

## The law applicable to cross-border defamation on social media: whose law governs free speech in ‘Facebookistan’?

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In the past decade, social media platforms such as Facebook and Twitter have gone from being a novelty to becoming an essential part of many people’s personal and professional lives. Like previous changes in communications technology, social media poses a legal challenge. Can existing laws be applied or adapted to this new context, or does it pose new problems requiring new solutions? This article examines one aspect of this question through an analysis of the private international law issue of what law applies (or should be applied) to cross-border defamation claims on social media. Cross-border defamation raises a range of issues, including private international law questions regarding which courts should adjudicate claims and which substantive law should be applied. While the jurisdictional issues are important and have a significant impact on the issues of applicable law, there are distinct questions and concerns raised by the choice of law question for cross-border defamation on social media. Indeed, it is a topic which perhaps raises some of the most difficult issues in private international law, as well as having important broader consequences for media law and free speech regulation. At a general level, it concerns choice of law in *defamation*, which has proven a particularly challenging subject in practice and in proposed law reforms – at present it remains excluded from both UK and EU statutory rules concerning choice of law in tort. More specifically, it concerns defamation *online*, a context which might be grounds for suggesting that a further specialised rule is required – a view taken by the ECJ in relation to jurisdiction over online defamation. And finally, it concerns defamation online on *social media*, which raises challenging issues in terms of adapting the law to new media contexts, as well as identifying the relevant ‘public’ within which a reputation is established. These are not just difficult practical questions, arising with increasing frequency in litigation, but also problems of principle which have broader implications. As social media become increasingly important modes of socialisation and communication, greater attention will need to be paid to the question of whose law governs standards of free speech on

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social media platforms – an important part of the question of whose law rules ‘Facebookistan’.

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## 1. Introduction

In the past decade, social media platforms such as Facebook and Twitter have gone from being a novelty to becoming an essential part of many people’s personal and professional lives. They have been viewed as a threat not only to traditional media, but also to authoritarian governments, particularly in the context of the so-called ‘Arab spring’ which commenced in 2010. Like previous changes in communications technology, social media also poses a legal challenge. Can existing laws be applied or adapted to this new context, or does it pose new problems requiring new solutions?

This article examines one aspect of this question through an analysis of the private international law issue of what law applies (or should be applied) to cross-border defamation claims on social media. It focuses on the approach under current English law, as well as considering various other approaches and possible options for reform. Cross-border defamation (online and offline) raises a range of private international law issues, including important questions regarding which court should adjudicate claims (much-discussed in the context of the phenomenon of ‘libel tourism’) as well as which substantive law should be applied. When compared with issues of jurisdiction, the subject of reform under the Defamation Act 2013, relatively little attention has been given to questions of choice of law in cross-border defamation. While the jurisdictional issues are important and have a significant impact on the issues of applicable law, there are distinct questions and concerns raised by the choice of law question, particularly in relation to social media – indeed, it is a topic which perhaps raises some of the most difficult issues in private international law, as well as having important broader consequences for media law and free speech regulation.

The article begins, in section 2, by discussing the jurisdictional issues and rules which help frame the choice of law problem. It then examines the choice of law issues as if ‘unpeeling the layers of an onion’, with each subsequent section focusing on increasingly particular aspects of the problem of choice of law in cross-border defamation on social media. At a general level, the problem concerns choice of law in *defamation*, which has proven a particularly challenging subject in practice and in proposed law reforms – at present it remains excluded from both UK and EU statutory rules concerning choice of law in tort, as discussed in section 3, leaving it regulated by a common law rule developed in the nineteenth century. More specifically, the problem concerns defamation *online*, a context which might be grounds for suggesting that a further specialised rule is required (a view taken by the ECJ in relation to jurisdiction over online defamation), as explored further in section 4. And finally, it concerns defamation online in the

context of *social media*, which raises challenging issues in terms of adapting the law to new media contexts, as well as identifying the relevant ‘public’ within which a reputation is established or speech should be protected, as considered in section 5. These are not just difficult practical questions, arising with increasing frequency in litigation, posing significant problems in applying traditionally territorial rules to a de-territorialised and perhaps even anonymised online context. The regulation of communication online and in particular on social media also raises problems of principle which have broader implications. As social media become increasingly important modes of socialisation and communication, greater attention will need to be paid to the question of whose law governs standards of free speech on social media platforms – an important part of the question of whose law rules ‘Facebookistan’.<sup>1</sup>

## 2. Jurisdiction and choice of law in defamation

Where a cross-border defamation claim arises, two distinct but connected private international law issues may arise. The first is the jurisdictional question of which court may hear the claim. The second is the applicable law question of what substantive governing law the court will apply. The two questions are sometimes related in a formal sense. Under the traditional common law approach the exercise of jurisdiction is discretionary (as discussed further below), and the courts are more likely to exercise jurisdiction where the dispute is governed by English law.<sup>2</sup> The issues are also sometimes related in a more informal sense. Claimants will often choose to bring proceedings in a particular jurisdiction because of perceived advantages presented by that forum. Those advantages may be procedural, such as advantageous rules of discovery which might help build a case. They may also be substantive, in the sense that different courts might apply different laws to the same set of facts. A party might thus be attracted to bring proceedings in a particular place because the courts of that place will apply a favourable applicable law – as discussed further below, English choice of law rules have been widely considered to incentivise such ‘forum shopping’ in defamation cases because they tend to lead to the application of English law, which has often been viewed as favourable to claimants.

Reform of jurisdictional rules is one important way of responding to the issues of cross-border defamation, as it can decrease the likelihood that essentially foreign communications will be litigated before the English courts. The jurisdictional reforms introduced in the UK through the Defamation Act 2013 have attempted to respond to the perceived problem of forum shopping in defamation cases, or as it has become known, ‘libel tourism’.<sup>3</sup> They are principally concerned

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<sup>1</sup>The term ‘Facebookistan’ is discussed further in section 5.2 below.

<sup>2</sup>See eg *Novus Aviation Ltd v Onur Air Tasimacilik* [2009] EWCA Civ 122.

<sup>3</sup>See generally eg Trevor Hartley, “‘Libel Tourism’ and Conflict of Laws” (2010) 59 *International & Comparative Law Quarterly* 25.

with cases in which foreign defendants are being sued before the English courts in relation to publications which have originated outside England and which are also distributed outside England.

The major reforms are in section 9 of the Act, which provides (in relevant part) that:

- (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
- (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

The effect of these two reforms is to change the exercise of jurisdictional discretion under English law, known as *forum conveniens* or *forum non conveniens*.<sup>4</sup> Under this test, the courts have traditionally taken jurisdiction based on the defendant's presence in the territory or based on some connection between the dispute and the territory (such as the claim being based on a tort committed in the territory) unless there is another clearly more appropriate forum. Even where there is another clearly more appropriate forum, the courts will not decline jurisdiction where it can be demonstrated that the claimant would be denied justice if denied access to the English courts.

Under the revised test introduced by the Defamation Act 2013, the court must be satisfied that England and Wales is 'clearly the most appropriate place' in which to bring an action. Further, in determining this question, the court must take into account any publication of the statement concerned in any place. Traditionally, there has been some doubt as to whether application of the *forum non conveniens* test should take into account only the claim brought before the court. An 'abuse of process' threshold existed, requiring a 'real and substantial' tort (meaning more than an insignificant amount of publication or reputation to protect) in England, but this was a minimal requirement, and did not require comparing the significance of English publication with publication elsewhere.<sup>5</sup> A claimant might thus rely

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<sup>4</sup>For the sake of convenience these tests will be referred to henceforth as '*forum non conveniens*', but strictly speaking they apply in distinct contexts – *forum non conveniens* applies where proceedings have been commenced based on the presence of the defendant in the territory and the defendant is asking the court not to exercise that jurisdiction, and *forum conveniens* applies where the claimant is seeking permission to commence proceedings against a defendant who is not in the territory, on the basis of a connection between the dispute and the forum. The only difference between the two tests in modern law is a partial difference in the burden of proof – see further *The Spiliada* [1987] AC 460 (Lord Goff).

<sup>5</sup>*Jameel v Dow Jones and Co* [2005] QB 946; *Cairns v Modi* [2012] EWHC 756 (QB).

exclusively on publication of the material in England, even if it had been simultaneously published in other jurisdictions, arguing that the English courts were the most appropriate forum to hear this *particular* claim, ie, arising out of the English publication.<sup>6</sup> Under the revised test, the court is clearly required to take into account other publications of the material, even if they do not form the basis of the claim.

The merits or otherwise of these reforms are not the major focus of this article. It should be noted, however, that the jurisdictional rule which has been introduced is potentially quite problematic in two main ways.

First, the rule appears to exclude the possibility that jurisdiction might be exercised where the English courts are not the most appropriate forum but to deny the claimant access to the English courts would be to deny them access to justice – an important second element of the traditional *forum non conveniens* test.<sup>7</sup> A claimant whose reputation has been damaged in England and also more substantially in a foreign jurisdiction whose courts are proven to be biased against the claimant on political or racial grounds may still be denied access to the English courts, unless ‘appropriateness’ is interpreted to encompass ‘fairness’ concerns (which is not the traditional position).<sup>8</sup> Without such an interpretation, it is not clear that this rule would be compatible with the United Kingdom’s obligations to ensure ‘access to justice’ under Article 6 of the European Convention on Human Rights.<sup>9</sup>

Second, the rule appears to go too far in another respect, in that it requires the English courts to be ‘clearly the most appropriate place’ to bring the proceedings, not just an appropriate place. A harmful publication which was equally distributed in England and the United States, causing equal damage to reputation in both places, can now no longer be sued for in England. In seeking to reject improper forum shopping, again, the rule may deny access to the English courts to deserving claimants, and unduly deny effectiveness to English laws governing the protection of reputations.

These criticisms aside, the reforms in the Defamation Act 2013 do reduce the likelihood of proceedings arising out of foreign defamatory acts being successfully brought in the English courts. They thus reduce the number of cases in which

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<sup>6</sup>See eg Hartley (n 3) 29 (‘if the claimant limits his claim to a remedy for publication in England, the English courts will apply *forum non conveniens* solely on the basis of such publication’); but see *King v Lewis* [2004] EWCA Civ 1329 [27] and *Chadha v Dow Jones* [1999] ILPr 829 (CA) [23], each deciding that under *forum non conveniens* the court could take into consideration the extent of publication and damage to reputation abroad even if not forming part of the claim.

