Blogger Served by Chevron to Reveal Gmail Information

Kevin Jon Heller, a regular contributor to international law blog *opiniojuris*, was subpoenaed by Chevron to reveal information related to his Gmail account. Heller has often criticized Chevron's action in Ecuador on the blog.

The email that he received from Google and his thoughts about it are available here.

It is interesting to note that Chevron was asking for

> *nine years of IP logs, which would likely have given them three types of information: (1) the geographic location from which I sent each and every Gmail; (2) the kind of device I used to send each and every Gmail (phone, computer, iPad); and (3) the service provider (internet, mobile, etc.) I used to send each and every Gmail.*

So, who is next in the blogosphere? Heller states that 43 other persons, including other bloggers, were subpoenaed.

Does this go with the job?

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!

Clara Cordero on Kate Provence Pictures

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Nowadays, almost all the people around the world have already heard something about the new scandal that has arisen concerning the British royal family: the topless photos of Catherine, Duchess of Cambridge. The pictures – that were taken when she was privately sunbathing during a vacation in a chateau belonging to her husband's uncle in Provence- were initially spilled into public view by the French magazine Closer, but Kate´s private images were rapidly spread all over the world. New photos were published later by different tabloids in several Member States, such as the Italian gossip magazine Chi (owned by the same company that had previously published the pictures inFrance) and the potential harmful content was uploaded in Internet. This is another example where the violations of personality rights are connected with acts in which the alleged offender exercises the fundamental freedom of expression or information.

In this particular case, from a civil perspective, the claimants exclusively asked a French court to stop further publication of the pictures. Based on article 9 of the French Civil Code they were seeking an injunction barring any future publication – online or in print – by the French magazine of the Duchess´ topless photographs. They neither have pushed for existing copies of the magazine to be

withdrawn from sales points nor for financial damages. The court has partially accepted the claimants´ request distinguising between photos published on the internet and photos published in the hard copy of the tabloide. Regarding the damages already occurred, the court has barred the defendant from assigning or forwarding all digital forms of the pictures to any third party, ordering to surrender all of them to the plaintiffs. However, no action was taken regarding the potential future publication of these images by the defendant.

Although injunctions to halt or prevent damages are subject to Private Int´l Law general rules on non-contractual obligations, their specific notes in this field must be highlighted. The spatial scope of injunctions to halt or prevent damages –contained either in a provisional measure or in a final judgment on the merits- is linked to the basis on which the jurisdiction of the court of origin is founded. In this case, an unlimited jurisdiction based on the defendant's domicile -article 2BrusselsI Regulation- or on the place of origin –the establishment of the publisher, in accordance with article 5.3- (both of them available in this case), allows obtaining injunctions to halt or prevent damage in any Member State where these damages could be suffered. Nevertheless, in this case the ruling is limited to French jurisdiction. If the court had resorted to this possibility the main problem would be the eventual recognition and enforcement of the French judgment in each EU Member State in which the publication had been distributed and where the victim was known (for example, Italy, Ireland or Denmark where several tabloids have already published the controversial photos), apart from the potential circulation of these photos on the Internet.

The freedoms of speech and information tend to prevail in most legal systems over rights related to the protection of privacy provided that certain conditions are met. Notwithstanding this finding, the different balance between these fundamental rights determines that their respective scopes –and the consideration of certain acts as illegitimate- vary deeply from oneMemberStateto another. In this field, public policy plays a decisive role not only in the application of the provisions on choice of law but also on the recognition and enforcement of judgments. In particular, the recognition and enforcement of decisions–especially in international defamation cases- public policy has a particular relevance as the main cause to deny recognition and enforcement of a judgment (art. 34.1 Brussels I Regulation). Although within the EU the use of public policy not to recognise a decision originating in another Member State should be exceptional in practice,

since all Member States belong to the European Convention on Human Rights and they are all bound by the Charter of Fundamental Rights, such a possibility is still available. In fact, the Italian newspaper that published recently the new photographies has already expressed that, in accordance with the Italian law, the publication of these photographies does not imply a violation of the Duchess right to privacy and that they are protected by the freedom of press. This only an example, since the number of countries –Member and not Member of the EU- in which the photographies could be distributed using Internet, is potentially numerous.

