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Social Media and the Protection of Privacy
Jan von Hein

Albert-Ludwigs-Universität Freiburg



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I. Introduction



- Connecting with people from all over the world...

The screenshot shows the Facebook homepage with the following elements:

- Navigation Bar:** Includes the Facebook logo, a search bar, and a "Log In" button. Below the search bar, there are links for "Forgotten your password?" and "Log In".
- Main Content Area:**
 - Left Column:** A headline "Facebook helps you connect and share with the people in your life." is followed by a world map with several orange person icons connected by dashed lines, representing a global network.
 - Right Column:** A "Create an account" section with the subtext "It's free and always will be." Below this are several input fields: "First name", "Surname", "Mobile number or email address", "Re-enter mobile number or email address", and "New password".
- Form Fields:**
 - First name:** Input field.
 - Surname:** Input field.
 - Mobile number or email address:** Input field.
 - Re-enter mobile number or email address:** Input field.
 - New password:** Input field.
- Additional Options:**
 - Birthday:** A section with dropdown menus for "Day", "Month", and "Year", and a link "Why do I need to provide my date of birth?".
 - Gender:** Radio buttons for "Female" and "Male".
 - Disclaimer:** A small text block stating "By clicking Create an account, you agree to our Terms and that you have read our Data Policy, including our Cookie Use."
 - Create an account:** A prominent green button.
 - Footer:** A link "Create a Page for a celebrity, band or business."

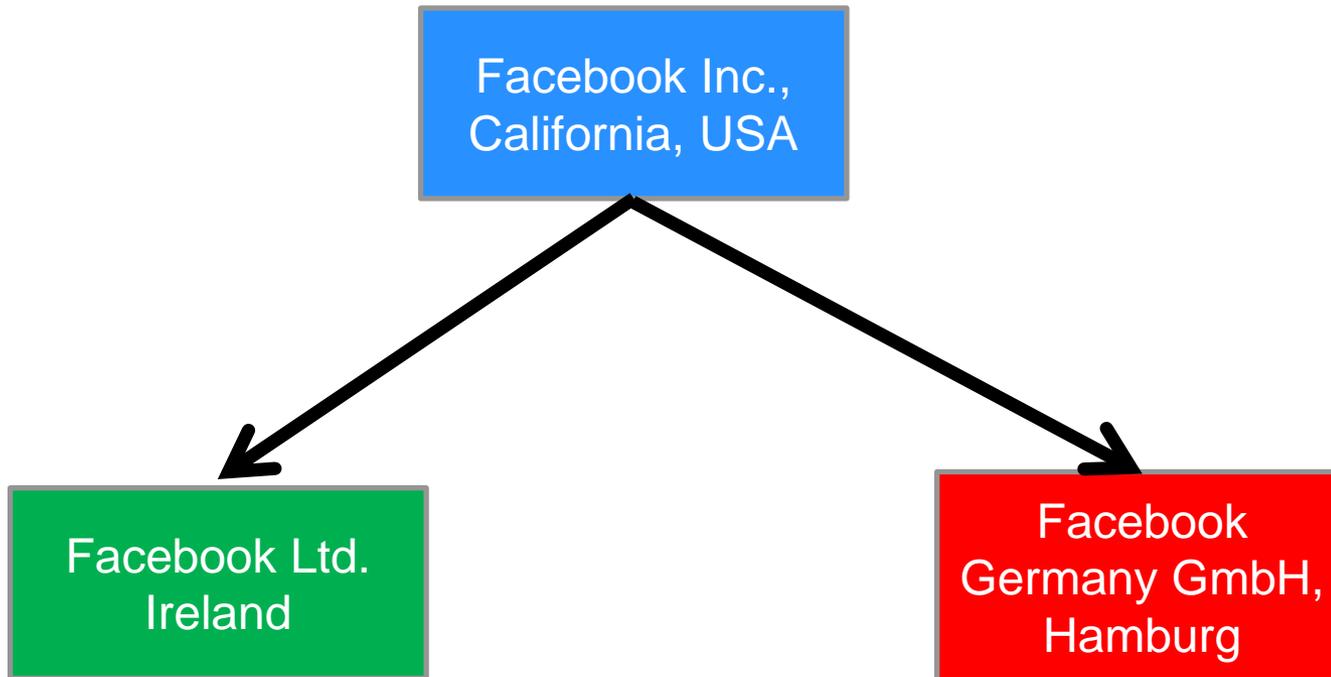
English (UK) Deutsch Türkçe Polski Italiano Română Français (France) Русский العربية Español Português (Brasil) +

Sign Up Locations AdChoices > Log In Celebrities Terms Messenger Groups Help Facebook Lite Moments Mobile About Find Friends Create Advert Badges Create Page People Developers Pages Careers Places Privacy Games Cookies

II. Introduction



- In an international network



III. The Object(s) of Protection



- *Privacy* (cf. Art. 7 EU Charter of Fundamental Rights; Article 8 European Convention on Human Rights)
- *Personality Rights*
- *Personal Data* (cf. Art. 8 EU Charter of Fundamental Rights)
- → a broad and autonomous concept
 - Cf. Article 1(2)(g) Rome II Regulation:
 - "*Non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" are excluded from the Regulation's scope

