Council of the European Union: Common Position on Rome II Excludes Defamation by Media

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Mireille van Eechoud
Institute for Information Law (IViR), University of Amsterdam

The Council has reached a common position on the proposal for a Regulation on the law applicable to non-contractual obligations ("Rome II"). Rome II deals, inter alia, with cross-border torts. These include infringements of intellectual property rights, acts of unfair competition, and to an uncertain extent, infringements of privacy and other personality rights.

At the heart of the proposal lies a three tier solution, variations of which are already in place in a number of Member States. The governing law is:

1. the law chosen by the parties, lacking a choice;

2. the law of the common habitual residence of plaintiff and injured party; lacking that

3. the law of the country where the damaging act took place.

In a case where the damage caused by the act arises in another jurisdiction, the latter applies (*lex loci delicti* , Article 5(3)). The latter will typically be the case in cross-border media, especially over the Internet, but also in broadcasting and in the print media.

The idea behind steps 2 and 3 is that these rules will normally identify the law of the country most closely connected with the dispute. In any case where they clearly do not, there is an escape clause in Article 5(4), which allows courts to apply the law of a country manifestly more closely connected. Infringements of intellectual property are governed by the law of the country under which protection is claimed (Article 9). In practice, this *lex protectionis* rule will point towards the same law as *the lex loci delicti* rule. It leads to the same problems including notably communication via the Internet: such communication will be simultaneously governed by the law of the country from where the communication originated and the laws of all the countries where it is received. Why disputes involving intellectual property cannot be subjected to the general rules is not explained in any way, other than that it "does not appear to be compatible with the specific requirements in the field of intellectual property" (see Rome II proposal COM 2003(427), p. 20). The Commission has taken the position that the *lex loci protectionis* is laid down in the Berne Convention and

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other international treaties on intellectual property. That point of view is not undisputed.

Violations of privacy and of personal rights by the media proved to be too controversial an issue. The problem is basically framed in terms of free speech versus privacy but it is also related to the media's reservations about the application of foreign laws to publications distributed abroad. The media favour application of the law of the country where the publisher or broadcaster is established; this will normally be the country where the communication is initiated, i.e. where the infringing act takes place. As it stands, many national laws also allow application of the law of the country where a publication is circulated or broadcast (reception), as this is regarded as one of the places where damage of the infringing act manifests itself. From that perspective, submitting defamation and similar violations to the general rule of the Rome II proposal would not appear to disfavour media interests much.

Because it did not expect an agreement, the Commission has taken violations of privacy and personality rights "by the media" out of the proposal it sent to the Council, to the dismay of the European Parliament. Rapporteur Wallis has already declared that a regulation not covering defamation and the like is unacceptable. It is therefore unlikely that the Rome II proposal will pass through Parliament in second reading smoothly.

Press release of the Council of the European Union, 2725th Council Meeting, Justice and Home Affairs, Luxembourg 27-28 April 2006

http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/06/106&format=HTML&aged=1&language=EN&guiLanguage=en

Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), 27 June 2005

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0211+0+DOC+PDF+V0//EN

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