<sup>7</sup>See eg *Connelly v RTZ* [1998] AC 854; *Lubbe v Cape Plc* [2000] UKHL 41.

<sup>8</sup>See eg *Cherney v Deripaska* [2009] EWCA Civ 849; *Berezovsky v Forbes* [2000] UKHL 25.

<sup>9</sup>See eg JJ Fawcett, ‘The Impact of Article 6(1) of the ECHR on Private International Law’ (2007) 56 *International & Comparative Law Quarterly* 1.

choice of law issues will arise before the English courts. The Act does not, however, and realistically could not, entirely eliminate cases which may be governed by foreign law, for two reasons.

First, jurisdiction over claims against defendants ‘domiciled’ in England or elsewhere in the European Union is governed by the Brussels I Regulation.<sup>10</sup> The Defamation Act 2013 does not purport to change the rules under the Regulation, and would have been ineffective as a matter of EU law to the extent that it tried to do so. Under the Regulation, proceedings may be brought against any English domiciled defendant for any defamatory act published by them anywhere in the world.<sup>11</sup> Proceedings may also be brought against any EU domiciled defendant in England where the claim arises out of a defamatory act which was either published in England or caused damage to reputation in England,<sup>12</sup> or which arose out of the activities of a branch located in England.<sup>13</sup> As discussed further in section 4.2 below, under a special rule introduced by the European Court of Justice a claimant whose ‘centre of interests’ is located in England may also sue any EU domiciled defendant in England for defamation online which causes at least some damage in England.<sup>14</sup> The suit is not limited to damages arising out of the English publications, but may be in respect of publications anywhere in the world. Jurisdiction under the Regulation is not subject to the *forum non conveniens* discretion,<sup>15</sup> and so it does not matter whether the claims brought under any of these headings are based on defamation in England or elsewhere – they must be heard by the English courts.

Second, there will still be cases in which claims against non-EU domiciled defendants arising out of their foreign publications will go ahead in the English courts, even under the Defamation Act 2013. This is particularly where a foreign publication was principally produced or distributed in England, as well as in other jurisdictions. Claims in defamation may essentially be brought against non-EU domiciled defendants on the basis of their presence in the territory (either physical presence for natural persons, or a fixed place of business for

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<sup>10</sup>The most recent version is Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), EU OJ L 351/1 (20 December 2012). ‘Domicile’ has a special definition for the purposes of the Regulation, set out in Articles 62–63, which are supplemented in the United Kingdom by the Civil Jurisdiction and Judgments Order 2001, s 9.

<sup>11</sup>Art 4. For a recent example see *The Bussey Law Firm PC v Page* [2015] EWHC 563 (QB).

<sup>12</sup>Art 7(2) – see eg *Shevill v Presse Alliance* [1995] ECR I 415; Hartley (n 3) 28.

<sup>13</sup>Art 7(5) – see eg *Somafer v Saar-Ferengas* [1978] ECR 2183; *Lloyds Register of Shipping v Campenon* [1995] ECR I 961.

<sup>14</sup>*eDate Advertising v X*, Case C-509/09 (25 October 2011), [2012] QB 654.

<sup>15</sup>*Owusu v Jackson* [2005] ECR I-1383; *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065.

corporations),<sup>16</sup> or on the basis that the tort occurred in England.<sup>17</sup> For jurisdictional purposes, this might again mean either the defamatory material being published in England, or the damage to reputation taking place in England.<sup>18</sup> It may also (debatably) include consequential loss being suffered in England.<sup>19</sup> If the English courts are the most appropriate place for the litigation, these claims may include damages arising out of not only publication of defamatory material in England, but also around the world.

The result of both these considerations is that although the English courts are less likely to hear cases arising out of cross-border defamation than they were prior to the Defamation Act 2013, such cases will probably continue in significant numbers.<sup>20</sup> As noted above, one of the greatest incentives for forum shopping in favour of the English courts is the potential application of English law, as a favourable governing law for claimants. The problem of choice of law is thus not only important in its own right, but also for how it affects the jurisdictional issue of forum shopping. To put this another way, while the focus of reform efforts has been on jurisdictional changes (partly to reduce choice of law problems), it is equally important to consider choice of law changes (partly to reduce jurisdictional problems).

### 3. Choice of law in defamation

The remainder of this article focuses on the question of how the courts determine or should determine the law which governs cases of cross-border defamation in a social media context, beginning first with a general outline of the approach taken to determining the law applicable to defamation claims.

#### 3.1. *The double-actionability rule*

Although it has received a degree of clarification and modification in subsequent cases, the basic traditional choice of law rule in tort in English law – a rule which still applies to choice of law in defamation today – was established in 1870, in *Phillips v Eyre*.<sup>21</sup> This case arose out of claims against Edward John Eyre, who served as colonial Governor of Jamaica. Faced with an uprising against the

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<sup>16</sup>See generally eg *Maharanees of Baroda v Wildenstein* [1972] 2 QB 283; *Adams v Cape Industries* [1990] 2 WLR 657.

<sup>17</sup>Civil Procedure Rules, Practice Direction 6B, Rule 3.1(9).

<sup>18</sup>*Berezovsky v Forbes* [2000] UKHL 25.

<sup>19</sup>*Cooley v Ramsey* [2008] EWHC 129; but see *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205.

<sup>20</sup>See further eg Peter Arnt Nielsen, 'Libel Tourism: English and EU Private International Law' (2013) 9 *Journal of Private International Law* 269.

<sup>21</sup>*Phillips v Eyre* (1870) LR 6 QB 1. See further generally Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) 32 *Melbourne University Law Review* 822.

local authorities in 1865, known as the Morant Bay Rebellion, he used brutal and excessive force to suppress the protestors, with hundreds killed and many more indiscriminately flogged. He was heavily criticised in England, and leading critics (including John Stuart Mill and Charles Darwin) formed the 'Jamaica Committee' to lobby for his prosecution in England, although he also had a number of prominent supporters. Before the end of his term of office in Jamaica, he passed a law (as Governor, with the support of the Jamaican parliament) expressly indemnifying himself, together with any other person involved, against any claims arising out of acts in suppression of the rebellion. When Eyre returned to England, civil proceedings were commenced against him, by parties involved with the rebellion and with the support of his critics, for assault and false imprisonment.<sup>22</sup>

This factual background highlights that although this was a private law claim, it had an intensely public character and context. The civil claim was being brought as an effective substitute for criminal proceedings, and concerned conduct in Jamaica which had received special regulation there through the statute of indemnification. These somewhat unusual facts gave rise to a somewhat unusual choice of law rule. The court held as follows:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done.<sup>23</sup>

In so doing, the court hybridised two traditional influences on choice of law in tort – the first viewing tort law as comparable to criminal law,<sup>24</sup> and thus as a matter of public law governed by the law of the forum, and the second viewing tort law as a matter of territorial conduct regulation.<sup>25</sup> The peculiarity of this rule was to insist on the application of both principles, requiring that liability be established under both sets of laws, the *lex fori* (law of the forum) and the *lex loci delicti* (law of the place of the tort) – thus it is widely known as the rule of 'double-actionability'.

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<sup>22</sup>Lead counsel for the claimants was John Richard Quain, a fellow of University College in London, after whom, together with his brother, the Quain professorships at UCL are named.

<sup>23</sup>*Phillips v Eyre* (1870) LR 6 QB 1, 28.

<sup>24</sup>As the Law Commission and Scottish Law Commission expressed it: 'the law of tort and delict was formerly seen, much more than it is today, as having a punitive rather than a compensatory function. As such it was more closely allied to criminal law, an area of the law where there is no question of a court in this country applying anything other than the domestic law of England or Scotland': Joint Report of the Law Commission (No 193) and the Scottish Law Commission (No 129) on 'Private International Law: Choice of Law in Tort and Delict' (1990) [2.6], [www.bailii.org/ew/other/EWLC/1990/193.pdf](http://www.bailii.org/ew/other/EWLC/1990/193.pdf).

<sup>25</sup>See further eg Symeon Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173, 188.

Almost a century later, the rule established in *Phillips v Eyre* received significant further development by the courts. In *Boys v Chaplin*,<sup>26</sup> the House of Lords heard a claim arising out of a car accident in Malta between two English parties. The court held that exceptionally the double-actionability requirement could be disapplied in favour of the exclusive application of English law. While the court described the exception to double-actionability as a discretion which was necessary to avoid an injustice, arguably the real reasoning behind this decision was that the two parties were English, and the key issue in the proceedings was the question of the allocation of loss between those parties. The court thus acknowledged the influence of a third idea of tort law as concerned with loss-distribution, principally developed in the United States,<sup>27</sup> and indeed the court cited the leading US authorities which had developed that idea.<sup>28</sup>

The exception to the double-actionability rule has been extended further by the courts to permit also the exclusive application of the law of the place of the tort – the other ‘arm’ of the traditional rule. In *Red Sea Insurance Co v Bouygues SA*,<sup>29</sup> the Privy Council held that a claim in tort brought before the courts of Hong Kong (against a company incorporated in Hong Kong, but with its head office in Saudi Arabia) arising out of problems with construction work in Saudi Arabia could be governed exclusively by the law of Saudi Arabia. The court held that this exception should be based on whether the law of the place of the tort had the ‘most significant relationship’ with the claim.<sup>30</sup> This reasoning, perhaps even more clearly than the exception introduced in *Chaplin v Boys*, suggests not just a qualification of the double-actionability rule, but a questioning of its underlying principles. It suggests a move away from the idea that tort law has a public regulatory character (which historically supported the necessity of applying the *lex fori*), toward a simpler analysis of the tort as concerned with conduct regulation (justifying the application of the *lex loci delicti*).

This leaves the traditional common law choice of law rule in tort in a somewhat confused position, at least when it comes to identifying the underlying principle or approach. The starting point remains the rule of double-actionability, which suggests a combination of viewing tort as having a public regulatory function as well as being concerned with conduct regulation. A flexible exception in favour of the law common to the parties has been introduced, which suggests an acknowledgement that the tort may instead be concerned with the allocation of losses within a relationship governed by a different law, instead of having a public or territorial regulatory character. But an alternative flexible exception in favour of the law of the place of the tort also exists, which suggests that the

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<sup>26</sup>*Boys v Chaplin* [1969] 2 All ER 1085.

<sup>27</sup>See further Symeonides (n 25) 188.

<sup>28</sup>[1969] 2 All ER 1085, 1102ff.