This scenario would not improve if a European uniform rule of conflict of laws in this field is finally established (Rome II Regulation) without a parallel revision of the recognition and enforcement provisions of the Brussels I Regulation. Looking at the Proposal of December 2010 for the review of the Brussels I Regulation, the recognition and enforcement provisions establish that the judgments arising out of disputes concerning violations of privacy and rights relating to personality will be excluded from the abolition of exequatur and subject to a specific procedure of enforcement (public policy being kept as reason for the refusal of recognition). Hence, in the current circumstances, victims could only ensure the success of their actions in multiple States by bringing their claims before each national jurisdiction where damages occurred (*locus damni*) with limited jurisdiction (*Shevill*, latter confirmed by *eDate)*.

In conclusion, as long as the unification of conflict of laws rules in personal rights within the EU is pursued –in search for a common balance between the interests in conflict-, the exclusion of recognition and enforcement of the decisions in this field from Brussels I would seem clearly detrimental for victims. For the time being, the Duchess will therefore would have to require a large number of courts intervention to achieve a complete and effective protection.

Ubertazzi on Kate Provence Pictures

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The publication of topless photographs of Britain's likely future queen Catherine Elizabeth Middleton, the Duchess of Cambridge (hereinafter: Kate Middleton or the Duchess), by certain newspapers in several EU countries – such as France, Italy, Sweden, Denmark and Ireland – demonstrates once more the need to strike a fair balance between the protection of the right to respect for private life guaranteed by Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the right to freedom of expression granted under Art. 10 of the same Convention.

The Kate Middleton photo case is reminiscent of the very recent and famous judgments of the European Court of Human Rights (hereafter: ECtHR) in the cases von Hannover v. Germany of February the 7th 2012 (Grand Chamber, applications nos. 40660/08 and 60641/08: hereinafter: von Hannover judgment 2) and of June the 24th 2004 respectively (Third Section, application no. 59320/00: hereinafter: von Hannover judgment 1). In both these cases, the elder daughter of the late Prince Rainier III of Monaco, Princess Caroline von Hannover, lodged applications before the ECtHR against the Federal Republic of Germany alleging that the refusal by the German courts to grant injunctions to prevent further publications of different sets of photos of her infringed her right to respect for her private life as guaranteed by Article 8 ECHR.

The ECtHR maintained that under Articles 8 and 10 ECHR States are obliged to balance the protection of the fundamental human right to respect for private life, which comprises the right to control the use of one's image, on the one hand, and the fundamental human right of freedom of expression respectively, which extends to the publication of the relevant photos by the press under a commercial interest, on the other hand. To strike this balance member States typically insert specific domestic provisions in their copyright acts, prohibiting the dissemination

of an image without the express approval of the person concerned, except where this image portrays an aspect of contemporary society, on the condition that its publication does not interfere with a legitimate interest of the person concerned (see Sections 22(1) and 23(1) of the German Copyright Arts Domain under which the German courts refused to grant the injunction required by Princess Caroline). These provisions are interpreted so as to distinguish between private individuals unknown to the public and public or political figures, affording the former a wider right to control the use of their images, whereas the latter a very limited protection of their right to respect for private life: then, public figures have to accept that they "might be photographed at almost any time, systematically, and that the photos are then widely disseminated even if [...] the photos and accompanying articles relate exclusively to details of their private life" [para 74 Hannover I]. However, under this interpretation the balance between the right to respect for private life and the right to freedom of expression struck by the provisions at stake is too much in favour of the latter, but insufficient to effectively protect the private life of public figures, since even where a person is known to the general public he or she may rely on a legitimate expectation of protection of and respect for his/her private life. Thus, these provisions should preferably be understood narrowly, namely as allowing the publication of the pictures not merely when the interested person is a public figure, but rather when the published photos contribute to a debate of general interest.

