"DIGITAL LIBRARY'S LIABILITIES. WHICH LAW APPLIES? (COPYRIGHT INFRINGEMENT, BLASPHEMY AND HATE SPEECH)"

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Abstract:

In this chapter we examine the way applicable law determines digital library's author liability. First part deals with choice of law in cases of copyright infringement and concludes that Rome II Regulation establishes what the Berne Convention avoided: a general rule (lex loci protectionis) for all copyright issues arising from copyright infringement. This solution however causes new problems in the modern era of the internet and of simultaneous cross-border transmission of copyrighted works for the tort in this case is perpetrated simultaneously in many countries. Second part deals with cases where the publication of a work per se infringes the law, such as in the case of blasphemy, religious insult and hate speech. We argue that the relevant prohibitions constitute serious burdens to free speech and cannot establish civil liability for the author of digital library. Although, since this is not the opinion of ECHR, we conclude that the exception of personality related offences from Rome II Regulation creates great uncertainty as to the applicable law and the prerequisites of civil liability for the author of digital library

Introduction

The act of digitizing and placing a copyrighted work in an e-library can qualify as a tort and raise numerous questions of applicable law[1]. Such acts can be tortious, for instance, if committed without the authorization of the author or the copyright owner. In such case, copyright is infringed both by uploading the copyrighted work to the worldwide web (unlawful reproduction) as well as by making the work available to the public through the internet. The mere placing of the work on the internet, however, can qualify as a tort in itself irrespective of copyright breach. This happens when in a given jurisdiction the publication of a work is against the law (e.g. when a work is considered to be blasphemous or to insult religion or to incite hatred on racist, national or religious grounds – hate speech). In such instances, liability lies not only with the creator of the work but with the distributor as well. In other words, the maker of an e-library is exposed to risks he may be unaware of as he cannot be sure to know all the laws which apply in all the countries from which access to the e-library (and through it to the work) is possible. Similar problems may arise in copyright since, as will be discussed below, there are cases where the maker of an e-library may believe to have acquired the required authorization but it may not be effective in all the countries from which access to the e-library (and through it to the work) is possible. So significant problems may arise not only due to the cost of copyright clearance or to orphan works but also from variances in the applicable law. In the first part of this article, we will proceed to examine the problems of private international law in copyright; in the second part, we will consider some issues of private international law arising from legislation on blasphemy and hate speech[2].

1. Copyright and applicable law

The choice of applicable law in case of copyright infringement with a foreign element is a quite complicated matter on which there is divergence of opinion (in both doctrine and case-law) and is still in the process of international consideration on the road to a common arrangement [3]. On a series of substantive issues, such as the initial owner of copyright (especially in collective works), the scope of the moral right, the limitations of copyright, etc. countries have adopted contradictory and conflicting rules. Even at community level where the process of harmonization of legislation has built up a rich *acquis communautaire* in

copyright, significant differences continue to exist between jurisdictions. Therefore, the importance of applicable law in case of intra-community conflict of laws remains topical.

The legislator has three main options regarding the choice of law in tort liability[4]: the law of the country of origin of the work (*lex origini*), the law of the protecting country (*lex loci protectionis*) and the law of the country in which protection is claimed (*lex fori*)[5]. The legislator may also choose between adopting the same applicable law on all subject matters of copyright (ownership, existence, scope, legal remedies) or a different applicable law for each matter. The theoretical discussion on the issue is very rich, especially in countries without relevant express legislation. In general, however, we find that the options are usually limited between the *lex loci protectionis* and the *lex origini* (for unpublished works the latter is the law of country of the author's nationality; for published works, it is the law of the country of origin as specified in the Berne Convention[6]). The applicability of the *lex fori* is mostly limited to matters of legal procedure or public policy[7].

In Germany, for example, the prevailing view in both doctrine and case-law upholds (in combination with art. 120 UrHG) that all the legal aspects of copyright are governed by the law of the protecting country[8]. By contrast, in France it is accepted that the scope of copyright and, generally, the extent of protection are governed by the law of the protecting country whereas the copyright existence and initial ownership are governed by the law of the country of origin of the work[9]. In the US the initial ownership of copyright is governed by the law of the country of origin of the work while the scope and, in general, the extent of protection are governed by the law of the country for which protection is claimed[10]. In Greece, according to art. 67 Law 2121/1993, initial ownership, existence and scope of copyright are governed by the law of the country of origin of the work, while legal remedies are governed by the law of the country for which protection is claimed, but this rule applies only if the International Conventions on Copyright do not stipulate otherwise (Koumantos, 2002, pp. 67 sqq; Marinos, 2004, pp. 424 sqq.; Sarafianos, 2009, ar. 67/nr.3,50-59).

These differences persist despite the fact that all four countries have joined the International Convention of Berne which contains certain rules of private international law that will be discussed in 1.1. In community law, the issue of conflict of laws is dealt with in two ways: first, the EC Treaty itself and its article 12 which establishes the general principle of non-discrimination on grounds of nationality (see below 1.2). Second, the process of harmonization of private international law rules by way of Regulations (as, in this case, Regulation 864/2007 on the applicable law to non-contractual obligations – Rome II) (see below in 1.3). The scope of this Regulation, however, is limited to harmful events that occur after its entry into force, i.e. after 11.01.2009. Besides, the adoption of Regulation Rome II falls short of solving all the thorny issues of private international law in the field of copyright, especially with regard to the internet.

1.1 Choice of law under the Berne Convention

Considering that the US has joined the Berne Convention since 1989, China since 1992, Russia since 1995 and 163 other countries have joined it too, it becomes clear that, in most cases of copyright protection the applicable law is, in principle, that stipulated by the Berne Convention.

The Berne Convention does not contain a general rule of applicable law but a series of *leges speciales* depending on the issue at hand, i.e. copyright existence, ownership, scope, limitations, duration, etc (Fawcett & Torremans, 1998, p. 461; Ricketson & Ginsburg, 2006, p. 1299)[11].

The Convention aims at protecting foreign authors (i.e. authors whose works originate in countries other than the one in which protection is claimed). To that purpose, it establishes two basic tenets: the principle of national treatment on the one hand, and rules of minimum protection applicable to all foreign works, on the other hand (Ricketson & Ginsburg, 2006, p. 1297). Pursuant to art. 5 (1) of the Convention which contains these two principles, authors enjoy (in regard to works protected under the Convention in countries other than the country of origin of the work) a) the rights that the law of these other countries recognize or will

recognize in the future (national treatment principle), as well as, b) the rights stipulated in the Convention (minimum rules).

The Berne Convention does not obligate countries to transpose the rights stipulated by it (minimum rules) in national legislation (as is the case with the community harmonization process). This means that national authors (that is, authors whose works originate in the protecting country) cannot claim these rights in their country –e.g. the country of origin of their works (see also art. 5 (3) (a) of the Convention, "Protection in the country of origin is governed by domestic law"). Thus, the application of the Convention may lead to increased protection for foreign authors (who may additionally claim the minimum rules stipulated by the Convention) compared to national authors (Fawcett & Torremans, 1998, p. 468) [12].