<sup>29</sup>*Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190.

<sup>30</sup>*Ibid*, 206.

public dimension of tort regulation may also be displaced in favour of a preference for the territorial law of the tort. Which of these approaches is adopted – which principle prevails – is largely left to the courts to resolve on a case by case basis, although the basic starting point remains the rule of double-actionability.

As noted above, this complex double-actionability rule continues to apply to claims for defamation brought before the English courts. But the significance of this fact needs to be understood within a broader context, in which defamation has been specifically excluded from two rounds of reforms to choice of law in tort, the first through a UK statute, and the second through an EU Regulation. The ongoing application of the double-actionability rule to defamation is therefore not a straightforward matter of continuity, but rather a point of particular exception. The double-actionability rule was not *designed* for defamation cases, but the alternative rules which have otherwise been adopted as ‘improvements’ on the double-actionability rule have not been viewed as such in the context of defamation. The following sections discuss these reforms, and consider why it was not viewed as appropriate for them to encompass choice of law in defamation and why no alternative reformed rule has been adopted.

### 3.2. *Private International Law (Miscellaneous Provisions) Act 1995*

The double-actionability rule was subject to widespread criticism as being ‘chauvinist’ and ‘parochial’<sup>31</sup> – it provided, at least viewed from one perspective, that English law should be applied to any tort, regardless of where in the world it was committed. Another way of expressing this criticism is that the ‘public’ function of tort law, which had historically justified the application of the *lex fori* by analogy to criminal law, was increasingly rejected. As a matter of ordinary private law, the continued presumption of applicability of English law did indeed appear parochial – out of step with the principles of choice of law, which start from the standpoint that foreign state legal orders are at least presumptively normatively equivalent to local law. The judicial modification of this rule through the development of a flexible exception did not do enough to satisfy all its critics.

The response to these criticisms culminated in a 1995 UK statutory reform. As noted above, defamation was excluded from this statutory regulation (in section 13). A brief explanation of the approach of the Act is still, however, helpful if we are to understand the reasons for this exclusion (discussed further in section 3.4 below).

The Act essentially established a two-stage test for determining the law applicable to a tort. Section 11(1) established the general rule, ‘that the applicable law is the law of the country in which the events constituting the tort or delict in question occur’, offering further guidance in section 11(2) on how that law should be determined where ‘elements of those events occur in different countries’. Essentially,

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<sup>31</sup>See eg Joint Report (n 24) [2.7].

the basic rule adopted here is a *lex loci delicti* rule – the law of the place of the tort. The second stage of the test, set out in section 12, provided for a flexible exception, under which a different law may be applied if this appears substantially more appropriate on the basis of a comparison of the connecting factors between the tort and different countries. While this rule is expressed in very general terms, in practice the courts have tended to use it almost exclusively for cases in which the relationship between the parties is centred around a different legal order. In *Edmunds v Simmonds*,<sup>32</sup> for example, two English parties were involved in a car accident in Spain while on holiday there – the court found that English law should be applicable, emphasising that both parties were English, and that most of the damages were suffered in England. Although not expressly put in these terms, the court essentially held that the issues in this case were concerned principally with loss distribution rather than conduct regulation, and that English law had the greatest interest in regulating these questions.

Two key features of the 1995 Act might therefore be identified. The first is that it abandons any prioritisation of the law of the forum, and thus rejects any ‘public’ dimension to choice of law in tort. The second is that it does not strictly decide between a conduct regulating or loss distributing approach. While the former is adopted as the most general rule, through the application of the *lex loci delicti*, the flexible exception allows the court to determine that a dispute, or an issue in a dispute, is more appropriately regulated by a different law, including where that issue concerns questions of loss allocation between parties whose relationship is centred in a different legal order.

### 3.3. The Rome II Regulation (2007)

Regulation of choice of law in tort has long been on the agenda of the European Union. The Rome II Regulation on the law applicable to non-contractual obligations<sup>33</sup> was finally enacted on 11 July 2007, coming into force from 11 January 2009 and applying to events which occur after that date.<sup>34</sup> Defamation was, however, excluded from the scope of the Rome II Regulation, under Article 1(2)(g), alongside violations of privacy.<sup>35</sup> This exclusion is intended to

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<sup>32</sup>*Edmunds v Simmonds* [2001] 1 WLR 1003.

<sup>33</sup>Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II’), EU OJ L 199, 31 July 2007.

<sup>34</sup>The date of commencement of the Regulation was unclear until settled in *Homawoo v GMF Assurances* [2011] EUECJ C-412/10.

<sup>35</sup>Claims in ‘privacy’ are not excluded from the Private International Law (Miscellaneous Provisions) Act 1995, and thus remain subject to that Act. Although a tort of ‘breach of privacy’ has not traditionally been part of English law, a claim may be brought before the English courts if it is governed by a foreign law which recognises such a tort. It also appears that a new tort of ‘misuse of private information’ has been recognised by the English courts – see *Google v Vidal-Hall* [2015] EWCA Civ 311.

be temporary, and Article 30(2) of the Regulation required the Commission to carry out a study on choice of law in the context of privacy and defamation no later than 31 December 2008, duly completed in February 2009 and consisting largely of a comparative analysis of existing choice of law rules applicable to privacy and defamation in the Member States.<sup>36</sup> Despite prompting from the European Parliament,<sup>37</sup> as discussed further below, the Commission has not yet taken any further steps in the matter.

The motivation for the Rome II Regulation was less a matter of modifying the choice of law rule of any particular state, and more a question of ensuring that the same choice of law rule would be applied in all Member States – the principal goal of the Rome II Regulation was harmonisation in pursuit of decisional harmony, itself in pursuit of improving the efficient functioning of the internal market (as set out in Recital 6). Although not applicable to defamation, several features of the Rome II Regulation may briefly be highlighted, which perhaps contribute to explaining the exclusion of defamation from its scope. One notable feature of the Regulation is that it contains a number of specific choice of law rules for particular torts – it represents a determination that different torts may indeed have different policy interests and concerns which ought to be reflected in specialised choice of law rules. The exclusion of defamation is thus partially the product of a determination that there does not need to be a ‘one size fits all’ rule of choice of law in tort.

The general choice of law rule in tort is set out in Article 4 of the Regulation. Article 4(1) specifies that a tort is generally governed by the law of the place of the tort, which is defined as the place in which direct damage is suffered. Article 4(2) specifies that this general rule is displaced in favour of the law of common habitual residence of the parties, should they have one. Finally, Article 4(3) specifies that if another law is ‘manifestly more closely connected’ than the law chosen under Article 4(1) or (2), which may particularly be the case where the parties have a pre-existing contractual relationship governed by a different law, then that law applies instead. The effect is a rule which combines a number of the elements and considerations examined in this article, not greatly dissimilar to that adopted under the 1995 Act in the United Kingdom – accepting and mediating uncertainly between the possibility of giving effect to the law of the place of the tort or the law common to the parties (or another law), but excluding any necessary role for the law of the forum, as is provided for under the traditional common law double-actionability rule.

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<sup>36</sup>JLS/2007/C4/028. Final Report, [http://ec.europa.eu/justice/civil/files/study\\_privacy\\_en.pdf](http://ec.europa.eu/justice/civil/files/study_privacy_en.pdf).

<sup>37</sup>See eg [www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-002703&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-002703&language=EN).

### 3.4. *The exclusion of defamation from statutory reform*

The history examined above leaves us with a simple fact – defamation has thus far been excluded from reforms in the field of choice of law in tort, leaving it governed by a double-actionability rule which has been widely criticised for being parochial and chauvinist. This section explores two possible explanations for this exclusion – one pragmatic, and one a point of principle.

The pragmatic explanation is that the double-actionability rule works in favour of English media organisations, and there is rarely political will to take on media interests. To explain this further, the issue of whether a claim is ‘actionable’ may well depend on the availability of a defence. The effect of the double-actionability rule is that the defendant gets the benefit of *two sets of defences* if proceedings are brought against them in England in relation to allegations of defamation in a foreign state. The claim may not proceed if a defence against it exists either as part of English law, or as part of the law of the place of the alleged publication. For English media organisations, this essentially means that, at least so far as proceedings against them in England are concerned, English law acts as a ceiling of liability, but does not exclude the possibility that liability may indeed be diminished further by a foreign legal system (such as that of the United States) which places greater emphasis on freedom of speech. Double-actionability, to put this another way, effectively means that where defamation proceedings are brought in England relating to foreign conduct, whichever system of law has the higher standard of free speech is applicable.<sup>38</sup>

The point of principle is that the law of defamation, when compared with the law governing traffic accidents or trespass to property, appears to engage greater (or at least distinct) public interests. The scope of the law of defamation is part of what defines the contours of a legal system’s rights of free speech, including political discourse. The reform efforts in the 1995 Act and the Rome II Regulation both shifted tort law away from its historic associations with criminal law (and the application of the *lex fori*), toward viewing it more as purely private law, subject to the same considerations of legal pluralism between states which justify choice of law rules more generally.<sup>39</sup> By contrast, the double-actionability rule preserves a role for the law of the forum, emphasising the public importance of regulating defamation and thus preserving (or constraining) free speech pursuant to the forum’s legal order. The continuation of the double-actionability rule in the context of defamation may thus be a defensible reflection of the distinct public implications of defamation law.

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<sup>38</sup>While English substantive defamation law is considered to be pro-claimant, English choice of law rules for defamation may therefore be considered pro-defendant. It is arguably the combination of these two features which has led to claimants suing foreign media organisations in England but confining their claim to English publications.

<sup>39</sup>See generally Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) 5.

The exclusion of defamation from EU regulation may also, to extend this further, not merely reflect a rejection of the Rome II Regulation's purely private law perspective on the regulation of tort law, but also a rejection of the idea that harmonised EU rules are appropriate on this question. If defamation law is concerned with the politically critical question of the balance between free speech and 'reputation',<sup>40</sup> it may be debated whether or when Member States ought to be under an obligation to recognise the balance struck in different legal orders, through recognition and application of foreign tort law. This concern may particularly be raised in regard to non-Member State legal orders, which may lack a tradition of human rights or democracy which encompasses strong free speech protection. While these complexities do not preclude the possibility of European solutions to these problems, they do go some way to explaining why the problems have proven so intractable in practice. The extent to which a community may agree that it is appropriate for the communications of its members to be governed by a foreign legal order is itself a difficult political question, and it is no great surprise that the views of the different Member States on this issue have not coalesced. Nevertheless, it is likely that the efforts at EU harmonisation in this field have not been exhausted.

