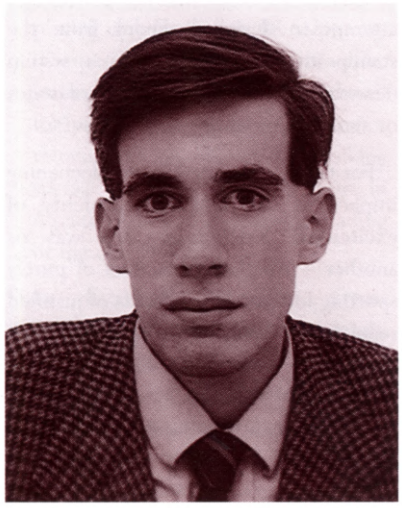
Conflict of Laws

The 'proper law of a tort' and the Internet

by Fabrizio Marongiu Buonaiuti



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Part III of the *Private International Law (Miscellaneous Provisions) Act* 1995 introduced two changes of major significance to English conflict of laws in torts: codification and the final abandonment of the leading common law rule of 'double actionability'.

DOUBLE ACTIONABILITY

Double actionability consisted in a twofold mechanism, requiring an alleged tort committed abroad to be pursued in the English courts in so far as recognised as such under both the law intrinsically applicable to it – the *lex loci delicti commissi* – and the lex fori. The rule as consolidated in *The Halley* (1868) LR 2 PC 193 and *Phillips v Eyre* (1870) LR 6 QB 1, and more recently specified in *Boys v Chaplin* [1971] AC 356, was a strict requirement for the plaintiff.

A first step towards the mitigation of the rule was taken by the Privy Council in *Red Sea Insurance v Bouygues* [1995] 1 AC 190 (PC), which granted recovery provided for under the *lex cause* but not the lex fori, thus setting aside double actionability as a general rule. Of course, one must bear in mind that the decisions of the Privy Council are not binding precedent on the English courts and the Privy Council itself, in deciding the issue, was not bound by any recent authority. Also, in the opinion of Lord Slynn, the double actionability rule was not actually overruled at all; rather an exception to it was applied on the facts of the case.

However, by the time this case was decided, a proposal to abolish the rule of double actionability had been included in the Private International Law (Miscellaneous Provisions) Bill, which in turn became the *Private International Law (Miscellaneous Provisions) Act* 1995.

The Act provides for the characterisation of the issues in question as being in tort or delict by the courts of the forum an assumption rather tautological, insofar as it does not provide for the law applicable for that purpose. This question is subsequently solved in the sense that the applicable law applies also to the fundamental question of whether an actionable tort or delict has occurred and, for the avoidance of doubt, declares the same rules applicable to events regardless of whether they occur in the forum or abroad. Section 10 then expressly provides for abolition of the consolidated rules requiring double actionability except in cases of defamation.

Finally, s. 11 of the Act introduces the general rule of the *lex loci delicti commissi,* as generally retained in other legislation, embodying a strict criterion of territoriality. This means that the *locus commissi delicti* is normally the place in which the events constituting the tort or delict in question occurred and, specifically, the law of the place where the victim or the property was at the time of the injury or damage (in the event that the plaintiff was in a different jurisdiction). A series of other rules are included, following the experience of other legal systems, providing for the application of the law of the country where the most significant element or elements of the events in question occurred – s. 12.

Section 12 of the Act provides for a balance to be struck between the factors connecting a tort or delict with the law applicable under the general rule and those connecting it with a different law, such that where, on balance, the latter law is substantially more appropriate to govern the matters of the case, it shall apply to the exclusion of the *lex loci delicti.* Such a solution has actually not been devised by the act *ex abrupto.* In fact, a solution expressed in similar terms had been retained in the common law, notably in *Boys v Chaplin,* and earlier conceived in an authoritative doctrinal elaboration, under the meaningful banner of the 'proper law of a tort' (J H C Morris, 'The Proper Law of a Tort' (1951), 64 *Harvard LR* 881). Such a perception represented a sort of confluence of choice of laws principles, in contract and in tort, as well as of doctrines retained in the English and American legal milieux. In fact the theory has its origins in the English notion of 'proper law' with respect to contracts, the lack of which was, conversely, resented within the American system.

