"Rome II" and the Choice of Law for Defamation Claims

There is a substantial note (some 41 pages) in the new issue of the *Brooklyn Journal of International Law* by Aaron Warshaw (Brooklyn Law School) entitled, "**Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims**". The article can be downloaded **for free** from the Journal homepage. Here's some of the introduction:

> *Like many other areas of law, commentators have repeatedly noted that the Internet has wreaked havoc on the jurisdictional and choice-of-law aspects of international defamation claims. Much of this difficulty stems from substantive differences in national approaches to defamation law and the ease with which plaintiffs can bring their claims in foreign jurisdictions. Central to these differences is the fact that, compared to the United States, many countries "place much greater importance on the protection of personal reputation, dignity, and honor than they do on protecting the freedom of speech." While U.S. defamation law reflects the constitutional guarantees of freedom of speech and press under New York Times v. Sullivan and its progeny, Sullivan's impact abroad has been mixed. Instead, every country possesses a different legal standard for resolving defamation claims based on their particular histories, values, and political systems. For instance, while the United States and the United Kingdom share the same tradition of common-law defamation, both countries have developed divergent approaches to balancing free speech and reputation interests. This conflict-of-laws problem is exacerbated by the fact that foreign courts appear keen to adjudicate claims against U.S. publishers without regard for the free-press protections under U.S. law. As a result, publishers are now subject to new and unforeseen liabilities and are likely to begin constructing "virtual borders" around their Internet presence to avoid exposure to restrictive foreign defamation laws.*
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> *In assessing the current situation, one British government commentator noted that any substantive solution to the difficulty of international defamation law would come in the realm of international treaty accompanied by greater harmonization of substantive national laws. One such pending treaty that will perhaps encompass the problematic arena of international defamation law is*

"The law applicable to non-contractual obligations," known commonly as "Rome II." This agreement among the European Union's Member States will determine the choice of law for cross-border defamation claims as well as a variety of other crossborder claims based in non-contractual relationships. Rome II will determine which law is applicable to all defamation claims brought within a Member State's forum, although jurisdiction will continue to be available in any nation where a publication is read. As such, Rome II presents an opportunity for an international body of lawmakers to adopt a clearer and fairer standard of how to settle defamation claims against foreign publishers in the Internet age.

Yet, despite the possibility of creating a clearer choice-of-law standard, Rome II's defamation provision proved to be extremely difficult to resolve. In 2006, after over three years of work, the European Union found itself no closer to creating a rule that all members could agree upon. The European Commission eventually excised the defamation provision from Rome II, effectively forestalling a new framework for the choice of law for defamation claims within the European Union's Member States. Despite this setback, much can still be learned from Rome II, both in terms of its potential application as well as the issues raised and debated during the drafting process—issues that are emblematic of the broader complexities of defamation law in the Internet age. This Note will argue that the European Commission's parliamentary maneuver is by no means the end of the story, but rather it is one chapter in a slow, difficult struggle to achieve a workable solution that satisfies publishers, national courts, and defamation plaintiffs. Part II of this Note examines the existing choice-of-law and jurisdictional rules for resolving defamation claims in Europe, the United States, and in other nations. Part III traces Rome II's legislative history, focusing on the opposing place-of-harm and place-of-publication approaches to defamation claims. Part IV examines Rome II through the lens of the modern American approach to conflicts of law. This Note concludes that while the drafters of Rome II attempted to create a rule to protect publishers, their inability to successfully adopt such a provision reflects the intractability of balancing publishing and reputational interests. This Note will argue that American conflicts law provides key insights into both the policy behind protecting press interests and also how to create a more workable choice-of-law framework.

Highly recommended. Download it from here.