The principle of national treatment defines how foreign works are treated as explained above and should not be confused with the rules of applicable law contained in the Convention (v.Eechud, 2003, p. 107 ; Koumantos, 1988, p. 440 ; Lucas & Lucas, 2006, pp. 935 sqq.). The principle of national treatment can affect the choice of applicable law in two ways: a) by contributing to the interpretation of the relevant provisions of the Convention, b) by preventing the application of a substantive rule which should apply according to a national choice of law rule but would lead to lesser protection of foreign *versus* national authors. Provided, of course, that such lesser protection do not result from the application of an express rule of private international law under the Convention (Ricketson & Ginsburg, 2006, p.319)[13].

In tort law which is our topic here the critical questions of private international law consist in the legal rules that will determine a) the existence of copyright, i.e. whether a work is protected by copyright law and the applicable qualifications of originality[14], b) the ownership of copyright, i.e. who is considered as the creator of the work, who as the copyright owner/holder and, mainly, who is legally entitled to claim damages for the infringement, c) the scope, limitations and duration of copyright which will determine if the act in question qualifies as tort or not (for instance, if a right is not deemed as absolute and exclusive but merely as a claim to a reasonable or statutory remuneration, failure to pay such remuneration does not automatically qualify as tort), d) the remedies for copyright protection including measures of interim protection, measures for the prevention or cessation of infringement and remedies to ensure indemnification.

1.1.1. Existence of copyright

The Convention contains no rule of applicable law in regard to the existence of copyright. The national legislator remains free to stipulate which law will specify the qualifications of originality of the work or even whether the work will qualify for protection under copyright law. In all events, however, the application of the substantive rules of the law of the country of first publication (lex origini) may not lead to situations that violate the principle of national treatment. Thus, if the law of the country of first publication requires a higher degree of originality for a given category of works (e.g. photographs) than the protecting country, this particular rule of the law of the country of first publication will not apply for it leads to lesser protection of foreign *versus* national works. If, on the contrary, the law of the country of first publication requires a lesser degree of originality for a given group of works than the protecting country, then it will apply.

The only exception to the issue of existence is article 2 (7) of the Convention on designs and models. Under this provision if an industrial design or model or a work of applied arts qualifies as such in the country of origin and the protecting country has adopted a special legislative regime for these categories of works, then only the protection specifically reserved to designs and models can be claimed in the protecting country. If the protecting country has no special legislation on designs and models, then the application of copyright law can be claimed for these works too although in the country of origin they do not qualify as works covered by copyright. According to this rule, the test for the applicability of special legislation on designs and models is not how the works are designated in the protecting country but how they are designated in the country of origin. Of course, nothing prevents the

national legislator from adopting a system of cumulative protection so that these works are protected both based on the legislation on designs and models as well as based on copyright law insofar as they meet the qualifications required by the latter.

1.1.2. Ownership of copyright

The Berne Convention contains no special rule of applicable law on the initial owner of copyright. The legislator remains free to specify the applicable law which will determine which person/s (individual or legal entity) is the first author or the first co-authors of the work.

There is one exception: the copyright owner in cinematographic and, generally, in audiovisual works. Under article 14 bis (2) (a) of the Convention, the copyright owner of audiovisual works is determined by the legislation of the country where protection is claimed (Ricketson & Ginsburg, 2006, pp. 388 sqq.). This provision attempts to reconcile the law of most jurisdictions in continental Europe that designate one or more physical persons as the author (director) or the co-authors (director, soundtrack composer, screenwriter) of the work with Anglo-Saxon jurisdictions that designate a legal entity (the production company) as the author or, at least, the co-author of the work. Instead of establishing a minimum rule to harmonize jurisdictions, it was left to each country to treat audiovisual works according to its own system of law provided all works (foreign and national) be treated equally (Fawcett & Torremans, 1998, p. 511)[15]. Thus, for example, the director of an audiovisual work which was first made accessible to the public in the US from a production company based in US may claim his rights as the author in Greece although in the country of origin of the work he is not considered as the author of the work. This compromise was met with strong criticism especially because, with this system, the author of the work changes every time the work crosses borders (Ricketson & Ginsburg, 2006, p. 1320).

At any rate, the holder of copyright – even if not recognized as the first owner – may claim his secondary contractual rights (in which case the corresponding rules of private international law will apply)[16] or invoke the presumptions on his protection as the copyright holder (on this see article 15 of the Berne Convention). Thus, for instance, although a US company – the producer of an audiovisual work – is not entitled under Greek law, for example, to claim the economic rights emanating from copyright in its capacity as first author of the work, it may rely either on the respective agreement for the assignment of copyright by the director or claim that the work bears the required indication of copyright (a possibility which cannot apply, of course, for the inalienable moral right).

1.1.3. Scope of copyright and remedies

The extent of protection and the legal remedies provided to authors to protect their copyright are governed exclusively by the legislation of the protecting country (art. (5) (2) (b)). The view currently prevailing on the international level (Desbois, Francon & Kerever, 1976, pp. 135-139; Fawcett & Torremans, 1998, p. 467; Katzenberger, 1999, pp. 1694, 1696; Koumantos, 1988, pp. 450-451; Lucas & Lucas, 2006, p. 954; Ricketson & Ginsburg, 2006, p. 1299; Ulmer, 1978, p. 11; contra Stewart, 1983, pp. 38-39) is that the protecting country is the country for which protection is claimed (*lex loci protectionis* – see also recital 26 Regulation 864/07) and not the country in which protection is claimed (*lex fori).*

In addition to legal remedies (sanctions, enforcement) the extent of protection includes the scope of copyright (the recognition and content of economic and moral rights). The same is true about the limitations of copyright (Ricketson & Ginsburg, 2006, p. 316). It would be against the principle of national treatment (in applying the law of the country of origin) to deny protection to a work which is subject to increased limitations in the country of origin as compared to the limitations which are effective in the protecting country. But also in case where the country of origin applies fewer limitations, the application of the law of this country would lead to unfavorable results for the user of the work who might otherwise claim the application of the limitation. Besides, copyright limitations are either delimitations serving

the same purpose that led to the granting of copyright (the development of cultural production – see especially the classical limitations in articles 10, 10 bis of the Convention) or a kind of statutory licenses against payment of a fair fee to the author which, being involuntary, are effective only within the jurisdiction that grants them (cf. articles 13 (1) and 11 bis (2) of the Convention).

The only exception to the scope of copyright under article 14 ter of the Convention is the *droit de suite*. In the context of the principle of reciprocity, protection can be claimed in all the countries that have adopted the *droit de suite* but only if the national legislation of the author has also adopted this right and only to the extent that it has (Koumantos, 1988, p. 445).

