



AT FORDHAM LAW SCHOOL

**Internet Jurisdiction:
A Survey of German Scholarship and Cases**

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I. Research Mission

The goal of this study is to identify trends in German legal jurisprudence on the issue of jurisdiction in claims arising out of Internet activity. Questions about jurisdiction arise in almost every Internet case. German law and court rulings are highly influenced by European Law and its regulations. This report seeks to offer an objective and comprehensive survey of the literature on Internet jurisdiction in Germany.

Jurisdiction law is comprised of three main legal questions.¹ First, courts must consider if they have the power to hear and determine a case. Unlike the US, Germany does not differentiate between “personal jurisdiction” and “venue,” but instead of using the terms “jurisdiction,” “forum” or “venue,” always refers to the territorial jurisdiction, i.e. in which district a court is to hear a case. The German Code of Civil Procedure (ZPO) has codified three categories of territorial jurisdiction; general jurisdiction, special jurisdiction and exclusive jurisdiction. General jurisdiction is the rule, exclusive jurisdiction the exception. According to the principle of “*Actor sequitur forum rei*” (the plaintiff has to sue the defendant in the defendant’s jurisdiction) the general jurisdiction refers to the domicile of the defendant. Special jurisdiction applies to a catalog of specific circumstances that may make it more practical for another court to hear the case. A plaintiff can choose between general and specific jurisdiction, however they have no right of choice when a case of exclusive jurisdictions applies. The German Code of Civil Procedure has no provision addressing “international jurisdiction.” However the provisions regarding territorial jurisdiction are used as analogues in determining international jurisdiction. In this report we will use the term “jurisdiction” for the sake of consistency and simplicity. The analysis of whether a court can hear the case then typically requires the court to consider what the nature of the dispute is between the parties, such as a contract claim, a defamation claim, or a trademarks dispute. Second, courts must address choice of law and consider what substantive law applies to the dispute. In Internet cases involving parties from different territorial jurisdictions, courts must determine whether to apply the laws of their territory or of the foreign territory. Finally, there is the issue of enforcement of judgments. Courts must consider whether they are able or willing to apply a judgment set forth by a court in another territorial jurisdiction.

A. Scope of the Project

This study sets forth a survey of rules and trends in German jurisprudence including law journal articles, treatises and cases related to jurisdictional issues that arise in connection with Internet activities. This study's purpose is to provide an objective and thorough overview that can assist in the search for materials addressing Internet jurisdiction. The study does not take any position on the body of law concerning Internet jurisdiction, on the merits of any arguments presented in the scholarship or on how jurisdictional issues should be addressed. The purpose of the study is to report on the information available and the observable trends in the literature.

¹ In this report the term “jurisdiction,” standing alone, refers collectively to the three legal issues that make up this body of law.

B. Research Methodology

For this report, Fordham CLIP collected and analyzed academic literature, key treatises and cases related to jurisdiction for claims arising from activity taking place on the Internet. The Fordham CLIP team put together a list of relevant search terms and applied those terms to a major legal database. The articles identified in the searches were reviewed to determine whether they focused, in whole or in part, on issues of Internet jurisdiction or only related tangentially to Internet jurisdiction. All relevant results were then categorized to identify trends in the scholarship.

1. Search Approach

Fordham CLIP selected nine search terms, each of which was searched in combination with “Internet,” “Online” and “Website.” For the word “website,” Fordham CLIP used both the English form and the German translation because some German courts and legal scholars use the English term while others use its German counterpart “Webseite.” In selecting the nine search terms, Fordham CLIP sought terms that would identify all cases and works addressing, in whole or in part, Internet jurisdiction. While the selected key words produced some false positives, Fordham CLIP decided to use these key words to ensure that all sufficiently relevant publications were likely to be identified.

Two filters were also used. First, searches were limited to literature and cases published between January 1, 2003 and December 31, 2012. This limitation ensured meaningful results that would capture current trends without returning an unmanageable number of hits. Preliminary results with the date filter, however, returned a high rate of false positives. To reduce the number of false positives, the date filter was then combined with a second filter that reflected the German civil law approach whereby every law journal article, treatise and court decision would cite one of the applicable statutory provisions related to jurisdiction. This filter used each of the statutes that might be discussed, even if only remotely, in Internet jurisdiction cases. At the national level, the statutes included for this filter were: EGBGB (Private International Law), ZPO (German Code of Civil Procedure), BDSG (German Federal Law on Data Protection), UrhG (German Copyright Law) and TMG (German Tele Media Act). At the European level, the statutes included for this filter were: Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations), Rome II (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), EuGVO (Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and Brüssel I (simply a different term for EuGVO).

2. Selection of Search Terms

In order to cast the broadest possible net, Fordham CLIP selected search terms that would necessarily have to be included in any substantial discussion of Internet jurisdiction. Search terms were selected in order to capture research related to jurisdiction, conflict of laws, applicability of law, recognition of foreign judgments, venue and choice of law. The terms selected related to these topics, namely “international jurisdiction,” “applicability of German law,” “recognition of foreign judgments,” “Venue,”

“judicial competence,” “conflict of laws²,” “German international law of civil procedure,” “private international law” and “choice of law,” each used in connection with “Internet,” “online,” “website” and “webseite.”

This research approach and the use of the search terms is shown as the matrix below. Searches were conducted using the combination of terms reflected by each of the boxes in the matrix (e.g. “international jurisdiction” was searched in combination with “Internet” on the vertical axis of the matrix).