III. Legal Sources



- **1. EU Law On Data Protection**
 - **Directive 95/46/EC** of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31)
 - **General Data Protection Regulation** of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, applicable from 25 May 2018 (OJ L 119, 4.5.2016, p.1)

III. Legal Sources, 2. Jurisdiction



- EU Member States: Distinction between cases involving defendants domiciled in a third state and defendants domiciled in a member state
- → Member state defendants: Brussels *Ibis* applies
- → Third state defendants: in most cases, autonomous rules of civil procedure apply
 - Exceptions: Jurisdiction Agreements selecting a Member State Court (Article 25 Brussels *Ibis*)
 - EU Consumer Contracts with professionals domiciled in third state (Article 18(1) Brussels *Ibis*)

III. Legal Sources, 2. Jurisdiction



- Brussels *Ibis* Regulation (Regulation (EU) No 1215/2012)
 - Jurisdiction Agreements, Article 25 Brussels *Ibis*
 - Contractual claims → Article 17 Brussels *Ibis* in consumer cases, otherwise Article 7(1)
 - If there is no contract between the parties, violations of privacy and personality rights are subject to general jurisdiction (Art. 4(1) Brussels *Ibis*) and tort jurisdiction (Art. 7(2) Brussels *Ibis*).

III. Legal Sources, 2. Jurisdiction



- Art. 7(2) Brussels *Ibis*: Principle of ubiquity → plaintiff has the right to choose between place where the wrongful act occurred and place of injury/damage
- For conventional media (press), area of distribution decisive, not plaintiff's habitual residence; "mosaic principle"
 - CJEU, 7 March 1995, C-68/93, *Shevill*, ECR [1995] I-415
- However, the CJEU, has in *eDate*, considerably modified the traditional principle of ubiquity for internet cases, thus in effect creating specific rules for violations of personality rights in cyberspace (plaintiff's main centre of interests, i.e. habitual residence).
 - CJEU, 25 October 2011, *eDate* and *Martinez*, C-509/09 and C-161/10, ECR [2011] I-10269

III. Legal Sources, 2. Jurisdiction



- Specific rules on data protection are now found in the new EU General Data Protection Regulation
- **Article 79 Right to an effective judicial remedy against a controller or processor**
 - 1. [...]
 - 2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

III. Legal Sources, 2. Jurisdiction



- Third state defendants → domestic rules apply to noncontractual claims.
- The vast majority of the national legal systems - namely France, Germany, Greece, Italy, Portugal, Spain, and the United Kingdom - include some variant of *forum delicti commissi* (understood in a wider sense, i.e. potentially encompassing both *forum actus* and/or *forum damni*) in their grounds of jurisdiction over violations of personality rights, including defamation.

III. Legal Sources, 3. Applicable Law



- a) Contractual Relations – The Rome I Regulation
 - Article 3: party autonomy
 - Article 6: consumer protection
 - Article 9: Overriding mandatory provisions
- b) Tortious Relations: The Still Incomplete Rome II Regulation
 - Article 1(2)(g) Rome II: privacy, personality rights, defamation excluded
 - EP Proposal 2012
 - However, Rome II remains applicable if privacy etc. is merely touched upon as an incidental question (e.g. in connection with a main claim relating to unfair competition, cf. *VKI v. Amazon*, ECLI:EU:C:2016:612)
- c) Other Legal Questions (e.g. Successions)

IV. The Relationship between Social Media Providers and (Potential) Users



- Facebook (UK) Standard Terms (15(1)):
 - "You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions."

IV. The Relationship between Social Media Providers and (Potential) Users



- Facebook Term 15(1)(1): Jurisdiction agreement in favour of US/Californian courts?
 - Invalid towards EU consumers (Article 25(4) in conjunction with Article 19 Brussels Ibis)!
- Facebook Term 15(1)(2): Choice of Californian Law?
 - Permissible in principle, but mandatory provisions favouring the consumer remain applicable (Article 3(1) in conjunction with Article 6(2) Rome I)
 - Problem: Agreement in standard terms = unfair clause?

IV. The Relationship between Social Media Providers and (Potential) Users



- *VKI v. Amazon*, ECLI:EU:C:2016:612:
- The same PIL standards apply to individual and collective actions.
- Article 6(1) Rome II determines the law applicable to a claim for injunction against unfair terms, whereas the law applicable to the assessment of a particular contractual term is determined by Rome I (→ principle of independent connection of incidental questions in PIL!).
- A clause which fails to inform the consumer about the fact that mandatory provisions favourable to him remain applicable in spite of a choice-of-law agreement (Article 6(2)(1) Rome I) is considered as unfair → Article 15(1)(2) of the Facebook terms is invalid, too.