Another way of expressing the analysis above is that the double-actionability rule requires that English legal standards of free speech protection must always be applied by English courts, regardless of the location of the relevant communication, as a matter of 'public policy' which overrides the usual respect given to foreign law. The evident risk with such a requirement is an over-application of English policy, exporting or projecting English standards of defamation unreasonably by applying them to a foreign context. This risk may be exacerbated by the rules which are applied to determine the location of a defamatory communication. English courts have traditionally taken the approach that a defamation takes place where the material is received and read.<sup>41</sup> Thus, an allegedly defamatory report concerning the Church of Scientology, prepared by the English police in England and subsequently sent to Germany, was considered to have been published in Germany.<sup>42</sup> US magazine publishers have similarly found that the distribution of their magazines in England, however small as a percentage of the overall print run, constitutes a distinct English publication, and thus that under English choice of law rules the only law applicable to a defamation claim arising out of those English publications is English law.<sup>43</sup>

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<sup>40</sup>On the different meanings of 'reputation' in this context, see further eg Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, distinguishing reputation as 'honour', 'property' and 'dignity'.

<sup>41</sup>See eg Hartley (n 3) 27.

<sup>42</sup>*Church of Scientology of California v Commissioner of Metropolitan Police* (1976) 120 SJ 690. See also eg *Bata v Bata* (1948) 92 SJ 574.

<sup>43</sup>*Chadha v Dow Jones* [1999] ILPr 829; *Berezovsky v Forbes* [2000] UKHL 25.

As noted in section 2 above, the jurisdictional reforms in the Defamation Act 2013 present an important response to this issue, in an effort to limit the circumstances in which these cases will be heard by the English courts, but they are only (at best) a partial solution. The English courts may still have jurisdiction over claims arising out of foreign communications (particularly those against English companies or individuals), in a context in which the application of English media standards is a questionable projection of English law. It is not clear, for example, that an English media group which publishes a newspaper which is distributed exclusively in a foreign state should be able to rely on the protection (at least presumed) of English law under the double-actionability rule, if sued in England for defamation. While these questions may be difficult, a choice of law rule which engaged with the issue of which political community was targeted or affected by a communication would seem a more sensitive response to the problem of determining which law should govern disputes concerning cross-border defamation.

A choice of law rule proposed by the Committee on Legal Affairs of the European Parliament in May 2012 (as an amendment to the Rome II Regulation) offered a clearly more sophisticated tool than the blunt double-actionability rule, providing that:

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.<sup>44</sup>

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<sup>44</sup>European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)) 2013/C 261 E/03, [www.europarl.europa](http://www.europarl.europa).

The public policy defence (already established under Article 26 of the Rome II Regulation) would offer a safety net to this rule, permitting the continued application of the legal standards of the forum where the foreign laws are contrary to fundamental values. In support of this, the Committee also proposed the adoption of a new Recital to the Rome II Regulation in the following terms:

This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

While, as noted above, European regulation of these issues is not necessarily a desirable prospect, the European Parliament proposal certainly represented an effort to engage with the competing policy issues and concerns which is far more sophisticated than the double-actionability rule. That is not to say that the proposed rule cannot be subject to criticism. Under subsection (1), the rule provides for the possibility that the law of the place of the loss or damage might apply, regardless of where the defendant acted, thus risking an over-application of the law of the place where material is received and read (although it is not clear whether the damage concerned is the entire loss, or only the loss claimed in the proceedings). Under subsection (2), the rule provides that the law of the defendant's own habitual residence might apply, risking an under-application of the law of the place where material is received and read and the claimant's reputation damaged. The concept of the 'reasonable foreseeability' of 'substantial consequences' of the act occurring in the place of damage is relied on to demarcate cases which should fall under the first rule rather than the second, although little guidance is provided as to what these terms might mean. While the test of reasonable foreseeability may assuage some fairness concerns regarding when defendants will be subject to foreign laws, it is not clear that it fully engages with the concerns regarding the extraterritorial application of the claimant's home law, and the risk that this might have a chilling effect on free speech in other jurisdictions – just because it is foreseeable that material published might have 'consequences' in a range of other jurisdictions does not necessarily mean the publisher ought to comply with the law of all those jurisdictions.

For publication of printed matter or broadcast material, the rule appears to be partially reversed: the place of most significant damage is presumed to be the place at which the publication was principally directed, which (if not apparent) is presumed to be the place in which editorial control is exercised. The countervailing

risk thus arises that print publishers or broadcasters may unduly benefit from these rules. A publisher established in a jurisdiction with very strong free speech protection might direct their publications to more than one jurisdiction, leading to the application of their (favourable) home law. Alternatively, a publisher directing their publications principally to a jurisdiction with very strong free speech protection may benefit from the fact that the law of principal publication governs even if a claimant suffers reputational damage through substantial publication in another place. Analysis of the European Parliament proposal thus highlights the difficult and complex balancing of interests involved in this issue – a balance which is arguably even more difficult when publication takes place online or through social media, as discussed in the following sections.

#### **4. Choice of law in defamation online**

This article now increases its focus a level further, by examining the way that choice of law in defamation operates in the online context, both as a matter of current law and as a matter of possible reform.

##### **4.1. *The application of traditional territorial rules***

As examined above, the choice of law rule applicable for questions of defamation which arise before the English courts, including defamation online, remains the common law double-actionability rule. Defamation online is thus a twenty-first-century problem which strikingly remains regulated by a nineteenth-century choice of law rule.<sup>45</sup> This rule at least starts from the position that the governing law is both English law and the law of the place of the tort. Fixing a territorial location to a tort is thus an essential part of applying this rule, as it would be even if a *lex loci delicti* rule were applicable, which is usually at least the starting point of formulations of an alternative rule. As also noted above, the case law dealing with defamation ‘offline’ establishes that the location of a tort of defamation, for choice of law purposes, is considered to be the place where the material is received and read. Thus, a claim in tort arising from an allegedly defamatory report produced by the English police for the German police, relating to the Church of Scientology, would be governed by both German and English law, in conjunction, subject to the possible application of the ‘flexible exception’ to the double-actionability rule.<sup>46</sup>

In applying this rule to communications which take place online, the courts have determined that where material is published through the Internet, the tort occurs where it is ‘downloaded’ – that is, at the location of the reader or recipient. A single web page may thus easily give rise to a hundred distinct torts. Thus, in

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<sup>45</sup>See eg *The Bussey Law Firm PC v Page* [2015] EWHC 563 (QB).

<sup>46</sup>See n 42.

*Godfrey v Demon Internet Ltd (Application to Strike Out)*,<sup>47</sup> the English court held that material originating from the United States, but distributed online through an English news server,<sup>48</sup> constituted a publication in England. In *Loutchansky v Times Newspapers Ltd (No 2)*,<sup>49</sup> the English court similarly held that articles read from a web site constituted ‘publication’ of the material they contained, at the time and place of downloading.<sup>50</sup> The issue received the attention of the High Court of Australia shortly thereafter in *Dow Jones v Gutnick*,<sup>51</sup> which once again confirmed the rule that an alleged defamation took place where the material was downloaded. In this case, material uploaded in the United States but accessed in the state of Victoria in Australia could constitute a tort of defamation in Victoria, which would be governed by Victorian law. The issue arose once again in the English courts in the case of *King v Lewis*,<sup>52</sup> and the Court of Appeal once again held that the tort arose at the place of download. Thus, the allegedly defamatory character of text uploaded to a website in California and subsequently downloaded in England would be judged according to English law, as each English download was a publication which occurred in England, and the proceedings only claimed in relation to damage to reputation in England. As discussed earlier, where such a claim is brought against a non-EU domiciled defendant the proceedings may clearly be stayed under the revised *forum non conveniens* test adopted in the Defamation Act 2013, although the problem is not resolved jurisdictionally in relation to EU domiciled defendants or in any case in which most downloads of an online publication are in England.<sup>53</sup>

The application of English law in this way, sometimes even when only a small minority of the recipients of an online communication download it in England, may at first glance seem relatively unproblematic. The tort will only be governed exclusively by English law if it occurs in England – so only damages based on harm to an English reputation may be claimed under English law. A small

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<sup>47</sup>*Godfrey v Demon Internet Ltd (Application to Strike Out)* [2001] QB 201. The court noted that ‘According to counsel this is the first defamation action involving the Internet to come up for judicial decision within this jurisdiction’. The main issue in the case concerned whether an Internet service provider could rely on defences generally available to publishers for material which they had disseminated but not produced.

<sup>48</sup>The material was published through ‘Usenet’, a system through which posts can be spread quickly around the world through linked ‘news servers’. This system still exists but has declined in popularity as the use of discussion forums hosted by web sites has increased.

<sup>49</sup>*Loutchansky v Times Newspapers Ltd (No 2)* [2001] EMLR 36.

<sup>50</sup>The main issue in this case concerned whether the time limit for bringing proceedings (within a year of the alleged defamation occurring) had expired – the court held that it may not have for the online distribution of the material, as publication did not occur when the material was uploaded, but when it was downloaded. Whether the material had been downloaded in the year preceding the proceedings would be a question of fact for the jury to decide.

<sup>51</sup>*Dow Jones v Gutnick* [2002] HCA 56.

<sup>52</sup>*King v Lewis* [2004] EWCA Civ 1329.

<sup>53</sup>See section 2 above.

number of English publications should thus be reflected in a relatively small damages award based on the application of English law – claims arising out of downloads in other jurisdictions may be possible, but would be based on foreign law, not the external projection of English standards.

This analysis, however, arguably underplays the potential significance of either damages or injunctive relief in this context.<sup>54</sup> Any award of damages is likely to lead to the withdrawal of an online publication, as very few such publications might make sufficient profit in other jurisdictions to overcome the imposition of damages in relation to even a relatively insignificant publication in England. A claimant may only be claiming in respect of English publications, but they will frequently ask the court for an order enjoining future publication of the defamatory material.<sup>55</sup> Compliance with such an order in the online context may well require removal of the material from the Internet altogether – indeed most website operators will probably voluntarily withdraw the material on demand in a pre-emptive effort to avoid litigation. It is true that it is reasonably possible to use the IP addresses of readers to determine their territorial location (or ‘geolocation’ as it is usually known) and thereby to limit their access to certain content, but these mechanisms are neither entirely reliable nor straightforward to implement,<sup>56</sup> and thus the most likely outcome of an English injunction or damages award is that the material will cease to be published anywhere. This criticism is not unique to the application of the English double-actionability rule – it would similarly arise through the application of a purely territorial *lex loci delicti* rule.<sup>57</sup> The problem with either approach appears to be an over-application of English public policy, and thus a projection of the standards of English defamation law worldwide, through the means of the Internet. Thus, the Internet may be viewed not only as a mechanism through which communication travels freely, but also a mechanism through which regulation of that communication may itself be ‘communicated’ readily across borders. The risk may well be that this has the effect of lowering the standards of free speech on the Internet to the lowest common regulatory denominator, at least among states whose judgments are likely to be practically enforceable.