Table 1

	Internet	Online	Website	Webseite
“International Jurisdiction”				
Applicability of German law				
Recognition of Foreign Judgments				
Venue				
Judicial Competence				
Conflict of Law				
“German International Law of Civil Procedure”				
“International Private Law”				
Choice of Law				

² The term “conflict of laws” is equivalent to “private international law.” Since both terms can be used interchangeably in discussing Internet jurisdiction, both terms were used in our search in order to catch all relevant results.

3. Database

Fordham CLIP used Beck's online database, one of the major legal research databases in Germany. The database offers full text search for virtually every case decided in Germany and by European courts, as well as journals, articles and treatises. It should be noted however, that German databases do not publish every article available in an organized, categorized manner but instead publish only those articles that are covered by the contracts between publishers and the database provider. Therefore, each database offers a different set of articles and treatises. Further, many articles might not be available in databases at all, but have to be accessed through other means. As a result, legal research in Germany is less comprehensive than is possible in the United States.

4. Review of Search Results

The searches resulted in a total number of 10,356 articles, treatises and cases. Fordham CLIP reviewed initial search results and filtered out duplicate results. False positives were identified by reading introductory sections and portions of text where search terms appeared.³ Where an article or case featured the necessary search criteria but was primarily focused on another topic without offering particular insight or analysis of Internet jurisdiction, it was excluded as not relevant to the report. Articles, treatises, and cases appearing as relevant were designated for later review and categorization.

After this filtering, 215 articles, cases and treatises were identified as relevant for analysis. This provided the basis for the analysis contained in this report.

II. Analysis

Because under German civil law, every court decision must necessarily be based on the provisions of a relevant statute or European Union law, the Fordham CLIP team initially identified that the 215 articles, treatises and cases fell into one of the following categories: materials focused on particular German statutes, materials focused on European law, materials focused on specific cases, Treatises, materials focused on specific subject area, and miscellaneous. Many of texts, though, reflected more than one category and were therefore placed in multiple categories. After this categorization was complete, Fordham CLIP reexamined the articles within each particular category to verify each article's fit within the group and to further draw out parallel ideas and concepts within a given category. Most of the materials addressed jurisdiction issues and the applicability of law together. A small subset of these texts focused exclusively on issues of applicable law and almost all of these were treatises.

To analyze the trends in the articles, treatises and cases, this Part will provide a description of the relevant statutes related to Internet jurisdiction cases as well as their relationships to European Law.

³ The search function in the Beck database differs from Westlaw and Lexis in their advanced search techniques. Unlike in the US, a German database does not offer searches within results nor does it offer limiting searches to those results that contain a term multiple times. For example, a document might have been listed because it had the term "jurisdiction" in one part of the text and the term "online" in the footnote referring to another online source. This led to a great amount of false positives in our search. Another reason for having an initial number of 10.356 is the fact that court decisions may be published in multiple publications, each of which will be listed as a separate document. For example, one single court decision can end up in 8 different publications therefore being listed 8 times.

The first section will address the trends seen in the German statutes and treatises. Next, the analysis will address the trends identified in European Union Law, followed by trends in case focused articles and subject area specific materials. The last section will then address miscellaneous additional points found in the literature.

A. German Statutes, their Treatises and Interpretation

Treatises in Germany are very important for both law study and practice. Treatises are usually the first reference lawyers and judges examine when faced with a legal issue and they are very influential in German jurisprudence. German legal treatises are updated regularly to reflect current developments and trends and can be comprised of multiple volumes. The treatise itself is a section – by - section commentary on a specific statute or multiple statutes with an extensive explanation of each provision. A reader can therefore quickly find relevant provisions and commentaries. The discussion in a German treatise opens with a recitation of the provision in its original wording, followed by commentary. A treatise is usually written by multiple authors, mostly well regarded scholars or practitioners, each dedicating its discussion to one or more provisions. The discussion usually involves important court decisions and relevant literature interpreting a provision and often includes a personal opinion.

The treatises and courts have addressed two statutory provisions in German law that are relevant to Internet jurisdictions matters.

1. § 32 of the German Code of Civil Procedure

a) Key Aspects of the Statute

The German Code of Civil Procedure (ZPO) is the relevant statute in all matters regarding civil procedure.⁴ Jurisdictional questions are regulated in §§ 12ff. ZPO, whereas the most important provision for Internet jurisdiction is § 32 ZPO.

In its direct application, § 32 ZPO covers questions related to territorial jurisdiction for cases involving unlawful acts.⁵ Since the statute does not offer a provision directly regulating international jurisdiction, the treatises and courts have long used § 32 ZPO by analogy to determine questions of international jurisdiction.⁶ One reason for implementing a special jurisdiction for unlawful acts is that a local court is seen to have more insight into the circumstances concerning the unlawful act than a court in a remote jurisdiction would have.⁷ An “unlawful act” is not defined in the Code itself but is to be determined by either the German Civil Code (BGB) in its provisions about unlawful acts or special statutes such as the Product Liability Law (ProdhaftG) or, the Air Traffic Act (LuftVG).⁸

The essential question is: when is a court competent to hear a case concerning unlawful acts? The text says as follows:

⁴ The German Judicature Act (GVG) is another relevant statute, but for this report irrelevant.

⁵ MünchKommZPO/Patzina, § 32 Rn. 1, BeckOKZPO/Toussaint, § 32 Rn 1, MusielakZPO/Heinrich, § 32 Rn. 2.

⁶ MünchKommZPO/Patzina, § 32 Rn. 1, BeckOKZPO/Toussaint, § 32 Rn 17, MusielakZPO/Heinrich, § 32 Rn. 23.