1.1.4. Duration of protection

On the issue of duration of copyright, the Convention contains a special provision under which protection in the protecting country is governed by the law of the latter but cannot be longer than the duration of protection in the country of origin of the work unless the law of the protecting country specifies otherwise (art. 7 (8)). This principle (comparison of the terms of protection) always leads to the shortest term of protection. Thus, if the term of protection in the protecting country is shorter than the term of protection in the country of origin the term of the protecting country prevails. If the term of protection in the protecting country is longer than the term of protection in the country of origin the term of the country of origin prevails. This provision seems to take into account that if the work has already come into the public domain in the country of origin, protection cannot be claimed in another country (cf. art (18) on the application of the Convention on works created prior to its entry into force).

1.1.5. Efforts to extricate an *erga omnes* rule of applicable law and their inconsistencies

With these methodological observations in mind we may now follow the international discussion which tries to extricate a single rule of applicable law from the Convention. One group of theorists (Katzenberger, 1999, Vor§120; Nimmer & Nimmer, 2001, §17.05; Plaisant, 1962, pp. 63-66; Troller, 1952, p.8; Ulmer, 1977, pp. 479 sqq.; Ulmer, 1978, p. 11, to name a few) argues that the Convention establishes as the applicable law on all issues (except the contractual exploitation of the work) the law of the protecting country (*lex loci protectionis*). Another opinion (Koumantos, 1988, pp. 448 sqq.; Koumantos, 2002, pp. 81 sqq.) argues exactly the opposite: that the Convention establishes as the applicable law on all issues (except legal remedies) the law of the country of origin (*lex origini*).

In most cases, the general applicability of the *lex protectionis* is based on the principle of territoriality. Although this principle is not explicitly enshrined in the Berne Convention, it is not entirely without merit in our opinion. Even though copyright is not granted by act of public authority (as is the case with trade-marks or patents) the protection of copyright is recognized through the national legislation of each country and acquires international content by countries joining international conventions (Fromm & Nordemann, 1998, Vor §120; Katzenberger, 1999, pp. 1693-1698). In actual fact, the principle of territoriality is a legal form of national sovereignty which applies to all legal rules. This, however, does not mean that we can, based on this principle, infer a general rule of applicable law[17]. The countries that choose to adhere to the Convention's regime accept the rules of applicable law it contains and apply their own rules of applicable law on all matters not regulated by the Convention (they may, therefore, refer to the law of another country - v.Eechoud, 2003, p 98; Schack, 1979, p. 25)[18].

What is more, we could not, based on a limited rule of applicable law (art. 5 (2) (b)), establish the grounds for the principle of territoriality itself so that we may then interpret this rule as generally applying in contrast to the systemics of the Convention (vicious circle).

In particular: no-one objects to the fact that in fields such as contractual obligations the Convention leaves the regulation of private international law matters to the national legislator

of the protecting country (Ginsburg, 1998, p.26; Ulmer, 1978). Furthermore, if according to the Berne convention all matters of copyright were to be regulated by the law of the protecting country (in an expansive interpretation of the rule in art. 5 (2) (b)) it would have made no sense to include a provision to the effect that the copyright holder of audiovisual works is determined by the legislation of the protecting country (art. 14 bis (2) (a))[19].

What is more, it would have been unnecessary to make clear that non-compliance with copyright registration formalities - in those countries of origin where such a system is in place – does not prevent the enjoyment and exercise of copyright in the protecting country (art. 5 (2) (a)). It would have sufficed to mention that the country in which the protection of the work is claimed cannot impose as a requirement for the protection of foreign works the prior compliance with formalities. On the contrary, the fact that it is expressly stated that in this case (compliance with formalities) the rules of the law of the country of origin of the work do not apply seems to imply that Berne Convention countries consider the application of these rules possible in other cases[20].

Neither could a rule of choice of law be drawn directly from the principle of national treatment (for such a position see Dinwoodie, 2001, p.31; Nimmer & Nimmer, 2001, §17.05; Troller, 1952, p. 8). As mentioned earlier, national treatment regulates the treatment of foreign works without even assimilating the treatment of foreign to that of domestic authors since foreign authors can be treated more favourably as compared with domestic authors (who may not invoke the minimum rules of the Convention).

For the same reasons (i.e. because national treatment does not mean equal treatment), the principle of national treatment cannot be construed so as to lead to the adoption of the law of the country of origin (*lex origini*) as the applicable law in all cases[21].

It is also submitted that art. 5 (3) (a) of the Convention (pursuant to which protection in the country of origin is regulated by national legislation), establishes an imperfect rule of private international law which, if extended into a fully-fledged rule by interpretation, will apply on all matters of applicable law in copyright the law of the country of origin (Koumantos, 2002, p. 81)[22]. At first sight, this interpretation is not incompatible with the systemic interpretation of the Convention's express choice of law provisions (which would, in this case, be deemed as exceptions and, as such, would be interpreted narrowly), but it is doubtful whether such a rule can be inferred from an article (art. 5 (3) (a) of the Convention) created for an entirely different purpose: to prevent authors from claiming the rights granted by the Convention (minimum rules) in their own country (Azzi, 2005, pp. 252-253; Fawcett & Torremans, 1998, pp. 474-475; Lucas & Lucas, 2006, p. 948)[23].

It is argued, finally, that when the Berne Convention makes reference to the applicability of the law of a specific country it refers not only to the substantive rules but also to the private international law rules stipulated in that law (Koumantos, 2002, p. 76 ; for a criticism, Koumantos, 1988, p. 451). This view is incompatible with the systemics of the Convention and can lead to a *regressus ad infinitum*. In fact, there can be no further referencing between the Convention and the law of the country referred to by the Convention. The country whose law is expressly referred to by the Convention may not in its turn refer to the law of another country because this would defeat the special purpose for which each rule of applicable law was included in the Convention; and the implications of further referencing might lead to the opposite result from that wanted by the Convention (in other words the violation of the principle of national treatment; Ricketson & Ginsburg, 2006, p. 1298; cf. Fawcett & Torremans, 1998, pp. 469, 473). Neither is further referencing conceivable for matters on which the Convention does not specify the applicable law and for whose regulation it does not refer to the law of a specific country (in this case the national legislator stipulates the applicable law for the first time). Further referencing is only thinkable between the law of two countries (i.e. the applicable law chosen by the national legislator and the law referred to by the applicable law chosen by the national legislator). But this risk has been explicitly removed in community jurisdiction with art. 24 Regulation 864/2007 Rome II on non-contractual obligations and art. 20 of Regulation Rome I on contractual obligations, and also art. 15 of the Treaty of Rome (1980) on contractual obligations.

1.2. Art 12 of the EC Treaty

As is known, this article bans all discrimination on grounds of nationality. As has become accepted, this provision applies on matters of copyright too and obligates each member-state to ensure absolutely equal treatment between its subjects and the nationals of other member-states whenever community law applies (ECJ ruling 20-10-93, Phil Collins C-92/92, C-362/92, ECJ Index 1993, 5145).