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<sup>54</sup>See eg Hartley (n 3) 31.

<sup>55</sup>See eg s13 of the Defamation Act 2013.

<sup>56</sup>See eg Marketa Trimble, ‘The Future of Cybertravel: Legal Implications of the Evasion of Geolocation’ (2012) 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* 567; but see Dan Jerker Svantesson, ‘Time for the Law to Take Internet Geolocation Technologies Seriously’ (2012) 8 *Journal of Private International Law* 473.

<sup>57</sup>The double-actionability rule partially resists the lowering of standards of free speech protection, because it establishes English law as a minimum benchmark in this respect. A purely territorial rule would not offer even this limited resistance to a regulatory ‘race to the bottom’ in terms of free speech, because a claimant with a reputation in multiple places claiming online defamation could potentially bring proceedings in the English courts based on foreign downloads in the state with the laws most favourable to their claim. Jurisdictional rules may limit these outcomes to some extent, but are unlikely to be entirely effective – see n 10 and accompanying text.

#### 4.2. *A special choice of law rule for online defamation?*

The issue of the applicable law for defamation online thus appears to raise particular problems, although it perhaps remains contested whether these problems are genuinely new or merely existing issues amplified in an online context which makes cross-border distribution of material both more prevalent and more difficult to control. In either case, it might thus be suggested that the special problems raised by defamation *online* could justify a special choice of law rule.

Support for this idea might be found in the context of the EU rules on jurisdiction under the Brussels I Regulation,<sup>58</sup> where the ECJ has indeed developed a special rule for defamation online. Under the Regulation, proceedings in tort may be brought against an EU domiciled defendant in either the place of the wrongful act or the place of direct damage,<sup>59</sup> as well as in the defendant's domicile.<sup>60</sup> For defamation, this has traditionally been understood to mean that a claimant could sue in the publisher's domicile or in the place in which the publisher acted, for all the damage to their reputation, or in each place where damage to their reputation occurred, but only in respect of the damage suffered in that place. Thus, a claim for defamation in a newspaper published in France with a small number of copies distributed in England could be brought in England, but only in respect of the damage suffered in England.<sup>61</sup>

In the context of defamation online, however, the ECJ held in the *e-Date Advertising* case that this rule created too great an obstacle for claimants to recover damages.<sup>62</sup> As their reputation might well be harmed in a variety of locations, a claimant would be forced to sue the publisher in the publisher's 'home' jurisdiction, or to bring a multiplicity of suits in different jurisdictions in respect of the damage suffered in each jurisdiction individually. In consequence, the ECJ determined that a claimant who is defamed online could also bring proceedings for all the damage to their reputation in the courts of the place where the claimant has their 'centre of interests'.<sup>63</sup> As previously noted, the effect of this rule is that claimants whose centre of interests is located in England may bring proceedings (against EU domiciled defendants) for damage to their

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<sup>58</sup>See n 10.

<sup>59</sup>Under Art 7(2) – see *Bier v Mines de Potasse* [1978] QB 708.

<sup>60</sup>Under Art 4.

<sup>61</sup>*Shevill v Presse Alliance* [1995] ECR I 415.

<sup>62</sup>*eDate Advertising v X*, Case C-509/09 (25 October 2011), [2012] QB 654. See discussion in eg CI Nagy, 'The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities' (2012) 8 *Journal of Private International Law* 251

<sup>63</sup>The court offered some limited guidance on what this means, holding (at [49]) that: 'The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.'

reputation based on downloads anywhere in the world – as an alternative to suing in the publisher’s home jurisdiction, or separately in the place of each download. The development of this rule is somewhat surprising, given the lack of textual support for it in the Regulation, and given the obvious disadvantages in having a rule of private international law which is specific to a particular medium of communication<sup>64</sup> – particularly as many communications happen simultaneously offline and online and the rule does not clearly explain how it should be applied in such contexts. The vague concept of a ‘centre of interests’ is also likely to increase jurisdictional risk for publishers of online material. In any case, the rule does not affect the choice of law question – only downloads in England will be governed by English law, so a claimant may well have to establish the content of numerous foreign laws in relation to the other downloads if relying on this rule.

In light of this development, and of the particular problems raised by defamation online as examined above, could or should a special choice of law rule also be developed for defamation online? Identifying the benefits of developing such a rule is, however, far easier than agreeing on the rule itself. The issue is more difficult in the context of choice of law than in the context of jurisdiction, because choice of law rules have to isolate and select a single governing law for a tort (or for each tort), whereas jurisdictional rules may and commonly do accept a degree of overlap (giving the claimant alternative forums). It is also particularly difficult in the context of defamation, as explored above, because of the strong degree of public policy inherent in defamation law, which balances protection of private reputation against a public interest in free speech which is at the heart of any democratic political order.

For cross-border defamation online, any territorial rule pointing to the law of the place of the tort (including the current common law double-actionability rule, which does so in conjunction with the law of the forum) does not appear to be entirely satisfactory from the position of either claimants or defendants. A defamatory communication posted online (other than through private messaging services) is likely to have a large number of recipients, and a difficulty thus arises concerning where such a tort should be ‘localised’. Traditionally under the common law (as examined above), the tort will be ‘located’ at the place of the receipt of the allegedly defamatory communication, meaning that a large number of torts may arise in different locations almost simultaneously when material is posted online. From the perspective of claimants, this means that a range of different applicable laws might govern a claim in defamation arising from online communication. Even if a single court can be seised of claims arising out of defamation in multiple jurisdictions, the claimant may still need to prove the content of the applicable law in each place in which their reputation has been damaged to be fully

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<sup>64</sup>Generally speaking, it is undesirable to express a rule of the common law in terms of a particular technology’: *Dow Jones v Gutnick* [2002] HCA 56 [125] (Kirby J).

compensated, which may be prohibitively expensive.<sup>65</sup> This ‘fragmentation’ of the law governing a tort where it leads to damage in different jurisdictions, known as the ‘mosaic effect’,<sup>66</sup> is not unique to communications online, but it is a problem which is particularly acute in this context. In some cases it might be possible to limit the applicable law or laws based on where the publication was directed or targeted,<sup>67</sup> but much online communication is simply presented to the world at large.

From the perspective of defendants, a territorial rule based on the place of damage seems equally problematic but in a very different way. As examined above, the rule means that a US publisher loading material onto a US website may find that they are required by an English injunction to withdraw that material, even when the communication is ‘authorised’ by US First Amendment free speech standards. The effect of this is that it risks a publication being regulated by the lowest common denominator of free speech protection, at least among states whose judgments will be practically effective against the defendant. To put this another way, a rule based on the place of damage risks leading to an *over-projection* of the public policy of each state in which the material is published, as each state may effectively restrain the publication worldwide. A rule which applied the law of the claimant’s place of residence (such as that notably adopted in China in 2010)<sup>68</sup> would similarly purport to project those standards of free speech protection globally, without regard for the interests and expectations of publishers in other jurisdictions.

A territorial rule based on the place of the defendant’s actions would obviously be far more attractive to defendants – the standard of free speech protection which would apply to their communications would (at least generally) be their ‘home’ law. From the perspective of claimants, however, such a rule would appear to lead to a problematic *under-projection* of the public policy of other states. Indeed, any similar US-style<sup>69</sup> attempt to aggregate all the damage caused by

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<sup>65</sup>Courts may also be reluctant to presume that foreign defamation law, if unproven, is the same as local law, given its special ‘public’ function of free speech regulation – see eg *National Auto Glass Supplies (Australia) Pty Limited v Nielsen & Moller Autoglass (NSW) Pty Limited (No 8)* [2007] FCA 1625 (Australia).

<sup>66</sup>See further, eg, Alex Mills, ‘The Application of Multiple Laws under the Rome II Regulation’, in W Binchy and J Ahern (eds), *The Rome II Regulation* (Brill, 2009) 133–152.

<sup>67</sup>See further eg Nagy (n 62).

<sup>68</sup>Law of the People’s Republic of China on the Laws Applicable to Foreign-related Civil Relations (2010), English translation by LU Song, China Foreign Affairs University, <http://conflictoflaws.net/News/2011/01/PIL-China.pdf>: ‘Article 46. Infringement via Internet or by other means of personality rights such as right to name, right to image, right of reputation and privacy right are governed by the law of the habitual residence of the victim.’

<sup>69</sup>In the US, the ‘single publication’ rule began as a jurisdictional principle, to avoid multiplicity of suits, but has also frequently been interpreted to function as a choice of law rule – since only one tort arises out of a publication, including on the Internet, it is considered that there can only be one governing law. Under the Uniform Single Publication Act, applicable

an online communication under a single governing law (whether based on the place in which the material was uploaded, or the first or main place in which it was read, or the place with which the tort is ‘most closely connected’)<sup>70</sup> would seem to underplay the importance which each legal order attaches to regulating communications within its territory. Choosing the place where the publisher acted, for example, would seem almost inevitably to promote a ‘race to the bottom’ in protection of reputation terms, with publishers choosing to base their Internet operations in the most favourable jurisdiction. Such a rule may, however, have been already partially established *within* the European Union by the E-commerce Directive,<sup>71</sup> which requires that European electronic commerce service providers may not be subject to greater regulation by virtue of carrying out their activities across European borders.<sup>72</sup> In this context, this rule (if applicable to defamation law)<sup>73</sup> essentially means that the European country of origin provides a minimum benchmark of free speech protection. This is likely to lead to European e-commerce being based in the Member State with the highest level of free speech protection, essentially harmonising the defamation law of the Member States (for e-commerce service providers) at the lowest common denominator – a controversial regulatory outcome which would surely have received greater resistance from the Member States if adopted as an

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in many US states, a single publication in multiple places is considered to constitute only a single cause of action, and courts generally apply the law of the claimant’s place of domicile in defamation cases, following the Restatement (Second) of Conflict of Laws, s150. See Laura E Little, ‘Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States’ (2012) 14 *European Yearbook of Private International Law* 181; Lori A Wood, ‘Cyber-Defamation and the Single Publication Rule’ (2001) 81 *Boston University Law Review* 895; Debra R Cohen, ‘The Single Publication Rule: One Action, Not One Law’ (1966) 62 *Brooklyn Law Review* 921; William L Prosser, ‘Interstate Publication’ (1953) 51 *Michigan Law Review* 959. This approach has sometimes been criticised for failing to distinguish clearly between questions of jurisdiction and questions of applicable law – see eg *Dow Jones v Gutnick* [2002] HCA 56 [34]–[35]. The ‘single publication’ rule adopted in the UK under s 8 of the Defamation Act 2013 only affects the question of the expiry of the time limit to bring proceedings, which runs from the ‘first publication’ (as defined).