⁷ MünchKommZPO/Patzina, § 32 Rn. 1, MusielakZPO/Heinrich, § 32 Rn. 1, BeckOKZPO/Toussaint, § 32 Rn 8.

⁸ §§ 823ff. German Civil Code (BGB), BeckOKZPO/Toussaint, § 32 Rn 2, MünchKommZPO/Patzina, § 32 Rn. 2, MusielakZPO/Heinrich, § 32 Rn. 3.

*A court is competent to hear a case about claims arising out of unlawful acts, if the unlawful act has been committed in its district.*⁹

A case falls within a court's jurisdiction if the "place of commission" is in its district.¹⁰

b) Treatise Interpretation

The treatises on § 32 ZPO argue that an act is committed in any place where at least one of the elements of the unlawful acts was realized.¹¹ The application of § 32 ZPO therefore requires a distinction between three localities two of which are relevant to this analysis: First, the place where the unlawful event was induced (place of action); second, the place where the legally protected interest was affected (place of injury); and finally, the place where damages manifest outside the place of injury.¹² Therefore, the crucial place of commission is both the place of action and the place of injury.¹³ Courts have long held that the plaintiff has the right to choose between the place of action and the place of injury, where those differ.¹⁴

In many tort cases, the place of action and injury will be the same. Problematic cases are ones involving so called "distant harms" or "scattered harms." These instances arise when the place of action and the place of injury are in different territories.¹⁵ This territorial separation is almost always present in cases involving the Internet.

The treatise search results revealed that almost every discussion involving jurisdictional matters revolved around the characteristics that should be considered to determine the place of action and the place of injury.

Four treatises discuss § 32 ZPO, however none contain any extensive discussion of Internet jurisdiction matters.¹⁶ To the contrary, one treatise merely summarizes a prominent case, the *New York Times* decision,¹⁷ while another treatise dedicates only 4 sentences to Internet related issues (one of which also refers to the *New York Times* decision.)¹⁸ The essence of each text is primarily a summary of different viewpoints rather than an argument for a specific view or recommendation. Most of the references cited are pre-2003.

The treatises do, nonetheless, take the unanimous position that Germany is competent to hear a case if either the place of action or the place of injury is in Germany notwithstanding any elements that may

⁹ § 32 ZPO.

¹⁰ BeckOKZPO/*Toussaint*, § 32 Rn 8.

¹¹ MünchKommZPO/*Patzina*, § 32 Rn. 1.

¹² SaengerZPO/*Bendtsen* § 32 Rn. 15, MünchKommZPO/*Patzina*, § 32 Rn. 20, MusielakZPO/*Heinrich*, § 32 Rn. 15.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Pichler* in: Hoeren/Sieber (Hrsg.), Multimedia-Recht, Teil 25, Rn. 175.

¹⁶ MünchKommZPO/*Patzina*, § 32 Rn. 1ff., MusielakZPO/*Heinrich*, § 32 Rn. 1ff., BeckOKZPO/*Toussaint*, § 32 Rn 1ff., SaengerZPO/*Bendtsen*, § 32 Rn. 1ff.

¹⁷ BeckOKZPO/*Toussaint*, § 32 Rn 14.1. For a discussion of the NY Times case, see Part II. A.1.c.

¹⁸ SaengerZPO/*Bendtsen*, § 32 Rn. 15.

have occurred in foreign territories.¹⁹ The treatises, however, set out different views on the localization of acts when occurring over the Internet. Three major opinions can be distinguished. One view, holds that the determinative factor in finding the place of commission is “the place where the website is intended to be accessed,” with an emphasis placed on the “intention.”²⁰ The minority view, mentioned by only one treatise in footnotes, regards the “mere accessibility of the website” as being sufficient in determining the place of commission.²¹ The German Federal Supreme Court has made clear, as every treatise acknowledges, that in cases involving infringement of personality rights, mere accessibility is insufficient to avoid a boundless expansion of defendant’s liability. The court requires an objective domestic connection as discussed in the section below.²²

c) New York Times Decision of the Federal Supreme Court

The interpretation of § 32 ZPO is heavily dependent on the ruling of the German Federal Supreme Court in a landmark case, *The New York Times* decision of 2010.²³ This decision set out a new standard for the interpretation of § 32 ZPO in the context of Internet jurisdiction in personality rights infringements.

In the case, the German Federal Supreme Court had to decide a claim by a German resident against *The New York Times* for infringing his personality rights. *The New York Times* published an article in its newspaper as well as online about an investigation against the plaintiff conducted in New York. *The Times* suggested that the plaintiff, residing and conducting business in Germany, was associated with organized crime in Russia. The plaintiff’s full name was published in the article. The plaintiff alleged that the article was infringing his personality rights and sued the *New York Times* and the author for injunctive relief.

The district court and the higher regional court dismissed the complaint on the grounds that Germany lacked jurisdiction.²⁴ The district court held that the mere accessibility of a website is insufficient to establish jurisdiction in Germany. Instead the determinative factor should be whether the website is intended to be accessed in the place in question.²⁵ In other words there has to be an adequate domestic connection for jurisdiction to be granted. This factor requires case-by-case analysis, taking into account all objective elements determining whether the information on the website is geared towards users in Germany.²⁶ Those factors can include: the language of the website, the composition of its content, how many times users in Germany accessed the site, the kinds of products offered, the content of the released article and whether the author intended to reach the German audience.²⁷ The court held that

¹⁹ SaengerZPO/*Bendtsen*, § 32 Rn. 2, BeckOKZPO/*Toussaint*, § 32 Rn 14, MünchKommZPO/*Patzina*, § 32 Rn. 41, MusielakZPO/*Heinrich*, § 32 Rn. 23.

