Conflict of Laws of Freedom of Speech on Elon Musk's Twitter

Elon Musk's purchase of Twitter has been a divisive event. Commenting on the response on Twitter and elsewhere, Musk tweeted:

> *The extreme antibody reaction from those who fear free speech says it all*
>
> >
>
> *By "free speech", I simply mean that which matches the law.*
>
> *I am against censorship that goes far beyond the law.*
>
> *If people want less free speech, they will ask government to pass laws to that effect.*
>
> *Therefore, going beyond the law is contrary to the will of the people.*

Ralf Michaels quote-tweeted perceptively: 'But which law?'

Twitter and the conflict of laws

By their very nature, digital platforms like Twitter present a variety of conflict of laws issues.

'Twitter' is not a monolithic entity. The functionality of the social media platform with which readers would be familiar is underpinned by a transnational corporate group. Twitter, Inc is incorporated in Delaware, and has various subsidiaries around the world; Twitter International Company, for example, is incorporated in Ireland and responsible as data controller for users that live outside of the United States. The business is headquartered in San Francisco but has offices, assets, and thousands of staff around the world.

The platform is populated by 400 million users from all over the world. After the US, the top 5 countries with the most Twitter users are comprised of Japan, India, the UK and Brazil. The tweets and retweets of those users may be seen all over

the world. Users have wielded that functionality for all sorts of ends: to report on Russia's war in real-time; to coordinate an Arab Spring; to rally for an American coup d'état; to share pictures of food, memes, and endless screams; and to share conflict of laws scholarship.

Disputes involving material on Twitter thus naturally include foreign elements. Where disputes crystallise into litigation, a court may be asked to consider what system of law should determine a particular issue. When the issue concerns whether speech is permissible, the answer may be far from simple.

Free speech in the conflict of laws

The treatment of freedom of speech in the conflict of laws depends on the system of private international law one is considering, among other things. (The author is one of those heathens that eschews the globalist understanding of our discipline.)

Alex Mills has written that the balance between free speech and other important interests 'is at the heart of any democratic political order'.[1] Issues involving free speech may thus engage issues of public policy, or *ordre public*,[2] as well as constitutional considerations.

From the US perspective, the 'limits of free speech' on Twitter is likely to be addressed within the framework of the First Amendment, even where foreign elements are involved. As regards private international law, the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 28 USC 4101- 4105 ('SPEECH Act') is demonstrative. It operates in aid of the constitutional right to freedom of expression and provides that a US 'domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that' the relevant foreign law would provide the same protections for freedom of speech as would be afforded by the US Constitution.[3]

Other common law jurisdictions have approached transnational defamation issues differently, and not with explicit reference to any capital-c constitutional rights. In Australia, the High Court has held that the *lex loci delicti* choice-of-law rule combined with a multiple publication rule means that defamation is determined by the law of the jurisdiction in which a tweet is 'available in comprehensible form': the place or places it is downloaded.[4] In contrast, where a claim concerns

a breach of confidence on Twitter, an Australian court is likely to apply the equitable principles of the *lex fori* even if the information was shared into a foreign jurisdiction without authorisation.[5] In either case, constitutional considerations are sidelined.

The balance to be struck between free speech on the one hand, and so-called 'personality rights' on the other, is a controversial issue within a legal system, let alone between legal systems. So for example, the choice-of-law rule for non-contractual obligations provided by the Rome II Regulation does not apply to personality rights, as a consensus could not be reached on point.[6] Similarly, defamation and privacy are excluded from the scope of the HCCH Judgments Convention by Art 2(1)(k)–(l).

There is a diversity of approaches to choice of law for cross-border infringements of personality rights between legal systems.[7] But the 'law applicable to free speech on Twitter' is an issue that goes far broader than personality rights. It touches on as many areas of law as there are aspects of human affairs that are affected by the Twitter platform. For example, among other things, the platform may be used to:

- spread misrepresentation about an election, engaging electoral law;
- influence the price of assets, engaging banking and finance law; or
- promote products, engaging consumer law.

