but harms the coherence in the regulation of unitary situations by their frag-

[29] Wintersteiger, Cit., §21 to 24; Peter Pinckney, Cit., §32, §36 to §39.

[30] Wintersteiger, Cit., §25; Peter Pinckney, Cit., §33, § 43.

[31] Fiona Shevill, Cit.

[32] *Idem, ibidem*.

[33] *Idem, ibidem.* In this situation, the plaintiff should take action before the courts of each Member State in which territory the damage occurred (*Mosaikbetrachtung*).

mentation, and reduces legal certainty[34]. The escape clause of manifestly closer connection to Article 4, Section 3, is not the solution for this problem. The escape clause is a technique to get the application of the law that has the closest connection with the case and is an expression of the principle of proximity[35]. This is a figure of exceptional intervention, which aims to correct the result of location done by the conflict-of-law rule and is closely related to the idea of the center of gravity of the legal relationship. It does not intervene by substantive reasons - to correct the material result of applying the laws indicated by the conflict-of-law rule[36], but by conflictual reasons - it allows the application of a law that has a closer connection with the situation, than the one indicated by the conflict-of-law rules, according to the principle of proximity.

Another problem, which arises from the diffuse and global nature of the Internet, is the difficulty in locating the damage and here the jurisprudence of the ECJ may also be of some help. It may not be easy to identify the place of the direct damage and therefore the problem is how to determine the applicable law according to the Rome II Regulation in such cases. For instance, situations where some virus affects computers all over the world by a virus introduced on an Internet service provider. How to determine the place of damage in those complex cases, which encompass several events, and the assessment of damages is complex because they are spread across several States, being therefore difficult to separate them in order to know which damage occurred in which country.

Article 4, Section 3 of Rome II, introduces a certain flexibility in the general conflict rule allowing the judge to correct the rigidity of the rules contained in Sections 2 and 1, according to the circumstances of the case. According to Section 3 of Article 4, the applicable law may be another that has a closer connection than the one prescribed by the connecting factors established by the rule. This implies a comparison between the law of the dam-

[34] About Gonçalves, A.S.S. 2013, *Da Responsabilidade Extracontratual*, Cit., pp. 135-158.

[35] About the escape clause, Gonçalves, A.S.S. 2013, *Da Responsabilidade Extracontratual*, Cit., pp. 444-464; González Campos, J. 2002, 'Diversification, spécialisation et matérialisation des règles de droit international privé', *RCADI*, vol. 287, pp. 214-220, p. 259; Lagarde, P. 1986, 'Le principe de proximité en droit international privé contemporain', *RCADI*, vol. 196, pp. 97 et seq.

[36] It does not allow the application of the best law in a substantive point of view: v. Gonçalves, A.S.S. 2013, *Da Responsabilidade Extracontratual*, Cit., pp. 446-467; Lagarde, P. 1986, 'Le principe de proximité', Cit., pp. 122 et seq; Ramos, R.M. 1995, 'Les Clause d´Exception en Matière de Conflits de Lois et de Conflits de Juridiction – Portugal' in *Das Relações Privadas Internacionais, Estudos de Direito Internacional Privado*, Coimbra Editora, Coimbra, pp. 311-312.

age and the law that has a closer connection according to the circumstances of the case. Thus, it requires a manifestly closer connection, which implies, in particular, a greater proximity with another law, compared with the one established on the other two connecting factors: habitual residence of the victim and the tortfeasor or the place of damage. However, in the hypotheses we are dealing with, it isn´t even possible to locate the damage, so there isn´t any way to make a comparison.

If it isn´t possible to apply the connections specified in Article 4, Sections 1 and 2, because one cannot locate territorially the offense and, although the vocation of the exception clause is not to be primarily applicable, to preserve the effectiveness of the rule, there is no reason not to do a direct application of the manifestly closer connection, not as an escape clause but as a general clause. This has already been admitted by some authors, myself included, in those cases in which the offense occurs in areas without sovereignty: offenses or collisions on the high seas or in international airspace, where there is no common habitual residence of the parties and it is not possible to locate the damage in a legal system[37]. Aside from the argument of effectiveness of Article 4, the criterion of the closer connection is also used by the ECJ on online delicts cases analyzed, when it tries to determine the jurisdiction. According to the ECJ, «(…) the identification of the place where the alleged damage occurred also depends on which court is best placed to determine whether the alleged infringement is well founded»[38]. By transposing this argument to situations of choice- of-law, and considering the difficulty in locating the damage on online cross-border cases, the applicable law can be the one that is best placed (has the closer connection) to assess, not just the damage, but the infringement as a whole. The closer connection, underlying the principle of proximity, was also the justification of the center-of-interest criterion established in the *eDate* case: the proximity and the predictability for the parties that results from it. Of course we arrived at this result trough a systematic and teleological interpretation, according to the principle of proximity that inspires the rule: in these situ-

[37] V. Gonçalves, A.S.S. 2013, Da Responsabilidade Extracontratual, Cit., pp. 462. Cfr., Brière, C. 2008, 'Le règlement (CE) n.º 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles («Rome II»)', *Clunet*, no 1, p. 55; Calvo Caravaca, A.L., Carrascosa González, J. 2008, *Las Obligaciones Extracontractuales en Derecho Internacional Privado, Editorial Comares*, Granada, p. 129; Garcimartín Alférez, F., 'Un apunte sobre la llamada "regla general" en el reglamento "Roma II"', *AEDIPr*, vol. VII, p. 250.

[38] Peter Pinckney, Cit., § 34. With the same reasoning: eDate Advertising and Olivier Martinez, Cit., § 48; Wintersteiger, Cit., §27.

ations we change what was thought to be a mechanism of flexible approach of a rigid conflict-of-law rule (a traditional fast and hard rule), in the rule itself.

3. FINAL REMARKS

This study is an example of how the traditional conflict-of-law rules (as also the jurisdiction rules) that were constructed in a perspective of localization need some adaptation to be applicable to the Internet, because of its worldwide reach. That happens in Article 4 of Rome II that was based on the principle of *lex loci delicti commissi*. Yet, this adaptation has to be done according to another principle that inspired the Article: the principle of proximity and the need for flexibility in a case-by-case approach, according to the nature of the infringed right and their special scope of protection.