It was upheld in this context (ECJ Ruling 6-6-02, Ricordi- La Boheme, case C-360/00, Index 2002, 5089) that the principle of comparison of the terms of protection adopted by German law (in implementation of art. 7 (8) of the Berne Convention) is against art. 12 (formerly 6) of the EC Treaty as it leads to discriminatory treatment between national and other community authors.

The ECJ extended the implications of this case-law with its ruling 30-6-2005 in Tod's SpA and Tod's France SARL *v.* Heyraud SA (case C-28/04, Index 2005, 5781). In this case, the Italian company Tod's who is the right holder of shoe models under the Italian law on designs and models requested the French court of the forum where their right was infringed to apply the provisions of French copyright law. French law (the law of the protecting country) indeed provides for a system of cumulative protection of designs and models, on the one hand, and copyright, on the other hand, especially for the creations of the clothing and jewelry industry (ar.112-2 (14) Code de la Propriete Intellectuelle). By contrast, Italian law (the law of the country of origin) excludes cumulative protection. Under art. 2 (7) of the Berne Convention, the Italian house is not entitled to claim this cumulative protection for shoes as they do not qualify as original works protected by copyright in Italy.

The ECJ expressly held in this case that the rule of art. 2 (7) of the Berne Convention is incompatible with art. 12 of the EC Treaty. Also, it expressly held that art. 12 of the EC Treaty does not allow a member-state to depend the admissibility of an author's lawsuit for the protection of copyright granted to him by the legislation of that state on considerations based on the country of origin of the work. As a result of this case-law, any provision adopting the law of the country of origin as the applicable law is not applicable on EU member-state nationals, at least not insofar as it concerns the existence of the work and the qualification of originality[24].

1.3. Regulation Rome II

Since the implementation of Regulation 864/11-6-2007 on the applicable law on non-contractual obligations (Rome II) the relevant provisions of private international law of all member-states are unified (with the exception of Denmark). Under the rule of art. 8 of said Regulation, the applicable law on non-contractual obligations emanating from copyright infringement is the law of the country for which protection is claimed (*lex loci protectionis*). Furthermore, in case of copyright infringement, there will be no derogation from the principle of the *lex loci protectionis,* not even under art. 14 of the Regulation which allows the parties of the dispute to choose the applicable law (art.8 (3)).

This rule has universal application pursuant to art. 3 of the Regulation and, as a result, the law of the country for which protection is claimed will apply even if this country is not member of the EU.

Of course, the scope of this Regulation is limited to harmful events occurring after its entry into force. As a result, the provisions of the Berne Convention and the rules of private international law of each country which apply in case of conflict of copyright laws remain effective with regard to harmful events which occurred prior to January 11, 2009.

Regulation 864/2007 will settle many ambiguities left by the interpretation of Berne Convention. First of all, art. 15 of the Regulation specifies that the applicable law on non-contractual obligations governs in particular, a) the basis and extent of liability, including the persons who may be held liable for their actions, b) the grounds for the exemption from liability as well as any limitations and division of liability, c) the existence, nature and assessment of damage or of the remedy claimed, d) the measures that can be taken to prevent

or terminate the injury or damage or to ensure payment of damages within the limits of the ruling court according to the respective procedural law, e) the transferability of the right to claim damages or a remedy including succession, f) the persons entitled to compensation for damage sustained personally, g) liability for the actions of third parties, h) the various ways of extinction of obligations and the rules of prescription and limitation including the rules relating to the commencement, interruption or suspension of a period of prescription or limitation.

Considering that the issues regarding the scope of protection are regulated by the *lex loci protectionis* as discussed above, the question arises if this Regulation has any effect on matters that under Greek law (and the law of other countries) used to be governed by the law of the country of origin. The Regulation does not make explicit reference to matters of copyright existence and initial ownership. In our view, however, the fact that art. 15 of the Regulation expressly stipulates that the *lex loci protectionis* even governs who is entitled to claim compensation for damage sustained personally deserves particular attention. Moreover, given that the list in art. 15 of the Regulation is by way of indication and the wording of art. 8 seems to imply that the *lex loci protectionis* governs all issues arising from the non-contractual obligations emanating from copyright infringement, one may conclude that art. 8 (1) of the Regulation establishes what the Berne Convention avoided: a general rule for all copyright issues arising from copyright infringement[25].

In our opinion, this is also the best solution *de lege ferenda*. The major argument against a general application of the law of the country for which protection is claimed is that it seems to imply that the creation of copyright depends on its infringement[26]. Obviously, this is not right. In point of fact, copyright is created as soon as the work is created. And the law of some jurisdiction will apply from that moment: if the work remains unpublished, it is the law of the author/s' nationality; if it is published, it is the law of the country where the author/s has chosen to publish it. At any rate, however, the problem is not what law applies on the work from its creation to the moment of copyright infringement but what law applies in case the situation of the work acquires foreign elements. And this will happen either when the use of the work becomes the object of contract or when copyright is infringed.

Anyway, the choice seemingly adopted by Regulation Rome II is still problematic in the modern era of the internet and of simultaneous cross-border transmission of copyrighted works for the tort in this case is perpetrated simultaneously in many countries.

If the problem of the forum that will settle the dispute in this case has been adequately addressed in the EU[27], the problem of applicable law on non-contractual obligations arising from the use of the internet or other cross-border acts remains a thorny one.

The whole discussion around the applicable law in case of simultaneous cross-border torts illustrates the problems of various solutions (Ginsburg, 1998, pp. 40 sqq ; Koumantos, 1996, p. 251; Lucas, 2001, pp. 17 sqq., Ricketson & Ginsburg, 2006, pp. 1301 sqq.). If we choose the law of the country where the triggering event takes place (e.g. in satellite transmission the place of the up-link; on the internet the place of installation of the server) we run the risk of seeing piracy heavens sprouting around. According to one view, the less risky solution is the law of the country of professional installation of the infringer although again one should consider the leeway of off-shore companies[28]. Another view makes a distinction between cases where the copyrighted work is placed on the market through a particular website ("push technology") where the applicable law should be the place of installation of the website's server and the cases of peer to peer reproducers and video on demand ("pull technology") where the applicable law should be the law of the place from where the distribution of the work is requested (Ricketson & Ginsburg, 2006, 1310). By contrast, if we choose the place where the damage occurs, the application of this rule would lead to the concurrent application of the law of each protecting country (mosaic principle).

In our view, the safest option *de lege ferenda* would be to explicitly specify which law applies in each case of cross-border tort (as is the case, for instance, with EU Directive 93/83 on satellite transmission). Until that happens, however, the judge must apply the law of each country where the tort is committed, his only option being to apply the provisions of art. 4 of Regulation Rome II *mutatis mutandis* and try to limit the choice of law by considering a) if

from the overall circumstances it may be concluded that the tort has an obviously close connection with one country (e.g. due to a pre-existing contract between the copyright owner and the infringer), b) if the owner and the infringer usually reside at the same country at the time the damage occurs, or, c) if the damage occurred only in a particular country/countries. Thus, the judge is called upon to choose the appropriate law taking into consideration all the circumstances of the case at hand.