²⁰ MusielakZPO/*Heinrich*, § 32 Rn. 18.

²¹ *Id.* at Fn. 111.

²² *Id.*, BeckOKZPO/*Toussaint*, § 32 Rn 14.1, SaengerZPO/*Bendtsen*, § 32 Rn. 15.

²³ BGH Urteil vom 2.3.2010 – VI ZR 23/09 = BGH GRUR 2010, 461.

²⁴ LG Düsseldorf, ZUM-RD 2008, 482, OLG Düsseldorf, NJW-RR 2009,701.

²⁵ LG Düsseldorf, ZUM-RD 2008, 482, 485.

²⁶ *Id.*

²⁷ *Id.*

The Times article was addressed to a US audience, particularly New Yorkers, and that as a result, Germany lacked jurisdiction to hear the case.²⁸

The higher regional court agreed with the district court that the “intentional accessibility” is the determinative factor and also agreed that it was missing in this particular case.²⁹

The Federal Supreme Court overruled the lower courts decisions. The court first outlined the principles of § 32 ZPO and then entered into a discussion of the various opinions in the literature. Finally the court set out a new test to determine jurisdiction in personality rights cases.³⁰

First, the Federal Supreme Court discussed a test that it had developed for print media in the late 1970s under which the place of commission is the place where the publication is distributed. A distribution requires an intentional act and not just a mere coincidental acknowledgement of the publication.³¹ The Federal Supreme Court, however, decided that this standard is not applicable to online publications because a website is not distributed in the traditional sense but rather is readily accessible.³² The Federal Supreme Court stated that the Internet is not as geographically definable as the distribution area for print media.³³

The Federal Supreme Court then discussed the argument that the mere accessibility of a website is sufficient to establish the place of commission. The Court rejected this argument as contrary to the basic principles of § 32 ZPO. The Court reaffirmed that § 32 ZPO is the exception to the rule “*Actor sequitur forum rei*” and as such is only justified by the proximity of the court to the place of injury and to the availability of evidence. However, a court’s proximity and the availability of evidence may not exist in every location where the website is merely accessible.³⁴

The Federal Supreme Court then rejected the test of “intentional accessibility.” The court held that this element was insufficient because the violation would occur when the publication was actually read whether or not that reading was intended.³⁵

The Federal Supreme Court further looked to France and the decision of the Tribunal de grande instance de Paris where that court held that the determinative factor is “the page view count.” The German Federal Supreme Court rejected this test, too. The Court took the position that page view counts are neither reliably ascertainable nor always accessible to a plaintiff because of data protection laws.³⁶

The German court then established its own test holding as follows:

²⁸ *Id.*

²⁹ OLG Düsseldorf, NJW-RR 2009,701.

³⁰ BGH GRUR 2010, 461, 462.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 463.

³⁶ *Id.*

Rather what is determinative is whether the alleged infringing content has an objective domestic connection such that a clash of the conflicting interests – plaintiff’s interest in his personality rights and defendant’s interest in designing his Internet appearance – according to the circumstances of the particular case, especially the content of the alleged infringing article, actually could have occurred or might occur domestically. This is the case when notice of the alleged infringing article is, according to the circumstances of the particular case, significantly more likely than it would be with mere accessibility.³⁷

Applying this test, the Federal Supreme Court overruled the lower court decisions and held that the content of the New York Times article had an obvious domestic connection such that there was a considerable likelihood that German users would notice the article.³⁸ The plaintiff is a German resident who was mentioned by full name, allegedly having a connection to the Russian mafia and his business being, according to German law enforcement agencies, part of international organized crimes.³⁹ This content made it likely that the article would be noticed in Germany. The Court also found that the stature of the New York Times as an internationally renown newspaper with a worldwide audience enhanced the likelihood that the article would be viewed in Germany.⁴⁰

2. Article 40 of the Introductory Act to the German Civil Code

a) Key Aspects of the Statute

In Germany, the “choice of law” or “private International Law” rules are codified in the Introductory Act to the German Civil Code (EGBGB). This provision determines which legal rules apply to cases involving international disputes.⁴¹ The scope of Article 40 EGBGB became very limited after 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) came into effect in January 2009.⁴² However, the right of privacy and personality rights still fall within the scope of Article 40 EGBGB.⁴³ Article 40 EGBGB is applicable to international disputes outside the scope of the European Union.

Just like § 32 ZPO, Article 40 EGBGB is applicable to claims involving unlawful acts.⁴⁴ According to section 1, the law of the state in which the unlawful act occurred (*lex loci delicti commissi*) applies.⁴⁵ Even though Article 40 EGBGB and § 32 ZPO both use the occurrence of an unlawful act as a link to that provision, the interpretations of Article 40 EGBGB and § 32 ZPO are not always the same.⁴⁶

Article 40 EGBGB states that:

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Roth, S. 73 Fn. 362.

⁴² SchulzeBGB/Dörner, Article 40 EGBGB Rn. 1.

⁴³ *Id.* at 4., MünchKommBGB/Junker, Article 40 EGBGB Rn. 72.

⁴⁴ MünchKommBGB/Junker, Article 40 EGBGB Rn. 8.

⁴⁵ MünchKommBGB/Junker, Article 40 EGBGB Rn. 22.

⁴⁶ Roth, S. 73.