<sup>70</sup>See eg Hartley (n 3) 35.

<sup>71</sup>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (2000) OJ L 178 1.

<sup>72</sup>See further *eDate Advertising v X*, Case C-509/09 (25 October 2011) [2012] QB 654 [53]–[68].

<sup>73</sup>In *Papasavvas and Others*, C-291/13 (11 September 2014), the ECJ was asked to decide whether defamation law might constitute an impermissible restriction in the operations of information society service providers established in other territories. Although the Court held that the question did not arise on the facts, because the service provider was not established in a different territory from the claimant, the Court did appear to accept the validity of the argument in principle.

express rule.<sup>74</sup> Doubts must also be placed on the appropriateness of a choice of law rule (such as that proposed by the European Parliament in relation to defamation generally, as examined in section 3.4 above) which seeks to resolve these questions by identifying the legal order to which a communication is targeted or directed, whether based on the intentions of the publisher or the actual audience of the communication.<sup>75</sup> An Internet publication may frequently not be targeted to any particular jurisdiction, and it may equally be foreseeable that it will be available to be read in almost any jurisdiction.<sup>76</sup>

A similar analysis might be applied to the adoption of a choice of law rule which looked to the law common to the parties, whether based on nationality, domicile or residence. In cases where the claimant's reputation and the communication nevertheless cross borders, applying the parties' common law would seem to be an over-projection of that law, and an under-projection of the law of the other places of the communication and reputation. To put this another way, it does not seem sufficient to analyse the issues between the two parties as purely a question of 'loss distribution', because the key issue is whether an actionable 'loss' has in fact occurred. If one English party defames another English party in the United States, the application of English law seems to underplay the context and the political community within which this communication takes place. This could particularly have a problematic chilling effect, through the over-application of English law, on website operators, who might have to determine whether content should be taken off-line based on the application of English law standards if the contributor and subject of a post are both English – matters which will not necessarily be known to the operator.

#### **4.3. Legal and political indeterminacy in regulating online defamation**

So where does this analysis leave choice of law for online defamation? It does not, of course, suggest a simple answer – indeed, it would be surprising if such an

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<sup>74</sup>It is of course true that the European Convention on Human Rights already provides a framework which defines minimum standards of protection of freedom of expression (Art 10), which must be balanced against, for example, the right to a private life (Art 8). The Convention, however, still leaves a significant margin of appreciation within which to operate – the laws of the Member States still differ significantly in terms of the degree of protection they offer to free speech or reputations.

<sup>75</sup>Under the Uniform Single Publication Act, applicable in many US states, a single publication in multiple places is considered to constitute only a single cause of action. Courts generally apply the law of the claimant's place of domicile in defamation cases, following the Restatement (Second) of Conflict of Laws, s 150. See Laura E Little, 'Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States' (2012) 14 *European Yearbook of Private International Law* 181.

<sup>76</sup>See similarly *King v Lewis* [2004] EWCA Civ 1329 [33]–[34]; *Young v New Haven Advocate*, 315 F.3d 256 (4<sup>th</sup> Cir 2002) (finding for jurisdictional purposes that a publication on the Internet was not sufficiently directed toward the forum state). See Little (n 75).

apparently intractable legal problem could be resolved ‘technically’ through legal analysis. The analysis above does, however, productively highlight certain features of the problem. The first is that, in comparison with most subject areas of law which are regulated by private international law, the law of defamation has a stronger public dimension. It is, indeed, no coincidence that many civil law systems deal with defamation primarily through criminal rather than private law – an issue which has raised its own problems with the interpretation of the double-actionability rule.<sup>77</sup> The public dimension of the law of defamation – the fact that it must balance private reputation rights against the freedom of speech which is considered necessary for a particular political order – is part of the explanation for the continued application of the double-actionability rule, which partially preserves the common law’s traditional public regulatory perspective on choice of law in tort.

The other main explanation for the continuation of the double-actionability rule is the difficulty in formulating any alternative rule, a difficulty which is exacerbated in the online context. The problem here seems to be a tension between the over-application and under-application of public policies. A choice of law rule which points to the law in which a communication is downloaded is likely to have a chilling effect on free speech, as an Internet communication will be likely to be downloaded in a number of jurisdictions, and an injunction or damages award may be sought from whichever jurisdiction has the lowest level of free speech protection, leading practically to an over-application of the policy balance struck in that jurisdiction. As discussed above, the Internet may be viewed not only as a mechanism for communicating information, but also as a mechanism through which regulation is itself communicated globally. By contrast, a choice of law rule which points to the law of the place in which a communication is uploaded is likely to have an expansive effect on free speech, as an Internet communication will, as a consequence, be likely to be uploaded in the jurisdiction with the highest level of free speech protection. For other legal systems, this would appear to lead to an under-projection of their own regulatory balance between the protection of reputation and freedom of communication.

What this analysis suggests is that the choice of which law should govern cross-border defamation, particularly online, is not a matter of legal ‘rationality’ but a matter of policy. Favouring the law of uploading means favouring free speech at a global level – the ‘race to the top’ which will occur as publishers locate and act in the jurisdiction which is most favourable to them. Favouring the law of downloading means favouring reputation protection at a global level – the ‘race to the bottom’ (in free speech terms) which will occur as claimants bring proceedings

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<sup>77</sup>See eg *Machado v Fontes* [1897] 2 QB 231, holding that criminal liability in Brazil was sufficient to establish the ‘wrongfulness’ of a publication under the *lex loci delicti*, even though it was not also civilly actionable. The decision was overruled by the House of Lords in *Boys v Chaplin* [1969] 2 All ER 1085.

in the jurisdiction and based on the law applicable which is most favourable to them. This is particularly problematic as damages or injunctive relief may effectively have a global effect, although perhaps the development of geolocation technologies may restrict the impact of such injunctions, at the risk of detracting from the idea of the Internet as a deterritorialised realm impervious to state boundaries. The reason the issue of the law applicable to cross-border defamation (particularly online) is so difficult to 'solve' in legal terms may be that it is not solvable, but rather inherently reflects a contest of competing substantive norms. Perhaps in the end all that may be anticipated (with little enthusiasm) in this area is a choice of law rule which contains within it the competing elements – similarly, although not identically, to the way that the common law double-actionability rule and Article 4 of the Rome II Regulation permit consideration of a wide range of connecting factors, and defer resolution of their balance to the courts.

## 5. Choice of law in defamation on social media

With these relatively unsatisfactory 'conclusions' on the issue of choice of law for cross-border defamation online, this article now narrows its focus again to social media. The question to be examined is whether there is anything particular or characteristic about the social media context which suggests a different approach to determining the law which should govern a claim in defamation. The practical problems raised by social media will first be considered, before turning to the issue of whether more fundamental problems of principle are raised.

### 5.1. *Practical problems: perception, percolation and anonymity*

One characteristic feature of social media which is particularly relevant for the analysis in this article is that it permits widespread communication by individuals to an audience which is potentially the world as a whole, but also potentially a defined social group or network. The most obvious implication of this is that individuals are at a much greater risk of committing defamation, particularly across borders, than existed under traditional media (which would generally exercise editorial control over publications by individuals), particularly if their conduct is not evaluated according to the standards of free speech set out in their 'home' law. This risk is not just a product of the fact that communication may more readily be made to a large and global audience, but also of the fact that the general mode of communication online through social media is informal and casual, rather than necessarily the product of thoughtful reflection, and that the impact of a communication will not necessarily be judged as lightly as it may have been intended.<sup>78</sup> It is true

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<sup>78</sup>The Court in *McAlpine v Bercow* [2013] EWHC 1342 (QB), eg, was unpersuaded that the inclusion of the words '\*innocent face\*' as part of the tweet concerned indicated anything other than insincerity. The online and casual context of a communication may, however, be

that not all online communication is intended to be ephemeral – a much valued feature of social media is the rise in ‘citizen journalism’, under which individual opinion or comment may well be viewed (however deservingly) as a complement or substitute for traditional journalism. In general, however, there is a mis-match between the perceived mode of online communication, often likened to ‘chatting’, and the legal reality (or at least perspective), which is that any tweet or Facebook post is as much a publication as a newspaper article.

There are, as a result, likely to be an increasing number of defamation cases arising from social media – there already appears, for example, to be a growing number of cases in the English courts dealing with alleged defamation involving Twitter.<sup>79</sup> The fact that individuals may carelessly or recklessly be exposed to defamation proceedings through social media does suggest the need to balance the interests of claimants and defendants carefully. In the world of social media, defendants are not necessarily large media organisations, nor will they necessarily have the knowledge or resources to anticipate the application of foreign law. There are also difficult issues of causation and allocation of liability where a defamatory communication is spread by other parties (for example, ‘shared’, ‘reposted’ or ‘retweeted’) – the party who initially posted the material may be held liable (in addition to any party reposting) for consequential damage to reputation, even in places and thus under governing laws beyond the scope of their own communication, if they ought to have anticipated that the subsequent re-communication would take place.<sup>80</sup>

Part of the solution to this problem could be the effective ‘editorialisation’ of Internet content, through a requirement that operators exercise a censorship function over content posted through their services, making them a more attractive ‘target’ of litigation.<sup>81</sup> This would, however, impose a significant burden on social media sites, essentially requiring them to act as traditional media organisations. The approach adopted in UK regulation recently has thus been quite different – under the

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taken into consideration in interpreting the words used: see eg *Thompson v James* [2013] EWHC 515 (QB), at [270].