A more flexible attitude had been adopted by American courts, typically with regard to the tort of conversion, following the English precedent of *Cammell v Sewell* 5 H&N 728, 157 Eng Rep 1371 (Ex Cham 1860), in *Goetschius v Brightman* 245 NY 186, 156 NE 660 (1927) and, in cases where the law of the place of the event differs from that of actual harm, in *Alabama Great Southern RR v Carroll* 97 Ala 126, 11 So 803 (1892), where the court resorted to controversial arguments so as to avoid the unreasonable consequences of the general rule, as in the case of *Levy v Daniels' U-Drive Auto Renting Co* 108 Conn 333, 143 Atl 163 (1928) (the fact that a car involved in an accident which occurred in Massachusetts was hired in Connecticut amounted to a sufficient ground for the tort to be actionable in the latter state).

The 'proper law of a tort' was upheld by the House of Lords in *Boys v Chaplin.* This allowed for tortious liability in a road accident that occurred in Malta,

between English parties, to be subject to the broader regime provided by English law as more significantly related to the matters of the case, although at that time the 'double actionability' rule still existed.

It has then been for the 1995 Act to give the proper law of a tort autonomous standing within English conflict of laws, freeing it from subjection to the double actionability rule where the House of Lords had left it. This article considers its prospective role in a field where it appears of particular relevance: that of the Internet as an ever-increasing vehicle for communication and exchange of information.

A *PROPER LAW* ON THE INTERNET

Activities taking place on the Internet may be subject to different sorts of protection, including protection by virtue of:

- intellectual property laws (both under trademark law, with specific reference to protection of domain names, e.g. *Pitman Training Ltd v Nominet UK* [1997] FSR 797 and, with respect to its fundamental aim of the circulation of information, under copyright law);
- general contract or tort law, e.g. passing off; or
- in the equivalent civil law cases of unfair competition.

These are in addition to activities which raise public policy or moral concerns *(The Free Speech Coalition v Janet Reno* (US DC ND Cal, No. C-97-0281, judgment of 8 December 1997, [1997] 66 *US Law Week* 1125).

Given such a broad spectrum, it is in the main those cases involving copyright infringement which will be addressed here, on the assumption that these may properly give rise to actions and conflicts of laws in tort, however *sui generis* they may be.

The traditional difficulty in this field is the strictly territorial character of intellectual property rights, although international conventions have gone some way towards unifying the application of the *lex originis*, and of the *lex loci delicti*. In this respect, the abolition of double actionability by the 1995 Act suggests a more far-reaching perspective, allowing English courts to apply foreign intellectual property law, as with tort law in general, when appropriate under the 1995 Act.

INTERACTIONAL SURVEY OF THE CASES

It is useful to survey the actual operation of this interaction in the case law, beginning with those cases exploring the nexus between use of the Internet as a means of circulation of information and copyright protection, even within domestic boundaries.

The first cases

The first cases have come from the other side of the Atlantic where, in the last few years, a number of significant cases have arisen, notably:

- *Playboy Enterprises Inc v George Frena* (839 F Supp 1552 (MD Florida, 1993));
- *Sega Enterprises Ltd v Maphia* (857 F Supp 679 (ND CaL, 1994));,
- *United States v La Macchia* (871 F Supp 535 (D Mass, 1994));
- *Religious Technology Centre, Bridge Publications Inc v Netcom On-line Communication Services Inc* (US DC ND Cal, No. C-95-20091); and
- *Frank Music v CompuServe* (US DC SD NY, No. C-93-8153, introduced on 29 November 1993).

There is, in addition, the Australian case of *Trumpet Software v OzEmail* (Australian Federal Court No. TG 21 of 1995, judgment of 10 July 1996).

Copyright infringement was found in the reproduction on a Web 'bulletin board' of downloadable materials – magazine photographs, computer games or software programs, texts and songs – which were subject to copyright. American copyright law holds that the mere loading of information onto a computer system amounts to an infringement of copyright, whilst other legal systems (the Japanese and Australian in particular) relate infringement to the subsequent stage of distribution or transmission as a form of communication. Further differences arise regarding the right of display, as recognised by the American courts in the *Playboy* case, with respect to display on screen; American law goes beyond the more restrictive notion used by most European systems.