To establish if the relevant pictures satisfy this last requirement, according to the ECtHR regard must be given to different factors (von Hannover judgment 2, para 109-113): whether the person at stake is not only well known to the public, but also exercises official functions; whether the pictures relate exclusively to details of his/her private life and have the sole scope of satisfying public curiosity in that respect, or rather concern facts capable of contributing to a general debate in a democratic society; whether the pictures have been taken in a secluded and isolated place out of the public eyes or even in a public place but by subterfuge or other illicit means, or rather in a public place in conditions not unfavourable to the interested person; whether the publication of the photos constitutes a serious intrusion with grave consequences for the person concerned, or rather has no such effects; and whether the pictures are disseminated to a broad section of the public around the word, or rather are published in a national and local newspaper with limited circulation.

Under these conditions, in the von Hannover judgment 1 the ECtHR held that the German courts refusal to grant injunctions against the further publications of certain photos of Princess Caroline von Hannover had infringed her right to respect for private life ex Art. 8 ECHR: in fact, despite the applicant being well known to the public, she exercised no official function within or on behalf of the State of Monaco or any of its institutions, but rather limited herself to represent the Prince's Monaco family as a member of it; furthermore, the photos related exclusively to details of her private life and as such aimed at satisfying a mere public curiosity; finally these photos where shot in isolated places or in public places but by subterfuge. In contrast, in the von Hannover judgment 2 the ECtHR reached the opposite conclusion, namely holding that there had been no violation of Article 8 of the ECHR: in fact, despite Princess Caroline exercising no official functions, she was undeniably well known to the public and could therefore not be considered an ordinary private individual; furthermore, some of the photos at stake supported and illustrated the information on the illness affecting Prince Rainer III that was being conveyed – reporting on how the Prince's children, including Princess Caroline, reconciled their obligation of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday – and as such were related to an event of contemporary society; moreover, despite the photos having been shot without the applicant's knowledge, they were taken in the middle of a street in St. Moritz in winter not surreptitiously or in conditions unfavourable to the applicant.

In light of these conclusions, if the courts of the EU States where the topless pictures are being published refused to grant injunctions to prevent further publications, at least in their respective territories, Kate Middleton -after having exhausted the internal procedural remedies in the States at stake – could lodge applications against these same States before the ECtHR for the infringement of their positive obligations to protect her private life guaranteed by Article 8 ECHR. In such circumstances, the ECtHR would most probably conclude that there have been violations of this Article by the States involved.

In fact, despite the Duchess exercising official functions by performing senior Royal duties since her first trip to Canada and US in July 2011 (see The Telegraph), the pictures at stake relate exclusively to details of her private life and have the sole scope of satisfying public curiosity in that respect, but do not concern facts capable of contributing to a general debate over Kate Middleton's

official role. Furthermore, the pictures were taken by subterfuge while the couple were on a private property at a luxury holiday chateau owned by the Queen of England's nephew – who promised absolute privacy to the Duchess -, by means of a photographer equipped with a high powered lens from a distance of over half a mile away from the chateau (see The Daily Mail ; P A Clarke). Also, the publication of the photos constitutes a serious intrusion with grave consequences for the couple, evinced by their official statement, according to which "the Royal Highnesses have been hugely saddened to learn that" the publication of the pictures at stake has "invaded their privacy in such a grotesque and totally unjustifiable manner. […] The incident is reminiscent of the worst excesses of the press and paparazzi during the life of Diana, Princess of Wales, and all the more upsetting to the Duke and Duchess for being so" (see The Huffington Post). Finally, despite the pictures having been disseminated by local newspapers with apparently limited national circulation, the original publications have initiated the immediate distribution of the images "over the internet like wild-fire", with the result of reaching a broad section of the public around the world (see SeeClouds).