In conclusion, if a work is included in an electronic data bank without the authorization of the author after 11-1-2009 and proceedings are brought within an EU member-state, the applicable law is the law of the protecting country (or countries). If this happened prior to the above date, the scope of copyright and the legal remedies will be governed by the law of the protecting country (or countries) but the existence and the owner of copyright will be governed by the law of the country indicated by the *lex fori*. Thus, in the above examples respectively, in Germany it will be the law of the protecting country, in France, US and Greece the law of the country of origin. The principle of comparison of the terms of protection will determine the duration of copyright. But if the work was created by a community national and the forum lies inside the EU, the duration and scope will be governed by the law of the protecting country. Finally, foreign law provisions will not apply if incompatible with a provision of public policy of the law of the forum, i.e. if a provision of foreign law is incompatible with the fundamental civil, moral, social, legal or economic perceptions prevailing in the country.

2. Blasphemy, hate speech and applicable law

The problems encountered when one attempts to determine the applicable law in copyright are no more hard to solve than those arising when trying to determine the applicable law in case of violation of the provisions on blasphemy, religious insult and hate speech.

There is significant divergence among jurisdictions as to whether blasphemy, religious insult and hate speech qualify as offences or not (and under which circumstances), even as to whether those whose religious feelings or religious freedom are offended have cause to sue for damages.

By way of indication, for European countries we can mention the following[29]:

a) Blasphemy is an offence *inter alia* in Austria, Denmark, Finland, Greece, Ireland, Italy and the Netherlands. These countries also stipulate the offence of religious insult which qualifies as an offence also in Germany, Spain, Russia, Norway, Poland, Portugal, Iceland, Lithuania, Ukraine, Switzerland (whereas repealed in the UK, Sweden).

The qualifications vary from country to country. In Greece, Austria and Denmark it is not required that an actual person be offended for an act to qualify as blasphemy or religious insult. In Ukraine punishable is the insult against citizens' religious feelings. In Germany and Portugal the act must be capable of disturbing the public order for the offence to materialize. In Spain the act must provoke a great public scandal.

b) Conserning incitement to hatred or hate speech (e.g. a form of expression which spreads, incites, promotes or justifies hatred based on intolerance[30]) the international conventions that castigates the crime allows a certain degree of flexibility for every party's legislation[31]. Therefore, although incitement to hatred qualifies as an offence in practically all European countries, in some countries (such as Greece, Austria, Italy) the law punishes incitement to acts that are likely to create discrimination or violence and not mere hatred. In other countries negationism (e.g. the public denial of historical facts or genocide with a racial aim) is also a crime (France, Austria, Belgium, Switzerland[32]). In Turkey every public denigration of Turkishness is punishable. In the majority of member-states, the incitement to hatred must occur in public. In France, the fact that the incitement is committed in public is an aggravating circumstance. In Austria and Germany, the incitement to hatred must disturb the public order to qualify as an offence. Intention to stir up hatred is generally not a necessary element of the offence whereas it is so in Cyprus, Ireland, Malta, Portugal, Ukraine and England and Wales[33]. By contrast, in the US any legislation to that effect would be deemed as violating freedom of expression[34]

All the above provisions interfere with freedom of expression as enshrined in Art. 10 of the European Convention of Human Rights which protects even shocking or disturbing expressions of ideas[35]. Although the European Court of Human Rights has held that religious insult may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must be a feature of a democratic society[36], in fact this offence, as long as it penalizes forms of expression, constitutes a breach in the liberal context of the ECHR. Moreover, it actually promotes intolerance. The law seems to pay heed to the request of a religious community: do not provoke us or we will attack you or, even worse, resort to generalized violence[37]. All crimes of "arousing" citizens not falling within the scope of instigating crimes against specific material goods (life, physical integrity, property), namely not aiming at convincing others to commit acts they would not commit otherwise, but inciting to acts of violence indirectly and by reflex (in the sense that a violent act is the reflex response to such incitement) contain an oxymoron: their punishment leads to the satisfaction of the perpetrators of violent acts. Thus, the protected legal interest behind public (religious) order (which can be disrupted by acts of violence – and only by such) seems to be the intolerance of others, and in its more vicious form. This is undoubtedly the case with blasphemy and religious insult[38]. But the same could be said about some forms of hate speech that do not provoke nor aim to provoke violence against a person or group of persons on grounds of their race, colour, religion, language, national or ethnic origin. The depreciation or denigration of a group of persons, even with a discriminatory intention, does not always provoke nor aim to provoke a violation of the rights of such persons[39].

As to civil law remedies it must be stressed that personality cannot possibly be infringed upon when the abuse or derision is not directed against a specific person and such person is deemed to be offended indirectly and by reflex (as member of a group - group libel)[40]. And even in the event of a direct offence of personality it must be investigated whether freedom of expression and freedom of art prevail through satire or criticism[41]. But since in many countries jurisprudence still castigates religious insult and religious hate speech (with the ECHR's blessings) we must answer to the question of which law applies.

On the international level, it is accepted that tort obligations are governed in principle by the law of the country where the tort was committed (*lex loci delicti commissi*). There are many occasions, however, (typically, the Internet) where the facts that make up the *actus reus* of an offence are committed in more than one country or the facts occur in one country but the consequences arise in another.

With regard to the offences we are concerned with, for instance, the question is whether one is entitled to claim damages for the injury suffered because of these acts. As we mentioned earlier, in our view, the answer is in the negative (especially for the offences of blasphemy and religious insult). But if such entitlement were accepted, the injury could be argued only as an offence against personality. The distinction has significant legal implications as Regulation Rome II does not apply on non-contractual obligations emanating from violations of privacy and personality-related rights including defamation (art. 1 (1) (h))[42]. In particular, should such acts be considered as offences against personality, the applicable law would decide if there are time limits for instigating proceedings and if the time limit starts anew with every new publication.

In any event, the applicable law on torts committed prior to the date specified by the Regulation depends on the legislation of each country[43].

Austria (art. 48 Bundesgesetz uber das Internationale Privatrecht 15-6-78) and Portugal (45(1) of the Civil Code) adopt the law of the country where the act that qualifies as tort was committed as the applicable law (*lex loci actus*). If the facts of the *actus reus* of the tort occurred in more than one country, the country where the tort was committed is the country in which the relevant acts were completed (e.g. the country of installation of the server where the work was uploaded). However in defamation cases Austria opts for the law of the place where the victim enjoys a reputation, presumed to be his habitual residence and Portugal for the law of the place where the damage is sustained when the lex loci actus does not provide for compensation. In France the applicable law is the law of the place where the damage occurred (*lex loci damni*, e.g. the place where the work became accessible to the public). In

defamation cases this means the place where the defamatory product was distributed and brought to the knowledge of third parties.