<sup>79</sup>Including, eg, *The Bussey Law Firm PC v Page* [2015] EWHC 563 (QB); *Johnson v Steele* [2014] EWHC B24 (QB); *Reachlocal UK Ltd v Bennett* [2014] EWHC 3405 (QB); *Coulson v Wilby* [2014] EWHC 3404 (QB); *Mole v Hunter* [2014] EWHC 658 (QB); *Kearns v Kemp & Anor* [2013] EWHC 4093 (QB); *Mama Group Ltd v Sinclair* [2013] EWHC 2374 (QB); *McAlpine v Bercow* [2013] EWHC 1342 (QB); *Cruddas v Adams* [2013] EWHC 145 (QB); *McCann v Bennett* [2013] EWHC 283 (QB); and *Cairns v Modi* [2012] EWHC 756 (QB).

<sup>80</sup>See further, eg, *Rai v Bholowasia* [2015] EWHC 382 (QB) [173] (‘That tendency of “percolation”, as it has been called, has been given new force by the internet, which creates the potential for libels to spread “virally”’); *The Bussey Law Firm PC v Page* [2015] EWHC 563 (QB) [14]; *McAlpine v Bercow* [2013] EWHC 1342 (QB); *Cairns v Modi* [2012] EWHC 756 (QB).

<sup>81</sup>As under the Defamation Act 1996, s 1 – see *Tamiz v Google* [2013] EWCA Civ 68; *Kearns v Kemp & Twitter, Inc* [2013] EWHC 4093 (QB).

Defamation Act 2013, website providers will generally not be liable for material posted through services they provide, even if they moderate those services.<sup>82</sup>

An important exception is provided to this rule where the provider does not either take down the allegedly defamatory material, or provide the claimant with sufficient information to identify the person who posted the statement.<sup>83</sup> This highlights another feature of social media, which is the degree of anonymity which is traditionally (although not universally) present. The potential for anonymity is sometimes praised because it may enhance freedom of communication, particularly online.<sup>84</sup> Anonymity also, however, not only increases the likelihood that a party will be reckless as to the possible effect of their communication on another party's reputation, as they may feel they are 'shielded' by their anonymity, but also increases the practical difficulty for claimants in pursuing defamation claims. If the applicable law were to depend, even partially, on the location of the defendant, then the anonymity of the defendant would provide a further significant obstacle for claimants. The Defamation Act 2013 essentially limits the defence available to website operators (who choose not to take posts down themselves) to cases in which the operator is *able*, in response to a notice of complaint, to provide the identity of the person who posted a statement.<sup>85</sup> The outcome of this rule is effectively that website operators must choose between the burden of adopting strong procedures for checking and establishing the identities of those who post material using their services, or adopting processes of exercising editorial control to take down material posted by those whose identity cannot be determined.<sup>86</sup> Even this does not, however, address a further problem which may arise for claimants, where (as under the current common law) the law applicable to a claim (or which court will have jurisdiction) may depend on where the communication has been downloaded. Proving that a defamatory statement posted online has been downloaded in a particular territory may present an additional difficulty in practice, particularly if those with access to the material are also participating anonymously.

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<sup>82</sup>Defamation Act 2013, s 5; note also s 10.

<sup>83</sup>Defamation Act 2013, s 5(3).

<sup>84</sup>It is sometimes argued that there is even a right to anonymity in certain circumstances – see eg *McIntyre v Ohio Elections Commission*, 514 US 334 (1995) (finding that an Ohio statute which prohibited anonymous political campaign material was unconstitutional); see further Jeffrey Skopek, 'Reasonable Expectations of Anonymity' (forthcoming, 2015) 101 *Virginia Law Review* (<http://ssrn.com/abstract=2523393>); Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2 *Journal of Media Law* 169.

<sup>85</sup>See further the Defamation (Operators of Websites) Regulations 2013. The Ministry of Justice has produced further guidance on the functioning of these rules, available at [www.gov.uk/government/publications/defamation-act-2013-guidance-and-faqs-on-section-5-regulations](http://www.gov.uk/government/publications/defamation-act-2013-guidance-and-faqs-on-section-5-regulations).

<sup>86</sup>Of course both could also be adopted, although many website operators would no doubt be concerned by the costs of doing so.

These points highlight some of the practical problems posed by social media to questions of cross-border defamation. In essence, they suggest that the use of social media is likely to lead to larger numbers of defamation claims, particularly in a cross-border context, but also to make the resolution of those claims more difficult. There are practical difficulties in terms of the application of existing choice of law rules, with social media presenting challenges for both claimants and defendants in locating relevant activities. There are also implications in terms of the possible design of choice of law rules for defamation online, and the need to balance the interests of claimants against those of defendants, who in a social media age may well be individuals rather than media organisations.

### **5.2. *Problems of principle: non-state law for a non-state community?***

This section considers whether defamation on social media raises more fundamental problems for choice of law, which might suggest the necessity of more significant changes to the law. As examined above, the basic difficulty which presents itself for online defamation is that localising the tort through a territorial rule appears both too broad and too narrow. It is too broad in the sense that it extends the application of the legal order which is chosen to cover other territorial places connected to the communication. A territorial rule is also too narrow in the sense that it isolates a single choice of law rule for a communication which is at least partially carried out within a distinct foreign political and legal order. Indeed, applying the law of the place of download leads to the potential application of numerous laws to a single communication, as each place of download potential establishes a distinct tort.

These apparently unsolvable problems invite consideration of a more radical solution. In some contexts, there is an apparent need to localise defamation to a particular state, particularly where it is the party's 'offline' reputation which is at stake, and that reputation is based within a certain territorial community. But it might be questioned whether this is or should always be the case. As noted above, a characteristic feature of social media is that it permits widespread communication by individuals to an audience which is potentially the world as a whole, but also potentially a defined social group or network. The communication may thus be constrained to a particular 'community' which only exists online. One might imagine, for example, an online forum in which experts in a particular field, from various countries around the world, engage in discussion – perhaps relating to IT security.<sup>87</sup> None of these experts may be presumed to know where the others are physically based – their communications may even be anonymous. The experts are also consultants who carry out work online for various companies and for each other, work that is also commissioned and carried out or delivered online. If one

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<sup>87</sup>Alternative examples might include participation in online multiplayer games or virtual worlds (like 'Second Life').

party in the forum posts material which is apparently defamatory of another, leading to a reduction in commissioned work, then it may be asked why there is a need to localise the dispute, speech or reputation through the application of territorial state law at all. In order to avoid the apparent arbitrariness of applying territorial rules, and the ‘mosaic effect’<sup>88</sup> of potentially having to apply a large number of national laws to the communication, it might be suggested that the ‘realm’ of social media could itself be conceptualised as a distinct political community or social ordering. To put this another way, if the law of defamation is partially involved in protecting public interests, could we consider adopting a non-territorial state conception of the relevant ‘public’ within which a reputation exists and has allegedly been damaged?<sup>89</sup> Could online anonymity, in this context, be viewed as establishing or enhancing a ‘break’ or ‘disconnect’ between an individual’s online and offline identities, such that the real reputation (or speech) which needs protection in this context cannot and should not be localised within any territorial state?

This idea perhaps risks echoing the apparently misplaced idealism of 1990s assertions of a distinct and de-territorialised ‘law of cyberspace’.<sup>90</sup> But it is not entirely far-fetched. The Rome II Regulation (which as noted above excludes defamation) already anticipates the possibility that parties might exercise party autonomy, at least in limited circumstances, in relation to choice of law in tort.<sup>91</sup> The draft Hague Principles on Choice of Law in Contract permit the parties to choose non-state law to govern their contractual relations.<sup>92</sup> Loosely combining these considerations, it is not unimaginable that the contract for a social media platform might require the parties to agree that their communications would be governed by a particular standard of free speech, which would not necessarily need to be tied to the standard of any particular state. This approach would also potentially be supported by the idea, examined previously in this article, that tort law may be principally concerned with regulating an existing legal relationship. In the example above, the legal relationship between the parties is arguably not centred around any state legal or social order, but around the social (and potentially legal and contractual) order established within the social media platform. National courts, or perhaps more likely private arbitral tribunals, would then apply the standards set out in the terms of use of the platform in lieu of national

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<sup>88</sup>See n 65.

<sup>89</sup>See more generally David S Ardia, ‘Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law’ (2010) 45 *Harvard Civil Rights-Civil Liberties Law Review* 261; Cedric Ryngaert and Mark Zoetekouw, ‘The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era’ (working paper, <http://ssrn.com/abstract=2523354>).

<sup>90</sup>See eg David R Johnson and David G Post, ‘Law and Borders: The Rise of Law in Cyberspace’ (1996) 48 *Stanford Law Review* 1367.

<sup>91</sup>Art 14.

<sup>92</sup>Art 3 ([www.hcch.net/upload/wop/contracts2012principles\\_e.pdf](http://www.hcch.net/upload/wop/contracts2012principles_e.pdf)).

law (or at least defer to them where possible) as regulating the parties' disputes over the lawfulness of their online communications. Indeed, private arbitral tribunals already commonly regulate disputes over contracts which are governed by non-state law,<sup>93</sup> and arbitral awards based on the application of non-state law are readily enforced by the English courts.<sup>94</sup>

Social media organisations are also already heavily engaged in regulating aspects of free speech themselves, particularly through censorship of communications deemed to be offensive, and do not necessarily apply any national law in doing this. Although such organisations and their users may also be subject to orders of national courts, national court interventions are far less frequent and may also be less accessible or effective (and thus less powerful) than the application of the system's own internal non-state rules. The stark reality is that the regulation of free speech on social media, in practical terms, is likely to be controlled much more by the private terms and conditions and internal complaints resolution procedures of social media organisations than it is by courts or national law.<sup>95</sup>

Facebook's somewhat notorious censorship policy (which at least initially permitted videos depicting a graphic decapitation murder,<sup>96</sup> and a page advocating murder of a group of individuals,<sup>97</sup> but prohibits mild nudity<sup>98</sup>) is perhaps the

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<sup>93</sup>Special online dispute resolution processes have also been developed in some cases, for example, by eBay and Amazon – see further eg Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2007) 10 *Yale Journal of Law and Technology* 151; David P Baron, 'Private Ordering on the Internet: The eBay Community of Traders' (2002) 4 *Business and Politics* 245.