IV. The Relationship between Social Media Providers and (Potential) Users



- Law applicable to data protection
- *VKI v. Amazon*: broad reading of Article 4(1)(a) of the Data Protection Directive
 - "The processing of personal data carried out by an undertaking engaged in electronic commerce is governed by the law of the Member State to which that undertaking directs its activities, if it is shown that the undertaking carries out the data processing in question in the context of the activities of an establishment situated in that Member State."
 - In most cases, this will lead to a harmony between the applicable (mandatory) private consumer law (Article 6 Rome I) and data protection laws.

IV. The Relationship between Social Media Providers and (Potential) Users



- *Article 3 General Data Protection Regulation*
- 1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
- 2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
- 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

IV. The Relationship between Social Media Providers and (Potential) Users



- 2. Persons outside the network
- "**Finding friends**"-function of Facebook → Mails inviting non-customers to become Facebook users are generated automatically if a user allows access to his email contacts - without the consent of those being invited!
- Unfair competition → law applicable determined pursuant to Article 6(1) Rome II
- Violation of Article 13(1) of Directive 2002/58/EC on privacy and electronic communications
- → Bundesgerichtshof (German Federal Court of Justice) GRUR 2016, p. 946

V. The Relations among Users of Social Media



- No contractual relationship between users → claims for violation of privacy, personality rights etc. sounding in tort.
- In legal history, a close relationship between jurisdiction and choice of law concerning violations of personality rights can be observed.
- In many legal orders, both jurisdiction and choice of law were founded on some variant of *lex loci delicti* (place of acting and/or damage).

V.1. The Connection between *lex fori* and *lex loci delicti*



- In **English** law, the „double rule“ turns *lex fori* into a ceiling for claims rooted in a foreign *lex loci delicti*.
- In **Germany** and **Italy**, the principle of ubiquity is followed both with regard to jurisdiction and choice of law → parallelism in practice.
- In **France**, both the law of the place of the action and that of the place of the damage may apply to torts; the court applies the law of the place which is more closely connected to the case (Cass., 1re civ., 14 Jan 1997, No 94-16.1861, Gordon and Breach Science Publishers). This is an expression of the application of the proper law.
-

V.1. The Connection between *lex fori* and *lex loci delicti*



- **Example: BGH NJW 2011, 2059 – “Seven days in Moscow”.**
- The plaintiff and the defendant were from Russia and had attended high school together in Moscow. Having finished school, the plaintiff became habitually resident in Germany, the defendant in the United States. They met again in September 2006 for a class reunion in Moscow. After this event, the defendant posted an entry on the website www.womaneurope.com, which was run by a German company. In this post, the defendant described the living conditions and the looks of the plaintiff in rather unfavourable terms. The post was written in Russian language and in kyrillic letters.
- The BGH denied jurisdiction because the publication lacked a sufficient connection with Germany, explicitly pointing out that accepting jurisdiction would also lead to the application of German law (Art. 40(1) EGBGB).

V.2. Empirical Convergence



- Although the alternative "German" approach seems to favour plaintiffs, while the English "double rule" seems to favour defendants, the practical implementation of both approaches leads to an application of the *lex fori*:
 - The favour accorded to the plaintiff by German law is curbed by a restrictive definition of the place of injury.
 - The strictness of the "double rule" is softened by traditional pleading standards (no *ex officio* application of foreign law).

V.2. Empirical Convergence



- Applying *lex fori* has several advantages:
 - Reducing time and costs involved in litigation
 - Better quality of judgments
 - Taking into account public policy concerns of the forum because personality rights, privacy, data protection etc. are rooted in constitutional values
- Main disadvantage: „**forum shopping**“, as long as Rome II does not cover personality rights.

V.3. Towards a synthesis



- Whereas *general* jurisdiction is "neutral" from a choice of law perspective, *specific* jurisdiction at least indicates that there is already some kind of significant connection between the forum and the legal question to decide.
- Should courts be allowed to simply apply their own law at the heads of *specific* jurisdiction (place of acting, centre of main interests, principal direction)?
 - Plaintiffs almost never sue in a specific jurisdiction (e.g. the place of injury) and plead for the application of a different law (e.g. the place of acting) anyway
 - Forum shopping may be reduced by limiting the number of available fora (cf. *eDate*)

V.3. Towards a synthesis



- However, infringements of privacy, personality rights etc. committed via social media may be more closely connected to another legal order:
 - (1) Common habitual residence (cf. Article 4(2) Rome II)
 - (2) Law applicable to the contract that *both* users (tortfeasor and victim) have concluded with the media service provider? Extension of idea of accessory connection (so far only limited to a contract between the parties, Article 4(3) Rome II)? Cf. Article 4(1)(h) Rome I: a single law applicable to multilateral trading systems

Conclusion and Outlook



- The EU should develop common rules on jurisdiction concerning third-state defendants not only for choice-of-court agreements and consumer contracts, but for torts as well.
- The exclusion of privacy and personality rights from the scope of Rome II does not hinder the application of the Regulation to claims relating to unfair competition.
- Rome II should be amended by a choice-of-law rule determining the law applicable to violations of privacy and personality rights, including data protection.