Claims arising out of unlawful acts are subject to the law of the state where the defendant acted. The injured has the right of choice, to choose instead of that state's law, the law of the state where the injury occurred. Where the defendant and the injured are domiciled in the same state, that state's law applies.

This place of action principle states that the scope, substance and requirements for a claim arising out of an unlawful act are determined by the law of the state where the act occurred.⁴⁷ If the place of action and the place of injury are in different jurisdictions then the place of action is determinative; however the plaintiff can choose the place of injury instead.⁴⁸

b) Treatise Interpretation

Four treatises discuss Article 40 EGBGB and how it applies to the Internet.⁴⁹ One treatise has a very brief discussion of Internet related issues. The treatise states that the place of action is the place where information is uploaded and the place of injury is where the user accesses the website.⁵⁰ Another treatise enters into a greater discussion focusing on personality rights with a slightly more in depth look at the location of the place of action, distinguishing relevant acts from mere preparatory acts.⁵¹ This treatise argues that the place of action is the place where the information is uploaded and that the server location is irrelevant. Other treatises also share this view.⁵² The treatise further points out that the place of injury is not the place where the information is accessed, but rather where the injury to reputation occurs at the time of the injury.⁵³ The treatise notes reservation about the limitation on the place of injury based on the infringer's ability to benefit from a worldwide communication network.⁵⁴ Another treatise adopts the position that the party who gets the benefits of the Internet has to bear the risks of it.⁵⁵ This treatise was concerned that putting the emphasis on the place of action would result in forum shopping.⁵⁶

B. European Law Context: The Relationship between German and European Law

German law, like the law of any European member state, is subject to European Union law, directives, regulations, decisions, recommendations, and opinions. In order to understand German legal trends it is necessary to take a close look at the European Union and its relevant legislation.

⁴⁷ PalandtBGB/Heldrich, Article 40 EGBGB Rn.3f. (This treatise was not covered by our search because the database did not contract with this publisher. However, since this treatise is one of the most important in Germany, Fordham CLIP decided to include it by acquiring it separately).

⁴⁸ *Id.*

⁴⁹ *Id.*, MünchKommBGB/Junker, Article 40 EGBGB Rn. 1ff., SchulzeBGB/Dörner, Article 40 EGBGB Rn. 1ff., BeckOKBGB/Spickhoff, Article 40 EGBGB Rn. 1ff.

⁵⁰ SchulzeBGB/Dörner, Article 40 EGBGB Rn. 8f.

⁵¹ BeckOKBGB/Spickhoff, Article 40 EGBGB Rn. 40.

⁵² *Id.*, PalandtBGB/Heldrich, Article 40 EGBGB Rn.12, MünchKommBGB/Junker, Article 40 EGBGB Rn. 75.

⁵³ BeckOKBGB/Spickhoff, Article 40 EGBGB Rn. 41.

⁵⁴ *Id.*

⁵⁵ MünchKommBGB/Junker, Article 40 EGBGB Rn. 78.

⁵⁶ *Id.*

The primary legal obligations of the European Union derive from the treaties between the member states. These are supplemented by the adopted rules of the two European Union institutions: the European Parliament and the Council of the European Union.

The Treaty on the functioning of the European Union⁵⁷ in its Article 288 sets out the type of legislative acts that the European Union can take.⁵⁸ On the top of the list are EU “regulations.” A regulation is enforceable immediately as law in all member states and leaves no interpretive discretion to individual states.⁵⁹ “Directives,” on the other hand, need to be transposed into national law and leave member states some flexibility in the transformation process.⁶⁰ A “decision,” in general, is binding just like a regulation, however only to those individuals to whom it is addressed.⁶¹ Finally, “recommendations” and “opinions” have no normative effect and are used as a governance tool that is not as consequential as the other available mechanisms.⁶²

The key European Union laws for jurisdiction come from a single regulation and a specific directive.

1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶³

a) Legal Text

The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (European Regulation 44/2001) is a key text for purposes of Internet jurisdiction and as a regulation is directly binding on all member states of the EU.⁶⁴ The regulation is applicable to all civil and commercial matters unless the matter is excluded under Article 1 (2), such as matters regarding the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security, and arbitration.

In relation to the EFTA countries (Iceland, Norway and Switzerland) the Lugano Convention (LugÜ) governs.⁶⁵

Article 5(3) of the European Regulation 44/2001 is structured similarly to its German counterpart § 32 ZPO:

⁵⁷ Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/1.

⁵⁸ Grabitz/Hilf/Nettesheim, Article 288 AEUV, Rn. 83.

⁵⁹ *Id.* at 89., Calliess/Ruffert/EUV/AEU, Article 288 AEUV Rn. 19.

⁶⁰ Grabitz/Hilf/Nettesheim, Article 288 AEUV Rn. 104, Calliess/Ruffert/EUV/AEU, Article 288 AEUV Rn. 23.

⁶¹ Grabitz/Hilf/Nettesheim, Article 288 AEUV Rn. 175.

⁶² Grabitz/Hilf/Nettesheim, Article 288 AEUV Rn. 200, Calliess/Ruffert/EUV/AEU, Article 288 AEUV Rn. 95.

⁶³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L. 012 (January 16, 2001).

⁶⁴ MünchKommZPO/Gottwald, Article 1 EuGVO Rn. 27.

⁶⁵ Roth, S. 64. Since the wording in LuGÜ is identical to its counterpart in the EuGVO, this report won't address this statute individually.