Muir Watt on Kate Provence Pictures

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*Cachez ce sein…*It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis:* whatever the applicable rules, the only real constraint on adjudication in such an

instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of

rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from "above", that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.),?*Collected Courses of the Academy of European Law*, Volume Ill. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various "operations" which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial ("no, we did not cross the bounds, the royals were visible through a telescopic lense"); counter-argument ("well, we merely made use of our fundamental freedom in the public interest"); the formulation of an exception to an otherwise accepted principle ("yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest"); then finally by "shifting levels" from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern, and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly

complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

> *§124. … the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying*

> *articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken…§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.*

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional dimension, frequently debated in terms of the lack of effectiveness of traditional

measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP 2010.495*). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

Kate Provence Pictures: Online Symposium

Two weeks ago, French tabloid *Closer* published photos of Prince William and his wife Kate Middleton taking the sun on the terrasse of a Chateau in Provence this summer, including pictures of the latter appearing topless.

The Royal couple has since then initiated proceedings in France, both civil and criminal against the publisher of the tabloid. A French court has issued an injunction ordering the publisher to hand over all digital forms of the pictures and enjoining it from assigning them to any third party. However, pictures had already circulated and were published in Italy and Ireland. They have now been offered to Scandinavian tabloids which have announced that they will soon publish them. A Danish newspaper has announced a 16-page "topless Kate" supplement.

What does this case reveal about the private international law of privacy in Europe? Was the Duchess of Cambridge appropriately protected? Will she have to sue separately publishers in all European jurisdictions where the publication will occur? Should she have access to a global injunction allowing her to litigate in one single forum? At a time when the European lawmaker is considering adopting a European choice of law rule for violations of privacy and rights relating to personality, what does this case teach us?

In the days to come, several scholars will comment and share their views on the implications of the case.

- Muir Watt on Kate Provence Pictures
- Ubertazzi on Kate Provence Pictures
- Cordero on Kate Provence Pictures
- Von Hein on Kate Provence Pictures
- Dickinson on Kate Provence Pictures

Grusic on the Territorial Scope of Employment Legislation and Choice of Law

Ugljesa Grusic, Lecturer at University of Nottingham – School of Law and PhD Candidate at London School of Economics & Political Science (LSE), has posted an article on SSRN that deals with the Territorial Scope of Employment Legislation and Choice of Law. It has recently been published in the Modern Law Review and can be downloaded here. The abstract reads as follows:

> *Traditionally, the determination of the territorial scope of the statutory rights conferred by employment legislation forming part of English law has been regarded as an issue entirely disconnected from the choice of law process. Indeed, this view formed the basis of the key decision addressing the problem of territoriality, Lawson v Serco, decided by the House of Lords in 2006. After*

presenting the current state of the law with regard to the territorial scope of employment legislation, this article takes a critical look at Lawson v Serco. It is argued that the 'European' choice of law rules must have a greater importance for determining the territorial scope of employment legislation and, consequently, that the approach pursued in Lawson v Serco is no longer correct, if it ever was, and should not be followed in the future.

Lüttringhaus on Uniform Terminology in European Private International Law

Jan D. Lüttringhaus, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has posted an article on SSRN that deals with the uniform interpretation of the Rome I, Rome II and Brussels I Regulations ("Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht – Grund und Grenzen der rechtsaktsübergreifenden Auslegung dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse". The article is forthcoming in RabelsZ and can be downloaded here. The English abstract reads as follows:

Autonomous and interdependent interpretation is a valuable tool for completing and systematising the growing body of European private international law. Yet, the general presumption in favour of uniform interpretation of similar notions in the various European Regulations as set out in Recital (7) of both Rome I and Rome II is overly simplistic. Total uniformity cannot be achieved because provisions governing conflict of laws and jurisdiction often differ in both function and substance.

Against this background, this paper analyses the rationale as well as the limits of autonomous and inter-instrumental interpretation. It demonstrates that uniform concepts may be developed in areas where the underlying motives

behind European provisions on conflict of laws and jurisdiction coincide, e.g. in the context of consumer and employment contracts or direct claims under Rome II and Brussels I. These parallels pave the way for an autonomous understanding of the various notions used in the respective Regulations. However, interdependent interpretation finds its limits in teleological considerations as well as in the persisting functional differences between European instruments on conflict of laws and jurisdiction.