In Italy (art.62(1) Act 31-5-95), although the *lex loci damni* is the applicable law, the victim may request the application of the *lex loci actus*. In defamation cases this means that significant is the place where the defamatory product was published, but the victim has the right to opt for the law of the place of the publisher' s installation. If the parties reside in the same country, the law of the country of residence is the applicable law. By contrast, in Germany, although the applicable law is the *lex loci actus*, the victim may request the application of the *lex loci damni* (40 (1) EGBGB[44]). So the victim has the right to choose as connecting factor between the publisher' s headquarters or the place where the product was published. But should it be considered that another country has a closer connection with the facts of the case, then the law of that country applies (41 (2) EGBGB). If the parties reside at the same place, the law of the country of residence is the applicable law (40 (2) EGBGB). In case of more than one *locus damni*, the *lex loci* applies only for the actual damages that occurred in each country (mosaic principle)[45]. German law also contains a clause (38 EGBGB) to the effect that the law of the foreign country to be considered as the applicable law according to the above will not apply on German citizens if it entails greater liability as compared with the provisions of German law.

In the UK (sec. 11.2.c Private International Law (Miscellaneous Provisions) Act 1995) the applicable law is the law of the country the tort is most closely connected with, therefore, the judge is called upon to choose the appropriate law taking into account all the circumstances of the case at hand (the place where the damage occurred, the place of the act, domicile, residence and nationality of the parties, the place of professional activity). However, this principle does not applies in defamation cases[46]. In defamation cases, English courts have traditionally applied a "double actionability rule" which states that for an English court to give damages in respect of foreign publications the matter must be actionable both in England and in the country in which the publication takes place[47].

A similar regulation exists in the US (2nd Restatement 1971) and the judge is called upon to choose the appropriate law taking into account all the circumstances of the case at hand, but the relevant policies of the forum state and of other interested states as well as the basic policies that underlie a particular field of law are also considered as relevant factors for choice of law purposes.

In the Netherlands, art. 3 (2) of the Dutch Conflict of laws tort Act favours the *lex loci damni* but contains a foreseeability clause. And if another country is considered as having a more closely connection with the facts of the case, the law of that country applies. If the parties reside at the same place the applicable law is the law of the country of residence (3 (3) Dutch WCOD).

If the Rome II Regulation is considered as applying in these cases then pursuant to art. 4 the general rule is that the applicable law is the law of the country where the damage occurred regardless of the country where the harmful event occurred, and also the law of the country or countries where the event causes indirect effects. However, if the alleged culprit and the injured party have, at the time when the damage occurred, their usual residence in the same country, the law of the latter applies. By way of exception, if all circumstances imply that the tort has an obviously closer connection with another country (as in the case of a pre-existing contractual relationship between victim and perpetrator) the law of the latter applies. Under art. 14 of the Regulation the parties may agree to apply a different law on non-contractual obligations after the occurrence of the harmful event[48]. In this case, however, if at the time the harmful event occurred, all the circumstances related to the event are located in a country other than the country whose law was chosen by the parties, the choice of the parties may not affect the applicability of mandatory law provisions of the former or, if it is a member of the EU, the applicability of community law which cannot be derogated from by private agreement (prohibition of circumvention).

From the above we can conclude that the exception of personality related offences from Rome II Regulation (although desired by both the organizations of publishers and journalists) creates great uncertainty as to the applicable law and the prerequisites of civil liability for the

author of digital library. Group libel lawsuits can be more dangerous than simple defamation cases. It is therefore critical to reach a new settlement between the different positions so as to establish certainty and foreseeability of law.

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ENDNOTES

[1] In this article we examine e-library author as content provider and not as host or access provider (as in the case of link libraries). Of course, even this distinction poses questions of applicable law.

[2] Problems of similar nature may arise in cases of violation of personal data, illicit competition, trade-mark abuse, etc. In all such cases, the right holder may claim damages for each infringement. Of course, what is relevant in terms of applicable law is tort, e.g. when in addition to criminal liability the perpetrator also bears civil liability. And this because in criminal liability the applicability of the lex fori is not put in question (v.Eechoud, 2003, p.29)

[3] See WIPO Forum on Private International Law and Intellectual Property, 2001; Drexl & Kur (eds.), 2005, passim

[4] In this article we do not examine choice of law issues in copyright contracts nor infringements of related rights for which see Azzi (2005), pp. 248 sqq.; Fawcett & Torremans (1998), pp. 572 sqq.; Guibault & Hugenholtz (2002); Lucas (2001); Lucas & Lucas (2006), pp. 836 sqq., 901 sqq.; Metzger (2005) pp.61 et seq.; Rickertson & Ginsburg (2006), pp. 1323 sqq.

[5] The distinction between the *lex loci protectionis* and the *lex fori* is significant because the infringement of copyright can occur in a country other than the country where the defendant has his domicile. Usually the plaintiff has the right to choose between the jurisdiction of the defendants' domicile and the jurisdiction of the place of tort (for EU countries see art. 5§3 of Regulation 44/2001).

[6] The country of origin of the work is deemed to be (art. 5 (4) of the Convention): i) if the work was published for the first time in a Berne Convention country, that country; ii) if the work was published simultaneously in more than one Berne Convention countries each of which has a different rule on the duration of copyright protection, the country whose legislation grants the shortest term of protection; iii) if the work was published simultaneously in a country outside the Berne Convention and in a Berne Convention country, the Berne Convention country; iv) if the work was not published or was published for the first time in a country outside the Berne Convention without simultaneous publication in a Berne Convention country, the Berne Convention country of which the author is a national; v) in any event, if it is a cinematographic work whose producer has his professional installation or usual residence in a Berne Convention country, that Berne Convention country; if it is a project of architecture which was erected in a Berne Convention country or a work of the graphic or the fine arts incorporated in a structure situated in a Berne Convention country, that Berne Convention country. It should be noted that the notion of publication under the Convention is restrictive. Pursuant to art. 3 (3) of the Convention, publication is considered as first publication if done (cumulatively): i) with the

author's consent, ii) in some sort of physical fixation of the work regardless of the manner of manufacture, iii) in a number of copies available to the public (in any way whatsoever, e.g. through sale, lease, donation) which satisfies the reasonable needs of the public depending on the nature of the work. The same article proceeds to exclude from the notion of publication the performance of a dramatic, dramatico-musical or cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of an architectural work.

[7] According to art. 26 of Regulation 864/2007 (Rome II) . A classical example of implementation of the public policy rule is the Huston case in France (Cour de Cassation 28-5-1991, JCP G 1991, II, 21731).

[8] BGH 17-6-1992 "Alf" GRUR Int 1993, 258; BGH 2-10-97 "Spielbankaffaire" GRUR Int 1998, 427; BGH 29-4-1999 "Laras Tochter" I ZR 65/96; Katzenberger (1999), Vor§120 pp. 1691 sqq. esp. 1693 - 1698

[9] Cour de Cassation 22-12-1959 "Ridau de fer", D. 1960, 93; Cour de Cassation 28-5-1991 "Huston", supra note 7; Desbois (1964), pp. 34 – 36; Lucas & Lucas (2006), pp. 791 sqq.