“A person domiciled in a Member State may, in another Member State, be sued: ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”⁶⁶

b) EU Decisions

Just like the German § 32 ZPO, the EU regulation provides that “the expression ‘place where the harmful event occurred’ is intended to cover both the place where the damage occurred and the place of the event giving rise to it.”⁶⁷ As in Germany, a reason for implementing a special jurisdiction for these torts is the closeness of the court to the scene of the injury and the available evidence.⁶⁸

The most significant court decision discussing Article 5(3) of the European Regulation 44/2001 is the *eDate* decision by the European Court of Justice of 2011.⁶⁹ The interpretation in German national law of Article 5(3) is dependent on the European Court’s ruling.

The *eDate* decision was an answer to a request for a preliminary ruling by the German Federal Supreme Court and the Tribunal de grande instance de Paris. Both requests concerned the interpretation of Article 5(3) of the European Regulation 44/2001 and the E-Commerce directive.⁷⁰

The German request involved a case between a German resident and the Austrian company *eDate Advertising*. The plaintiff was sentenced to life for murdering a famous actor in 1993. *eDate Advertising* operated a website, www.rainbow.at, and published an article about the plaintiff. According to that article, the plaintiff appealed his conviction to the German Supreme Court. He was mentioned by full name, followed by a description of the crime and a statement by the plaintiff’s lawyer. The plaintiff requested *eDate* to take down the article. Even though *eDate* never responded to that request directly, it took down the article. The plaintiff sued for injunctive relief to prohibit further publication of any article about him. *eDate* contested on the grounds that Germany lacked international jurisdiction. The plaintiff prevailed in lower courts and *eDate* appealed to the German Federal Supreme Court.⁷¹ The Federal Supreme Court suspended proceedings and asked the European Court of Justice the following question related to the regulation:

“Is the place where the harmful event may occur to be interpreted in that the complainant can sue the operator of a website for omission in every member state where the website is accessible no matter where the operator is located? Or does the international jurisdiction of the member state in which the operator is not located require some connection to that state other

⁶⁶ Council Regulation (EC) No 44/2001, O.J. L. 012 (January 16, 2001), Article 5(3).

⁶⁷ EuGH v. 25.10.2011, Rs. C-509/09 und C-161/10 = GRUR 2012, 300 – *eDate* citing EuGH v. 7.3.1995, Rs. C-68/93, Slg. 1995, I-415, Rn. 20 – Shevill.

⁶⁸ MünchKommZPO/*Gottwald*, Article 5 EuGVO Rn. 53, MusielakZPO/*Stadler*, VO (EG) 44/20001 Article 5 (3) Rn. 21.

⁶⁹ EuGH v. 25.10.2011, Rs. C-509/09 und C-161/10 = GRUR 2012, 300 - *eDate*.

⁷⁰ 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, O.J. L. 178 (July 17, 2000).

⁷¹ *Id.*

than mere technical accessibility? If such a domestic connection is required, which criteria are determinative?

In its judgment regarding Article 5(3) of the European Regulation 44/2001, the European Court of Justice first emphasized that the expression “place where the harmful event occurred” is intended to cover both the place where the damage occurred and the place where the event arose.⁷² The court made reference to its *Shevill* decision⁷³ in which it held that “in case of defamation by means of a newspaper article distributed in several contracting states, the victim may bring an action for damages against the publisher either before the courts of the contracting state of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation, or before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised [sic].”⁷⁴ The court then agreed with the referring courts, holding that “the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure ubiquity of that content. That content may be consulted instantly by an unlimited number of Internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person’s Member State of establishment and outside of that person’s control.”⁷⁵ The court further stated that the usefulness of the criterion relating to distribution is reduced because the scope of the distribution of content placed online is universal.⁷⁶

The court adjusted the standard established in *Shevill* and ruled as follows:

“Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an Internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised [sic].”⁷⁷

⁷² EuGH v. 25.10.2011, Rs. C-509/09 and C-161/10, Rn. 41.

⁷³ EuGH v. 07.03.1995, Rs. C-68/93, Slg. 1995, I-415, Rn. 20 – *Shevill*.

⁷⁴ EuGH v. 25.10.2011, Rs. C-509/09 and C-161/10, Rn. 42.

⁷⁵ *Id.* at 45.

⁷⁶ *Id.* at 46.

⁷⁷ *Id.* at 52.

c) Interpretation

Three treatises discuss Article 5(3) of the European Regulation 44/2001.⁷⁸ They address the Internet issues always in connection with the interpretation of the element “place where the harmful event occurred.” One of the treatises was published prior to the landmark *eDate* decision of the European Court on this issue.⁷⁹ The treatises each suggest that for violations of competition rules related to online activities the place where the damage occurred is anywhere the website was intended to be accessible.⁸⁰ The treatises argue the same interpretation for infringements of intellectual property rights.⁸¹ For infringements of intellectual property rights that are territorially bounded (trademarks and patents), the treatises state that the place of injury can only be the territory where protection was requested.⁸² However, one treatise suggests that the principle place of business is a possible jurisdiction for trademark infringement cases.⁸³

2. 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 Market⁸⁴ and § 3 Telemedia Act

a) Legal Text

The objective of 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 (E-Commerce Directive), is to contribute to the proper functioning of the internal EU market by ensuring the free movement of information services between Member States.⁸⁵ One reason the EU stated for adopting the directive is that the development of information services within the EU community was hampered by a number of legal obstacles arising from divergences in member state law and the legal uncertainty as to which national rules applied to such services.⁸⁶ The EU noted that an economic activity that has an effect on multiple states runs the risk of being exposed to different legal requirements, which would hinder economic transactions.⁸⁷

The directive states that:

⁷⁸ MünchKommZPO/*Gottwald*, Article 5 EuGVO Rn. 53ff., MusielakZPO/*Stadler*, VO (EG) 44/20001 Article 5 (3) Rn. 21ff., SaengerEuGVO/*Dörner*, Article 5 (3) Rn. 4ff.