Issues falling into different areas of law may be subject to different choice-of-law rules, and different systems of applicable law. What one system characterises as an issue for the proper law of the contract could be treated as an issue for a forum statute in another.

All of this is to say: determining what 'the law says' about certain content on Twitter is a far more complex issue than Elon Musk has suggested.

The law applicable to online dignity

Key to the divisiveness of Musk's acquisition is his position on content moderation. Critics worry that a laissez-faire approach to removing objectionable

content on the platform will lead to a resurgence of hate speech.

Musk's vision for a freer Twitter will be subject to a variety of national laws that seek to protect dignity at the cost of free speech in various ways. For example, in April, the European Parliament agreed on a 'Digital Services Act', while in the UK, at the time of writing, an 'Online Safety Bill' is in the House of Commons. In Australia, an Online Safety Act was passed in 2021, which provided an 'existing Online Content Scheme [with] new powers to regulate illegal and restricted content no matter where it's hosted'. That scheme complements various other national laws, like our Racial Discrimination Act 1975, which outlaws speech that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and was done because of the race, colour or national or ethnic origin of the person or group.

When a person in the United States posts content about an Australian that is permissible under US law, but violates Australian statute, the difficulty of Musk's position on the limits of censorship becomes clear. Diverse legal systems come to diverse positions on the appropriate balance between allowing online freedom and protecting human dignity, which are often struck with mandatory law. When your platform is frequented by millions of users all over the world, there is no single 'will of the people' by which to judge. Perhaps Musk will embrace technological solutions to give effect to national standards on what sort of content must be censored.

A host of other conflicts issues

Musk-era Twitter is likely to pose a smorgasbord of other issues for interrogation by conflict of laws enthusiasts.

For example: legal systems take diverse approaches to the issue of whether a foreign parent company behind a platform like Twitter can be imposed with liability, or even criminal responsibility, for content that is on the platform. While conservatives in America consider the fate of s 230 of the Communications Decency Act—a provision that means that Twitter is not publisher of content they host—other countries take a very different view of the issue. Litigation involving the companies behind Twitter is likely to engage courts' long-arm jurisdiction.

Perhaps the thorniest conflicts problem that may emerge on Musk's Twitter is the scope of national laws that concern disinformation. In an announcement on 25 April, Musk stated:

> *'Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated'.*

Recent years have shown that the future of humanity is not necessarily benefited by free speech on social media. How many lives were lost as a result of vaccine-scepticism exacerbated by the spread of junk science on social media? How many democracies have been undermined by Russian disinformation campaigns on Twitter? The extraterritorial application of forum statutes to deal with these kinds of issues may pose a recurring challenge for Musk's vision.[8] I look forward to tweeting about it.

Michael Douglas is Senior Lecturer at UWA Law School and a consultant in litigation at Bennett + Co, Perth.

[1] Alex Mills, 'The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7 *Journal of Media Law* 1, 21.

[2] See, eg, International Covenant on Civil and Political Rights, art 19(3).

[3] SPEECH Act s 3; United States Code, title 28, Part VI, § 4102. See generally Lili Levi, 'The Problem of Trans-National Libel' (2012) 60 *American Journal of Comparative Law* 507.

[4] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

[5] But see Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 *UNSW Law Journal* 490.

[6] Art 4(1); see Andrew Dickinson, *The Rome II Regulation* (Oxford University Press, 2008).

[7] See generally Symeon C Symeonides, *Cross-Border Infringement of Personality Rights via the Internet* (Brill, 2021) ch VI; Tobias Lutzi, *Private International Law Online: Internet and Civil Liability in the EU* (Oxford University Press, 2020) ch 4.

[8] See generally Matthias Lehmann, 'New Challenges of Extraterritoriality: Superposing Laws' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar, 2019) ch 10.