[10] Itar-Tass Russian News Agency v. Russian Kurier, Inc. 153 F.3d 82 (2d Cir. 1998)

[11] for the dissenting opinions see below under 1.1.5.

[12] In this sense, the principle of national treatment can not be deemed as a non-discrimination principle

[13] Correspondingly, art. 3 of the TRIPS Agreement and its relevant note according to which every member of the Agreement extends to the nationals of the other parties a treatment that is no less favourable compared with its own nationals with regard to the protection of copyright (such protection meant as covering the availability, acquisition, scope, maintenance and enforcement of copyright) specify the scope of the principle of national treatment. Hence, the provision concerns the way foreign nationals are treated and not the applicable rules of private international law; see Fawcett & Torremans (1998), pp. 481, 509 sqq., especially 512, according to whom the provision does not exclude, even if exceptionally, the application of the lex origini or the lex fori on some of the issues, particularly the initial ownership of copyright (see also Torremans, 2005, p. 76)

[14] For a long time it was questioned, for instance, whether data bases or software programs qualify for protection under copyright. Today, respectively, it is questioned whether a multimedia work should be protected primarily as an audiovisual work or a data base or a software program (Stamatoudi, 2002). As to the degree of originality required for a work to qualify for protection under copyright law, the example of photographs is typical. Many countries (as for example Greece) require a lesser degree of originality to protect photographs as works qualifying for copyright protection whereas in other countries (such as Germany) only photographic works enjoy full copyright protection (for the distinction between photografic works –Lichtbildwerke- and photographs –Lichtbilder see §2 (1) 5 and §72 UrhG.).

[15] For a strong criticism on this compromise see Desbois,Francon &.Kerever (1976), pp. 216-221

[16] Berne Convention does not contain choice of law rules on contractual obligations. Applicable are the relevant private international law rules of every country and for EU countries the new Rome I Regulation (593/2008) for contracts signed after 17/12/2009 and the Rome Convention of 1980 on the law applicable to contractual obligations for contracts signed before this date

[17] Besides, the principle of territoriality could in its turn raise a host of relevant connective factors: place of nationality, place of usual residence, place of creation, place of publication (Koumantos, 1988, pp. 441 sqq; Koumantos, 2002, p. 66 fn. 153; Lucas, 2001, p 3; Shack, 1979, p. 20)

[18] Besides, unlike criminal law where the judge applies the law of the forum, in case of art. 5 (2) (b) the judge of the forum is called upon to apply the law of the protecting country (*lex protectionis*) which does not necessarily coincide with the law of the forum – thus the argument that thanks to the *lex loci protectionis* (and in contrast to the *lex origini*) the judge has a better knowledge of the law he will apply holds no water (for this approach see Stewart, 1983, pp. 38-39)

[19] Even if this argument cannot be founded on the discussions that preceded the regulation (Ulmer, 1977, p. 499 points out that there was no conversation on the applicable law when the provision was adopted) the systemics of the Convention speaks in favour of the *a contrario* argument.

[20] Especially concerning the existence of copyright; for the relevant discussions on the adoption of the article see v.Eechoud (2003), pp. 69-70.

[21] Koumantos (1988), pp. 451 claimed that the principle of national treatment should be considered as imposing the equal treatment of foreign and national works both in terms of copyright and in terms of applicable law (thus, if in the protecting country the law of the country of origin applies on national works – since the two coincide in this case – then, accordingly, the law of the country of origin must apply on foreign works also); see also Koumantos (2002), p. 76

[22] On the inductive extraction of private international law rules from imperfect law provisions, see, in detail, Koumantos (1964), p. 98.

[23] And because this is the meaning of that article and not the stipulation of a choice of law rule, the problem pointed out by Shack (1979), pp. 29 sqq. and v.Eechoud (2003), p. 109 does not arise. In the related example, where a Swiss citizen who publishes his work in Germany brings a law suit in Germany for copyright infringement in Switzerland, applicable is the Swiss law.
[24] see a critic on this decision in Lucas & Lucas (2006), pp. 1052-1053
[25] for the relevant discussion see Drexl (2005), pp. 151 sqq., especially 176
[26] for the relevant discussion see Lucas & Lucas (2006), pp. 872 sqq.

27 The matter of jurisdiction is determined by art. 5 (3) of the Brussels-Lugano Conventions according to the interpretation of this provision by the ECJ in its ruling 7-3-1995 in case C 68/93 (Fiona Shevill, ECJ Index 1995, 415). According to this interpretation the injured party may bring proceedings either to the courts of the place where the culprit has his professional installation and claim damages for the overall injury incurred in all the countries where the tort was committed or to the courts of each country from where the tort was committed (e.g. each country from where access to the pirate copy of the work was possible) and claim damages only for the injury incurred in that country (the same direction is followed by art. 5 of Regulation 44/2001: Lucas, 2001, p. 14; Fawcett & Torremans, 1998, pp. 152 sqq., critically especially pp. 161,167-9; Ricketson & Ginsburg, 2006, p. 1295). It can be concluded from the above that in the second case the applicable law is the law of the protecting country (*lex loci protectionis*). The problem persists in the first case when the plaintiff files the suit in the place where the defendant has his professional installation and seeks damages for the overall injury incurred in all the countries. In this case one of the *leges loci protectionis* has to be chosen. On the contrary in Anglo-Saxon counties jurisdiction is determined by whether it can objectively be considered that the infringer indented to provide access to the website at issue to consumers of the country of the forum; see Court of Appeals 4th Cir. S.K.Young vs New Haven (available at http://pacer.ca4.uscourts.gov/opinion.pdf/012340.P.pdf); also -indirectly- High Court of Australia Dow Jones &Company Inc. v Gutnick (available at www.kentlaw.edu/perritt/courses/civpro/Dow%20Jones%20&%20Company%20Inc_%20v%20Gutnick%20%5B2002%5D%20HCA%2056%20(10%20December%202002).htm); DeGroote & Derroitte, 2003, pp. 66 sqq. In US for every single publication of a communication that produce damages only one action for damages can be maintained and all damages suffered in all jurisdictions can be recovered in this one action (§ 577 of 2md Restatement of Torts 1977 –single publication rule).

[28] Although v.Eechoud (2003), pp. 218-219 considered it to be a small danger in view of the international conventions and the fact that the generation and circulation of information usually take place in the developed world where copyright enjoys increased protection.
[29] An analytic report on various legislations can be found in Council of Europe/Venice Commission (ed.), 2008, pp. 61 sqq.
[30] ECHR 4-12-2003 Gunduz vs Turkey
[31] The Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, provides that each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the distributing, or otherwise making available, racist and xenophobic material to the public through a computer system, but a Party may reserve the right not to attach criminal liability to such conduct, where the material advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available. Notwithstanding this exception a Party may reserve the right not to attach criminal liability to such conduct to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies. Additionally this Protocol provides that each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the threatening or public insulting, through a computer system, of (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics, but a Party may either: a require that the offence has the effect that the person or group of persons is exposed to hatred, contempt or ridicule; or b reserve the right not to apply, in whole or in part this article. The same applies in the case of negationism. According to art.6 of the Protocol each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right the distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and

recognised as such by final and binding decisions of the International Military Tribunal, or of any other international court established by relevant international instruments but a Party may either a. require that the denial or the gross minimisation is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise b. reserve the right not to apply, in whole or in part, this article altogether.