⁷⁹ MünchKommZPO/*Gottwald*, Article 5 EuGVO Rn. 53ff.

⁸⁰ SaengerEuGVO/*Dörner*, Article 5 (3) Rn. 35, MusielakZPO/*Stadler*, VO (EG) 44/20001 Article 5 (3) Rn. 24a.

⁸¹ MusielakZPO/*Stadler*, VO (EG) 44/20001 Article 5 (3) Rn. 24a.

⁸² MünchKommZPO/*Gottwald*, Article 5 EuGVO Rn. 65.

⁸³ SaengerEuGVO/*Dörner*, Article 5 (3) Rn. 4ff.

⁸⁴ 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, O.J. L. 178 (July 17, 2000).

⁸⁵ Article 1 E-Commerce Directive.

⁸⁶ Preamble, Recital 5 E-Commerce Directive.

⁸⁷ MünchKommBGB/*Martiny*, § 3 TMG, Rn. 19.

“Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”⁸⁸

In 2007, the directive was transformed into the German Telemedia Act (TMG). § 3(1) TMG provides that:

To Service Providers established in the Federal Republic of Germany and their Telemedia, national laws apply even when the services are provided in another state within the territorial scope of the e-commerce directive.⁸⁹ (Country of Origin Principle)

b) EU Decisions

The key decision of the European Court of Justice on the E-Commerce Directive is the *eDate* decision. There the EU court responded to the following question posed by the German court:

Is Article 3 Section 1 and 2 of the e-commerce directive to be interpreted as being a conflict of laws provision in that it supersedes national conflict of laws rules and mandates that the law of the country of origin be applied? Or is it merely a corrective at a substantive level in that it modifies the results to the requirements of the law of the country of origin?”⁹⁰

The EU court held that even though the directive is to contribute to the proper functioning of the internal market by ensuring the free movement of information services between Member States, the E-Commerce Directive is not intended to achieve harmonization of substantive rules.⁹¹ The court read the E-Commerce Directive to define a “coordinated field” such that Article 3 must allow information services to be subject to the substantive law of the Member State in which the service provider is established.⁹²

The court specifically ruled as follows:

“Article 3 of the Directive (...) must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule. Nevertheless, in relation to the coordinated field, Member States must ensure that, (...)the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.”⁹³

⁸⁸ 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, O.J. L. 178 (July 17, 2000) Article 3.

⁸⁹ § 3 Section 1 TMG.

⁹⁰ EuGH v. 25.10.2011, Rs. C-509/09 und C-161/10 = GRUR 2012, 300 - *eDate*.

⁹¹ *Id.* at 57.

⁹² *Id.*

⁹³ *Id.*

c) Interpretation

Articles note that § 3 TMG implementing the E-Commerce Directive is applicable only if the matter falls within the material scope of the Telemedia Act. The Act only covers specific services defined as a “Telemedia Service.”⁹⁴ § 1(1) TMG defines “telemedia” as all electronic information and communication services, excluding “mere” telecommunication services. The term “mere” telecommunication services is not readily ascertainable but the majority view is that this term applies to services consisting only of transmission and includes all communication services that do not involve an editing or viewing of data.⁹⁵ “Telemedia” governed by the TMG include online sales of goods, online-information services, online advertising, e-mail communication for commercial purposes, search engines, access-providers, video on demand providers, operators of social networks, and online multi-player games.⁹⁶

§ 3 TMG serves the purpose of integration and harmonization of law.⁹⁷ However, scholars dispute its nature.⁹⁸ The principle debate concerned the question whether § 3 TMG is to be seen as a conflicts of law rule. As noted above, this debate was subsequently resolved by the European Court of Justices *eDate* decision – holding that the directive is not a conflict of laws rule.⁹⁹

Perhaps surprisingly, the four treatises that discuss § 3 TMG¹⁰⁰ do not address Internet cases.

3. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations¹⁰¹

The EU regulation relevant for choice of law is 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) which is binding on all member states, except for Denmark.¹⁰² The regulation overrides national provisions on the law applicable to non contractual relationships in civil and commercial matters within member states, i.e., Article 40 of the German EGBGB. According to its Article 1, the right of privacy and personality rights are not within the scope of the regulation. These areas remain governed by Article 40 EGBGB.¹⁰³

a) Legal Text

The general choice of law provision in the EU Regulation regarding unlawful acts is Article 4(1):

⁹⁴ Pfeiffer/Weller/Nordmeier in Spindler/Schuster, Recht der elektronischen Medien, Rn. 2.

⁹⁵ Holznagel/Ricke in Spindler/Schuster, Recht der elektronischen Medien, Rn. 5.

⁹⁶ Pfeiffer/Weller/Nordmeier in Spindler/Schuster, Recht der elektronischen Medien, Rn. 3.

⁹⁷ MünchKommBGB/Martiny, § 3 TMG, Rn. 20.

⁹⁸ MünchKommBGB/Martiny, § 3 TMG, Rn. 23.

⁹⁹ See Part II.B.1.b.