Optional Common European Sales Law, Private International Law and Uniform Sales Law (article)

Maud Piers (Professor at the Civil Law department, Ghent University), and Cedric Vanleenhove (Assistant and Ph.D Researcher at the Private International Law department, Ghent University), have published *Another Step Towards Harmonization in EU Contract Law: the Common European Sales Law* on SSRN. The article has also been published in *Contratto e Impresa / Europa* (Italy) 2012/1, 427-453 and the *Revista Trimestral de Direito Civil* (Brazil) 2012, 191-218. The abstract reads as follows:

> A Common European Contract Law has been in the pipeline for some time now and recently, another step in that direction was taken. On 11 October 2011, the European Commission issued a proposal for a Regulation that would establish such a European instrument. This Regulation aims to remedy a series of legal impediments that sellers and buyers face in their cross-border trade. With the 'Optional Common European Sales Law', the European Commission opts for a secondary regime that the Member States should adopt as part of their national law. This Common European Sales Law will not replace the existing national sales laws, but will exist autonomously, together

with and next to the 27 national contract law systems already in place. This is the solution the Commission selected from the seven options listed in its Green Paper of 2010. In the 'Explanatory Memorandum' to the Proposal for a Regulation, the Commission explains that this was considered the most optimal route to achieve the intended objectives while still respecting the principles of subsidiarity and proportionality.

The goal of this article is three-fold. First, to inform the reader of the Proposal for a Regulation on a Common European Sales Law and introduce its objective and applicability. Second, to examine whether the Optional Common European Sales Law, and the regime that the Proposal for a Regulation introduces, would create a legal environment that stimulates the intra-Community, cross-border trade in the most adequate manner. Third, to assess the position of the Optional Common European Sales Law vis-à-vis the existing framework of private international law and uniform sales law.

This article consists of six parts. Under Title 1, the authors provide a brief introduction on the background and operation of the Common European Sales Law.

The authors then scrutinize this instrument more critically by raising a number of questions. A first question relates to the scope of this instrument (Title 2). A second question deals with the way in which parties may or should express their choice for the application of the Common European Sales Law (Title 3). A third question they briefly touch upon concerns the way in which the uniform application of the instrument will be safeguarded (Title 4).

The authors also examine how this new and unique instrument may coexist with the already established framework of private international law and uniform sales law. Under Title 5, they will more specifically reflect upon the position of the Common European Sales Law in relation to the regime of the Rome I Regulation. Under Title 6, they also look at how the proposed instrument corresponds with the rules of the CISG.

The authors conclude with a number of observations and recommendations with which they hope and intend to facilitate the drafting proceedings of the

European legislators.

Download here.

Foreign State Immunity in Australia

The High Court of Australia has rejected Garuda's appeal against the finding that it was not immune from Australian jurisdiction as a "separate entity" of a foreign state, namely Indonesia. The case arose from a proceeding brought by the Australian competition regulator (the ACCC) over alleged price-fixing in the air freight market to and from Australia. Our earlier posts on the case are here and here.

The decision turned on the meaning of the "commercial transaction" exception to state immunity in s 11 of the Foreign States Immunities Act 1985 (Cth), which may be of interest to British readers given the similar (but not identical) wording of s 3 of the State Immunity Act 1978 (UK).

Garuda argued that it did not fall within the "commercial transaction" exception either because the proceedings were not brought against it by a party to the transaction seeking private law relief; or because the transaction (the alleged price-fixing) was not contractual in nature.

The High Court rejected those arguments. The joint judgment of French CJ, Gummow, Hayne and Crennan JJ held that:

> *"The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by s 9 and s 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of*

> *a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to Australia. The definition of a "commercial transaction" is satisfied." [at [42]]*

Heydon J agreed, and emphasised that the individual contracts with air freight clients were sufficient to engage the "commercial transaction" exception. "If a contract in contravention of [competition law] is capable of being a commercial transaction, non-contractual arrangements or understandings are capable of being "a commercial, trading … transaction … or a like activity"' within the meaning of s 11 [at [74].

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission [2012] HCA 33 (7 September 2012)