Von Hein on Kate Provence Pictures

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The Duchess of Cambridge's topless photos
A boost for amending the Rome II Regulation?

As Gilles Cuniberti has already informed the readers of this blog, the Duchess of Cambridge recently obtained a victory in a lawsuit that she and her husband had filed at the Tribunal de Grande Instance de Nanterre in France (the full text of the court's judgment is available at http://www.legipresse.com). The royal couple had demanded both damages for and an injunction against the publication and further reproduction (both online and in print media) of photos made of the Duchess without her consent while she was sunbathing at the terrace of a private residence in France, which was surrounded by a large woody park, well shielded from intrusive gazes by passers-by or any other people. Rumour has it that the pictures may have been taken by a so-called "drone", i.e. a pilotless radio-controlled mini aircraft (on this aspect of the case, see the interesting comment by Dr. Claudia Kornmeier in the Legal Tribune Online). The Nanterre court based its judgment on article 9 of the French Code Civil without discussing issues of jurisdiction and choice of law. Nevertheless, the case has obvious international elements: While the defendant is a French publisher, the plaintiffs are habitually resident in the United Kingdom; moreover, the pictures were accessible via the internet across Europe. This raises the question what European choice of laws rules have to say about the proper law in this case. At the moment, the answer is: nothing, because the Rome II Regulation contains a deliberate carve-out for violations of personality rights (Article 1(2)(g) Rome II). The European Parliament, however, has adopted, on 10 May 2012, a resolution with recommendations to the Commission on the amendment of the Rome II Regulation. The Parliament's proposal reads as follows:

> *Article 5a Privacy and rights relating to personality*
>
> *1. The law applicable to a non-contractual obligation arising out of a violation of*

privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

This most recent proposal, drafted by rapporteur Cecilia Wikström, combines various elements of suggested solutions that have been on the table before. It all started with the Commission's initial draft proposal of 2002 which recommended submitting violations of personality rights to the habitual residence of the victim. This proposal, although popular in academia, met with fierce resistance from the media lobby and was replaced in the Commission's final proposal of 2003 by a mosaic principle which would have led to the application of the laws at the various places of distribution, limited to the damage suffered by the victim in the respective country. The Parliament, in 2005, presented a proposal which was similar to paragraphs 1, 3 and 4 of its current article 5a; in the former version, however, the specific rule for publishers of printed matter and broadcasters was

extended to internet publications as well. At the end of the day, a consensus could not be reached, and the whole question was excepted from the scope of the Rome II Regulation. In 2011, former rapporteur Diana Wallis made a new attempt at amending the Regulation, presenting a proposal which was influenced by a rule that I had suggested in a conflictoflaws.net online symposium before (see here). Miss Wallis' proposal read as follows:

> *Article 5a – Privacy and rights relating to personality*
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*

For a full explanation of the reasons behind this proposal, I refer both to Miss Wallis' excellent working document of May 23, 2011 and to my contribution to the online symposium already mentioned. In sum, the basic ideas guiding this approach were the following: (1) Closely tracing the Court of Justice's Shevill jurisprudence, which relates to Article 5(3) Brussels I, for choice of law as well, i.e. applying the so-called mosaic principle (full damages available at the publisher's domicile, only partial damages at the various places of damages). Although the plaintiff was slightly favoured by giving him or her an option to

choose the applicable law, this favour was mitigated by restricting the reach of the laws in force at the place(s) of damage, thus creating, on the whole, a balanced solution. (2) Anchoring the rule in the doctrinal framework of Rome II, i.e. avoiding an uncritical bias towards favouring the victim and reserving the application of general rules for torts (Articles 4(2) and (3), Article 14). (3) Online publications and conventional modes of publication (print media, broadcasting) should be treated alike for the sake of simplicity, clarity and to avoid unnecessary technicalities. (4) Sticking to the concept of a loi uniforme (Article 3 Rome II), i.e. avoiding any distinction between EU and third state victims or defendants. (5) Denying the need for a specific public policy clause to protect the freedom of the press, but taking into account the legitimate need for foreseeability of the applicable law from the point of view of alleged tortfeasors.

However, the CJEU's jurisprudence on Article 5(3) Brussels I has evolved considerably since Shevill. In its eDate judgment (C-509/09 and C-161/10) of October 25, 2001 (see the pertinent post on this blog here), the Court modified its Shevill decisional rules for violations of personality rights committed via the Internet. For the latter group of cases, the plaintiff now has three options: (1) Suing at the defendant publisher's domicile for recovering his or her whole damage, (2) suing at his or her habitual residence as the presumptive centre of interests, again for recovering his or her whole damage (3) suing at the various places of damages; in this case, however, the plaintiff remains limited to recovering only the damage that he or she has suffered in the respective forum. From the Court's reasoning, it must be inferred that the judges intend to cling to the former Shevill rules, however, as far as violations of personality rights by conventional media (print, broadcasting) are concerned. This artificial distinction raises severe doubts: As the case of the Duchess of Cambridge's topless photos demonstrates, media content violating personality rights is, in our modern world, regularly distributed through various media channels simultaneously (print, broadcast, Internet, Twitter etc.). Differentiating between those channels creates the risk of contradictory decisions concerning the same substantive content: Pursuant to the eDate principles, the Duchess could have sued the French Magazine in the UK (her habitual residence) for recovering her whole damage with regard to the topless photos disseminated online, but would have been limited to the partial damage suffered in this forum with regard to the printed pictures. The CJEU justified such a distinction by two reasons: First of all, it referred to "the ubiquity of that [online] content. That content may be consulted

instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control" (para. 45). Yet, this factual assumption is hard to square with the reality of the internet. Every user of youtube, for instance, knows that, instead of a video clip, sometimes a sign pops up which informs the viewer that the desired content is protected by copyright and not available in his or her country. Evidently, users are identified by their IP address, and their access is restricted accordingly. Apart from that, several online media require a user's registration before allowing him or her to access the content provided. Thus, it is far from evident that a publisher should be deemed to have absolutely no control of where the content that it places online is accessed. "Moreover", the Court assessed, "it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State" (para. 46). Yet it is of course feasible to design websites in such a way that they record the number of times that they have been visited. Every page on SSRN, for example. displays the number of "abstract views". I am sure that every publisher's marketing department collects such data (at least my publishers do…). So why should it not be technically possible to quantify distribution of online content in a certain member state? If the victim does not know these figures, this is a problem of procedural rules on the disclosure of evidence by the defendant, but not an issue that should have an influence on the question of jurisdiction.

Be that as it may, any new conflicts rule will have to be tuned to the current jurisdictional framework established by the eDate decision. In this light, I will now turn to an analysis of the most recent proposal by the Parliament (PP 2012). It is obvious from a first glance that this draft as well contains a problematic differentiation between various channels of distribution: There is a general rule in Article 5a(1) PP 2012, but this paragraph is superseded by Article 5a(3) PP 2012 with regard to a violation caused by the publication of printed matter or by a broadcast. Contrary to the Parliament's proposal of 2005 (therein paragraph 1, subparagraph 3), the special rule on printed matter and broadcasts is no longer extended "mutatis mutandis" to the distribution of content via the Internet. From this change in the drafting, it must be inferred that the law applicable to violations of personality rights committed online will have to be determined by the general rule found in Article 5a(1) PP 2012. Unfortunately, however,

paragraphs 1 and 3 of Article 5a PP 2012 lead to diametrically opposed results. Paragraph 1 refers to the "law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur". Thus, the place of acting (the publisher's domicile) is discarded in favour of a "centre of gravity" approach. In the context of the eDate decision, this centre of main interests of the victim will have to be located at his or her habitual residence. Contrary to the eDate decision, however, the mosaic principle (the Shevill approach) is no longer of even residual relevance. If one applied Article 5a(1) PP 2012 to the Duchess of Cambridge's topless photos which have been distributed online, this rule would lead to the application of English law. With regard to the photos distributed by the publication of printed matter, however, Article 5a(3) PP 2012 would lead to the application of the law of the "country to which the publication or broadcasting is principally directed, or if this is not apparent, the country in which editorial control is exercised". This rule points to the application of French law, because the photos were published in a French Magazine. It is highly debatable whether such an artificial and technical differentiation is justified by any convincing reasons of policy. Whereas Article 5a(1) PP 2012 favours the victim, Article 5a(3) PP 2012 favours the defendant, but why this should be so is far from evident.

Could there be a better solution? Burkhard Hess has proposed to simply apply the lex fori (either at the publisher's domicile or at the victim's habitual residence) to violations of personality rights and to discard the mosaic principle completely (Juristenzeitung 2012, p. 189, 192 et seq.). This approach certainly has the appeal of simplicity and procedural economy. Hess himself is ready to admit, however, that his proposal would lead to a dubious discrimination of third-state victims, who would be limited to the publisher's law to recover their damages from an EU tortfeasor. Thus, the concept of a loi uniforme would be sacrificed. The German Council for Private International Law, on the other hand, has proposed to use the victim's habitual residence as a general and single criterion of attachment (Junker, RIW 2010, p. 257, 259). This again has the virtues of simplicity and clarity. It has the drawback, however, that it would force the victim to rely on his or her own law even in cases in which the suit is brought in the courts of the defendant's domicile, thus making more expensive (and slowing down considerably) the passing of an injunction or the recovery of damages in this forum. A compromise solution could consist in returning to Diana Wallis' draft proposal of 2011 (supra), while at the same time accommodating the basic

rationale of the eDate decision in its second paragraph, which would then read as follows:

> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues* ***either*** *in the court of the domicile of the defendant* ***or in the court of the plaintiff's habitual residence****, the claimant may instead choose to base his or her claim on the law of the court seised.*

Contrary to the eDate decision, however, this rule should apply regardless of the kind of media channel via which the content was distributed. It certainly tilts the scales towards the victim, but this can hardly be avoided after eDate. Comments welcome!