Cases in Europe

Moving to the reactions of European jurisdictions in similar cases, the first case that should be mentioned is the Scottish case of *Shetland Times Ltd v Dr Jonathan Wills* [1997] FSR 604. Whilst considering whether an interlocutory injunction was to be granted to the publishers of *The Shetland Times* to restrain the providers of the news reporting service, *The Shetland News,* from including in their Web service headlines appearing on the plaintiff's Web site, two questions were considered:

- whether the headlines made available by the defendants on their Web site constituted a form of 'cable programme service' under s. 7 of the *Copyright, Designs and Patents Act* 1988; and
- whether inclusion within such a service of the items in question amounted to infringement under s. 20, provided such headlines constituted literary works and were thus subject to copyright under s. 3 of the Act.

Interim relief was granted, after argument that whereas literary merit was not a necessary element of a literary work, a *prima facie* case had been made that reproduction of such items on a Web site constituted copyright infringement by inclusion in a cable programme service, the interactive character of the Web site appearing merely incidental at that stage. Although an out of court settlement prevented the achievement of a full precedent ([1997] *Gazette* 19 November, p. 18), the argument adopted has paved the way to guide the Internet within the framework already laid down for previously developed means of communication.

There have been cases similar to *Shetland Times* in other European jurisdictions, notably:

- *Association Générale des Journalistes Professionnels de Belgique v SCRL Central Station* [1998] ECC 40, in Belgium;
- *Re Copyright in Newspaper Articles Offered On-Line* [1998] ECC 238, in Germany; and
- the two *Queneau* cases ([1998] ECC 47; [1998] BLD 23 February, 26) in France,

concerning similar issues of reproduction of written work (parts of newspaper articles in the first two cases and pieces from a poem in the latter ones) on Internet sites. In all these cases, the relevant courts ultimately upheld the respective plaintiffs' claims of copyright, holding that the reproduction of such material on Web sites amounted to an infringement of those rights under the

relevant national laws. Exceptions were overruled in cases of lack of literary merit or the non-infringing character of fragmentary reproduction and, in the last case, of private use and accidental disclosure.

on the internet

http:lw.bna.com/1014

Full text of *Weber v Jolly Hotels* is available at the above site

ACROSS THE ATLANTIC

With the lack of any further European case law developments so far, particularly from a conflict of laws perspective, one has to look across the Atlantic to a case with a conflict of laws, though not an intellectual property, perspective: *Weber v Jolly Hotels* (US DC NJ, No. CIV a 96-2582 (full text at the above Web site)). This case turned on whether the defendant, having provided information on a passive Web site (on the basis of which a contract was eventually entered into), could be attracted to the forum of the plaintiff and have the law of that forum applied in a situation where the defendant's own courts (New Jersey) would not have had personal jurisdiction. This would not be the usual situation because, under the general rule *actor sequitur forum rei,* jurisdiction would be vested in the defendant's courts applying their own law, as more strictly connected to the facts at issue, under the rule of characteristic performance. Faced with such a claim for exorbitant jurisdiction, the District Court of New Jersey prudently held that such jurisdiction may descend only from an interactive use of the Internet, that is by the defendant actually doing business on it. To have allowed the plaintiff to sue in his own jurisdiction would have rendered anyone providing information on the Internet subject to the jurisdiction of any court worldwide where a plaintiff had suffered damage, even indirectly.

RECOURSE TO TECHNICAL MEANS

An altogether different issue is that of recourse to technical means to supplement the legal protection of materials circulated on the Internet, such as the use of encryption technology. The fact that this technology is no longer restricted to the fields of electronic funds transfer and military networks, but is now increasingly available for the use of individuals and non-governmental sectors, is likely to have serious implications for the sensitive areas of public policy and security, not to mention freedom of information.

In the case of *Daniel Bernstein v US Department of State* (US DC ND Cal No. C-95-0582 MHP, [1997] US Dist LEXIS 13146) freedom of expression of academic opinion in the field of encryption programs, especially regarding the distribution of a model known as 'Snuffle', was severely restricted by particularly sensitive American military security regulations. This has ultimately resulted in restraints on the export of non-military encryption products of the type produced by the plaintiff. Although the rigour of the American regulations in this respect may seem rather excessive, encryption technologies undoubtedly still remain a field for further legal and political consideration. Regard must also be had to the parallel and broader issue of the protection of privacy and in particular of personal data, which could not be addressed in the present context.

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