<sup>94</sup>Note the Arbitration Act 1996, s 46; see eg *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH at al v The Government of the State of R'as Al Khaimah and The R'as Al Khaimah Oil Company* ('the Rakoil Case') [1987] 2 All ER, 769–784 (reversed on other grounds at [1990] 1 AC 295); *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334; *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch); *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46. On the possibility of 'non-state law' see further generally Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press, 2014).

<sup>95</sup>Facebook does not appear to publish data on the number of requests it receives to take down material, although does keep more general data on government requests for access to user information or to block content which is illegal under national law: [govtrequests.facebook.com/](http://govtrequests.facebook.com/). Google and Twitter also publish data for requests received from governmental authorities (such as the police or courts) to take down material, including on the grounds that the material is defamatory: see [www.google.com/transparencyreport/removals/government/](http://www.google.com/transparencyreport/removals/government/); [transparency.twitter.com/](http://transparency.twitter.com/). The relatively small number of such requests (eg, 1,228 for Twitter worldwide in 2014) strongly suggests that most complaints are not dealt with through governmental authorities.

<sup>96</sup>See eg Leo Kelion, 'Facebook makes U-turn over decapitation video clip' [www.bbc.co.uk/news/technology-24635498](http://www.bbc.co.uk/news/technology-24635498) (23 October 2013).

<sup>97</sup>See eg Leo Kelion, 'Facebook wipes page saying soldiers should be murdered' [www.bbc.co.uk/news/technology-26938007](http://www.bbc.co.uk/news/technology-26938007) (8 April 2014).

<sup>98</sup>See eg Charles Arthur, 'Facebook's nudity and violence guidelines are laid bare' [www.theguardian.com/technology/2012/feb/21/facebook-nudity-violence-censorship-guidelines](http://www.theguardian.com/technology/2012/feb/21/facebook-nudity-violence-censorship-guidelines).

best known example of this. Tellingly, Facebook's policy is described as a set of 'Community Standards' which 'aim to find the right balance between giving people a place to express themselves and promoting a welcoming and safe environment for everyone'<sup>99</sup> – replicating the function of national law rather than referring or deferring to it.<sup>100</sup> A prominent non-governmental organisation focused on the rights of Internet users has expressed the concern that 'Facebook has become a sort of parallel justice with its own rules that we cannot fully understand'.<sup>101</sup> This has led some to refer to Facebook as 'Facebookistan' – a self-governing community (with a population of monthly active users approximately equal to the population of China)<sup>102</sup> which is deterritorialised but otherwise potentially comparable to a state.<sup>103</sup> The answer to the question of whose law governs free speech in Facebookistan, in a purely practical sense, may thus well be 'Facebookistani law', which does not regulate free speech through private law defamation claims, but through removal of content based on application of its own (somewhat unclear) administrative standards.<sup>104</sup>

It is by no means suggested that this idea of a non-state public online realm, with its own standards of speech protection, is unproblematic. For example, if it is to be based on contractual consent then its application will be limited to situations in which the claimant and defendant to proceedings are both members of the same social media platform, within which the claimant's reputation has been

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<sup>99</sup>[www.facebook.com/communitystandards/?letter](http://www.facebook.com/communitystandards/?letter).

<sup>100</sup>See [www.facebook.com/communitystandards](http://www.facebook.com/communitystandards) (updated on 16 March 2015 – see Leo Kelion, 'Facebook revamps its takedown guidelines' [www.bbc.co.uk/news/technology-31890521](http://www.bbc.co.uk/news/technology-31890521) (16 March 2015)), which states: 'Because of the diversity of our global community, please bear in mind that something that may be disagreeable or disturbing to you may not violate our Community Standards.' The terms and conditions on Facebook also provide that they are governed by the laws of the State of California, and contain an exclusive jurisdiction agreement in favour of 'the U.S. District Court for the Northern District of California or a state court located in San Mateo County' ([www.facebook.com/legal/terms](http://www.facebook.com/legal/terms)). The agreement does not purport, however, to define the law or forum applicable to disputes between users.

<sup>101</sup>Leo Kelion, 'Facebook wipes page saying soldiers should be murdered' [www.bbc.co.uk/news/technology-26938007](http://www.bbc.co.uk/news/technology-26938007) (8 April 2014), quoting a representative of 'Squaring the Net' ([www.laquadrature.net/](http://www.laquadrature.net/)).

<sup>102</sup>See [newsroom.fb.com/company-info/](https://newsroom.fb.com/company-info/).

<sup>103</sup>See eg Anupam Chander, 'Facebookistan' (2012) 90 *North Carolina Law Review* 1807; Rebecca MacKinnon, 'Ruling Facebookistan', *Foreign Policy* (14 June 2012), [www.foreignpolicy.com/articles/2012/06/13/governing\\_facebookistan](http://www.foreignpolicy.com/articles/2012/06/13/governing_facebookistan).

<sup>104</sup>Facebook's 'Community Standards' (n 98) provide that 'We allow you to speak freely on matters and people of public interest, but remove content that appears to purposefully target private individuals with the intention of degrading or shaming them'. They appear to take a different approach, however, in relation to 'public figures', providing that 'We permit open and critical discussion of people who are featured in the news or have a large public audience based on their profession or chosen activities', although also noting that 'We remove credible threats to public figures, as well as hate speech directed at them – just as we do for private individuals'.

damaged. Applying non-state standards without a direct basis in consent would require a significant further step in the scope of recognition of the validity of a non-state legal order. Perhaps even more critically, this idea would seem to constitute (or at least recognise) a potentially problematic transfer of regulatory power from the public sphere to the private. It is not self-evident that the benefits of recognising non-state community standards (such as avoiding apparently arbitrary or multiple territorial laws) outweigh the seemingly alarming consequences of the fact that this would empower corporations such as Facebook or Twitter to determine the limits of free speech on their platforms (or rather enhance the extent to which they already do so in reality), displacing norms which may be generated through more participatory and democratic processes.<sup>105</sup> It is not just the population of Facebookistan that is comparable to China, but its autocratic governance as well. One concern is that the rules on a social media platform or their enforcement could readily become politicised – favouring restrictions only on free speech of a certain political persuasion – arguably raising distinct issues from the politicisation of traditional print and broadcast media which has seemingly (and perhaps also problematically) become an accepted feature of many democratic systems.<sup>106</sup> It must, however, also be remembered that retaining national law control over social media does not in any way guarantee its depoliticisation – as recent events in Russia in relation to VKontakte (Russia's most popular social media platform) may appear to suggest.<sup>107</sup>

Given this range of concerns, this article does not go so far as to *advocate* the recognition of non-state norms to govern cross-border defamation in place of national laws, let alone claim that existing positive law quite allows for this type of analysis. But non-state private regulation of social media is already taking place far more commonly and effectively than regulation by national law and institutions, and lawyers and legal academics ignore such realities at their

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<sup>105</sup>See generally eg Evgeny Morozov, *The Net Delusion: How Not to Liberate the World* (Penguin, 2012).

<sup>106</sup>The UN Human Rights Committee has commented (in General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights, CCPR/C/GC/34, 12 September 2011) that: '15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.'

<sup>107</sup>See eg 'Russian social network founder says he has been fired' [www.bbc.co.uk/news/technology-27113292](http://www.bbc.co.uk/news/technology-27113292) (22 April 2014) ('The founder of Russia's most popular social network site says he has been fired and that allies of President Putin have taken over his site'); Mark Scott, 'Mail.ru Takes Full Ownership of VKontakte, Russia's Largest Social Network' <http://dealbook.nytimes.com/2014/09/16/mail-ru-takes-full-ownership-of-vkontakte-russias-largest-social-network/>.

peril. The problems and the example discussed above highlight that the issues posed by cross-border defamation on social media are deeper than merely practical problems – they are potentially problems which challenge our very idea of a political community within which a reputation may exist and speech may be regulated, and they are worth taking seriously. As one scholar wrote, perhaps presciently, in 1986:

[D]efamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, so will the nature of the reputation that the law of defamation seeks to protect.<sup>108</sup>

## 6. Conclusions

This article has explored a range of questions and problems surrounding the determination of the law applicable to cross border defamation on social media. As choice of law in tort has developed through judicial and statutory reform and through its more recent European harmonisation, choice of law in defamation has been left behind, continuing to be subject to the traditional common law double-actionability rule. This is not merely because it has proven difficult to agree on a new rule, but also because there remain doubts about the appropriateness of adopting any rule which approaches choice of law in defamation purely as a matter of private law, without recognising the important public significance of the regulation of free speech in a political community. Even offline, the territorial regulation of defamation has proven highly problematic, whether the tort is determined to be located at the place of damage or the place of the wrongful act. The former potentially leads to a multiplicity of laws and the risk that any given law will be over-projected through injunctive relief, and thus a ‘race to the bottom’ in terms of free speech protection. The latter leads to a single law which is likely to favour the publisher, and thus a ‘race to the top’ in terms of free speech protection, and the over-projection of that law into other political communities. Offline, such problems may potentially be addressed through asking where a communication was targeted or directed. Online, the problems are multiplied, as the Internet may spread regulation as readily as it spreads information, and communication is less likely to be targeted or directed to any particular audience. The ‘solution’ to these problems appears, in the final analysis, to belong to the realm of policy rather than technique, based on whether the risk of damaging free speech is considered to outweigh the risk of harm to private reputations. The difficulties in resolving these questions mean that defamation online is a twenty-first-century problem which remains regulated by a nineteenth-century rule.

The addition of social media to this issue creates not only further complexity and practical problems, but also potentially a more fundamental challenge. The

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<sup>108</sup>Post (n 40) 693.

practical problems are caused by the increased access which individuals gain to a global audience, through a medium which encourages a casual approach to communication, and which may promise (although not always deliver) anonymity. Indeed, as people increasingly ‘live’ and work online, it may be that the application of territorial rules to connect their behaviour to national legal orders becomes increasingly difficult and arbitrary. The more challenging suggestion this raises is that, at least in some circumstances, the relevant political community which defamation law should seek to protect is an online community, not a territorial state community. Exactly how such a legal order could be constructed or recognised – or indeed whether it should be at all – is a question whose full exploration is beyond the scope of this article. But if social media platforms are, as it is often claimed, changing the way we live our lives, so that our social organisation is ordered around online groups rather than within territorial ‘neighbourhood’ social circles – that we are residents of Facebookistan as well as citizens of territorial states – then we should take seriously the proposition that this could also change the way we identify and regulate ourselves within legal orders.

**Notes on contributor**

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