[32] Correspondingly the German Constitutional Court 90 BVerfGE 241 (1994) stated that the dissemination of false information (at least if its publisher knows that the information is false or its falsity has been proved) cannot claim the coverage of freedom of expression

[33] For the adventures of the English provision see Barendt (2005), pp. 178-179

[34] In Brandenburg vs Ohio (1969),Supreme Court upheld the right of KKK to call publicly for the expulsion of African Americans and Jews from the United States, even though the speech in question intimated the desirability of using violence. "The constitutional guarantees of free speech and free press," the Court wrote, "do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action" (pp. 571–572). The Brandenburg test has proven nearly impossible to meet. For example, in the famous Skokie cases (National Socialist Party of America v. Village of Skokie, 432 U.S. 43 1977), Supreme Court affirmed the right of Nazis to march on a public street in a community populated with World War II concentration camp survivors. And in R.A.V. vs City of St.Paul (1992) invalidated an antibias ordinance under which several teenagers were convicted of burning a cross on an African American family's lawn. As Justice Antonin Scalia, reasoned "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. … In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination" (p. 391). Consequently online hate speech will rarely be punishable under the Brandenburg test. Moreover US Courts and legislative bodies protects US writers and editors even from the enforcement of foreign libel decisions. On the subject see Davidson (2008); Warshow (2006); Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997); Yahoo vs La Ligue Contre Le Racisme et L'Antisemitisme case (433 F.3d 1199 (9th Cir. 2006) and especially New York's Libel Terrorism Protection Act, which gives American defendants protection from the enforcing of foreign libel judgments.

[35] ECHR 7-12-1976 Handyside vs UK; 8-7-1986 Lingens vs Austria, 29-3-2001; Thoma vs Luxembourg; 31-1-2006 Giniewski vs France

[36] ECHR 20-9-1994 Otto-Preminger-Institut vs Austria. In broad strokes, the case-law of the ECHR on matters of protection of religious peace and religious feeling comes in contrast with its case-law on the protection of freedom of expression leaving a great margin of appreciation to national legislators. As typically stated (ECHR 25-11-1996 Wingrove vs UK, 10-7-2003 Murphy vs Ireland, 13-9-2005 IA vs Turkey) «The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion». See critically Alivizatos (2008), p. 256; Tsakyrakes (2006) ; Tulkens (2008), p. 311

[37] As the ECHR states in Preminger case (supra note 50), "the Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner".

[38] For a more detailed analysis see Sarafianos (2008), p. 291

[39] See for example ECHR 13-1-2005 Dogtekin vs Turkey; 5-12-2002 Kucuk vs Turkey (but on the other hand 8-7-1999 Surek vs Turkey).

[40] This is also the opinion of Greek Supreme Court (Areios Pagos 1298/2002 NoB 2002, p. 2064). On the contrary, in Preminger case ECHR has held that "The respect for the religious feelings of believers as guaranteed in Article 9 ECHR can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration". With this jurisprudence religious feeling is reified. It is immanent in the public domain and can be infringed upon without the intervention of actual people. It is as if there were a legal fiction to the effect that the state itself has religious feelings. This is a blatantly ideological construct and cannot offer sufficient grounds for criminal punishment, as is the case for all non-personalized "feelings" (citizens' sense of security, etc.). It must be notes that in a more recent case (31-10-2006 Klein vs Slovakia) ECHR ruled that strong criticism against the head of a national church cannot be considered to be an insult against all members of this church. In US the Supreme Court also ruled (in Beauharnais vs Illinois) that since an individual's dignity and reputation are associated with that of the group to which he belongs, there is no justification for treating group

libel laws differently from the rules of private libel, but this jurisprudence remains unique since no case managed to pass the Brandenburg test (supra note 47). For this case see Barendt (2005), p. 184

[41] Especially in the area of artistic expression ECHR in many cases applied art. 10 of the Convention (24-5-1988 Muller and other vs Switzerland; 8-7-1999 Karatas vs Turkey; 29-3-2005 Alinak vs Turkey) and stated that "taken literally certain passages might be construed as inciting readers to hatred, revolt and the use of violence (…) it must nevertheless be borne in mind that the medium used was a form of artistic expression that appeals to a relatively narrow public compared to the mass media". As to the limits of this jurisprudence see ECHR 22-10-2007 Lindon,Otchakovsky-Laurens and July vs France.

[42] The initial draft of the Regulation (art. 7) adopted as applicable law in cross-border personality-related torts the law of the country of residence of the offended party. This provision was fiercely objected to by publishers and journalists who whished to have as applicable law the law of the country of publication and/or of the country where the publications are mostly expected to circulate (on the related discussion see Warshow, 2006. On the reactions of publishers and journalists see www.epceurope.org/issues/RomeII_Joint_Position_for_Second_Reading.pdf, www.edri.org/edrigram/number3.13/RomeII). In the end, it was decided to leave these offences outside the scope of the Regulation.

[43] See Commision's Proposal for Rome II Regulation COM(2003) 427 final 2003/0168 (COD)

[44] BGH "Benomyl" NJW 1981, 1606

[45] OLG Hamburg NJW-RR 1995, 790

[46] see sec. 13 Private International Law (Miscellaneous Provisions) Act 1995.

[47] University of Glascow vs The Economist 1997 EMLR 495, 501 sqq. See also Collins, 2005, pp. 370, 375-376

[48] The German EGBGB contains a similar provision (art. 42)

Key Terms:

Applicable law: the law that applies in a case with international elements.

Copyright infringement: any unlawful, without the consent of the author, fixation or reproduction (direct or indirect, temporary or permanent, in whole or in part) or translation or adaptation or distribution to the public or public performance or radio/tv broadcasting or communication to the public or any other form of exploitation of a copyrighted work or any of its copies.

Berne Convention: the most important and influential international treaty aiming to protect, the rights of authors in their literary and artistic works. The Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979.

Blasphemy: a public manifestation (oral, in writing, by way of images, symbols and/or gestures) involving mockery, affront, offensive or vulgar expressions against God as the Supreme Being of monotheistic religions or against the divine as anything which is considered sacred by a recognized religion

Religious insult: a public manifestation of contempt by way of vituperative or vile utterances or the vile abuse of religious doctrines, symbols or customs

Hate speech: a form of expression which spreads, incites, promotes or justifies hatred based on intolerance on racist, national or religious grounds