¹⁰⁰ MünchKommBGB/Martiny, § 3 TMG, Rn. 1ff., MünchKommStGB/Altenhain, § 3 Rn.1ff., Holznagel/Ricke in Spindler/Schuster, Recht der elektronischen Medien, Rn. 1ff., Müller-Broich, Telemediengesetz, § 3 Rn.1ff.

¹⁰¹ 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, O.J. L. 199/40 (July 31,2007).

¹⁰² Doerner in: Schulze u.a. Bürgerliches Gesetzbuch, Rom II, Article 1 Rn. 1. Hereinafter, the Regulation will be referred to as *Rome II*.

¹⁰³ See II. A. 3.

“Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

This general provision, however, is superseded by specific provisions found in Articles 5 to 9. The most notable provision is Article 6 that covers unfair competition and acts restricting free competition. Article 6 states:

- 1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.*
- 2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.*
- 3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.*

This provision distinguishes between violation of competition rules that are market oriented and those that are related to competitors.¹⁰⁴

b) Interpretation

Three treatises discuss the Rome II regulation, however none of them discuss general Internet issues in any meaningful way.

In the context of the special provision for competition (Article 6), one treatise does take the position that the relevant market for violations of competition rules via the Internet is the place the website is geared towards.¹⁰⁵ Whether this is the case depends on the composition of the website in the particular case, including the language and currency used.¹⁰⁶

¹⁰⁴ SchulzeBGB/Dörner, Article 6 Rom II Rn. 3.

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

Another treatise includes a brief discussion about cloud computing arguing that the nature of cloud computing makes the localization of the place of injury difficult.¹⁰⁷ This work rejects the application of the law that is applicable to the contract between cloud computing provider and the injured person and instead proposes to apply the law of the place where the injured party is domiciled.¹⁰⁸

C. Case Focused Articles

Fordham CLIP identified five articles that examine the holdings of Internet jurisdiction cases. Some of these articles were published prior to the two major decisions of the German Federal Supreme Court and the European Court of Justice. As a result, the trends in these articles omit important developments in those areas.

1. *New York Times Decision*¹⁰⁹

Two articles agree that the *New York Times* decision is one of the most important in recent years.¹¹⁰ One of the articles argues, however, that the test the court developed is too imprecise and has significant consequences for the German information society.¹¹¹ The article does, nevertheless, agree with the court that the mere accessibility of the website is too broad and not in accordance with the important doctrine of *actor sequitur forum rei*.¹¹² The piece also agrees with the court's rejection of the factor adopted by the French Court: page view counts.¹¹³ The article disagrees with the court's rejection of the test adopted in the *Shevil* decision for printed publications.¹¹⁴ Unlike the court, the article argues that printed publications and publications over the Internet are comparable. The piece claims that it makes no difference if the reader picks up the newspaper at a kiosk or opens a website, because in both cases the product has to first be "transported" from the publisher to a certain place, either the kiosk or the server, no matter if the place is near or far.¹¹⁵ The article maintains that court ignores a reality of today's Internet and argues that the test developed is too imprecise as to set a clear rule.¹¹⁶ The work argues that the language of the test is too complex and the court failed to define it.¹¹⁷ Lastly, the article states that the adverse consequences for the information society would be tremendous if US newspapers began to block German users as a result of this ruling.¹¹⁸

The other article does not take a specific position on Internet jurisdiction principles, but instead states that the *New York Times* decision finally sets the framework for unity between German and European

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ BGH, Urteil vom 02.03.2010 – VI ZR 23/09, GRUR 2010, 461.

¹¹⁰ Damm, GRUR 2010, 891, 892, BGH, LMK, 305128.

¹¹¹ Damm, GRUR 2010, 891, 892.

¹¹² *Id.* 892, 893, BGH, LMK, 305128.

¹¹³ *Id.* at 893.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

law regarding Internet jurisdiction in personality rights cases.¹¹⁹ However, this article was written prior to the *eDate* decision of the European Court of Justice.

2. *eDate* Decision¹²⁰

Two articles focus on the *eDate* decision of the European Court of Justice.¹²¹ While one clearly states that the different treatment of § 32 ZPO and Article 5(3) of the European Regulation 44/2001 is unfortunate, the other argues that the German interpretation is preferable even though the same interpretation of the German and European provision would be welcome.¹²² Both articles are skeptical about the different treatments for online and offline publications. One of the articles states that the German and EU courts failed to explain why there is a need for different treatment in the first place.¹²³ The other raises the still open question of how a publication should be treated when it is simultaneously published online and offline.¹²⁴

One of the articles argues that a “flying jurisdiction” is the problem, not the solution and suggests that all the problems could be solved by simply using the domicile of the plaintiff and the domicile of the defendant as determinative in personality rights cases both in online and offline cases.¹²⁵ The other article asks what consequences this decision will have on other Internet cases such as intellectual property rights infringements.¹²⁶ The piece indicates that if the reasoning lies on personality rights, then one should be skeptical in transferring the test to intellectual property rights cases. If the reasoning however lies on the ubiquity of the Internet, then it would be much harder to avoid a transfer to other Internet cases.¹²⁷ If this is the case, it would reverse the principle of “*actor sequitur forum rei*,” something the article argues would be undesirable.¹²⁸

3. *Seven Days in Moscow* Decision¹²⁹

One article discusses the *Seven Days in Moscow* decision of the German Federal Supreme Court of March 2011. This decision is a further development of the *New York Times* decision.

In the case, the plaintiff, domiciled in Germany, sued the defendant, domiciled in the US, for injunctive relief. The defendant wrote about the plaintiff’s appearance and way of life in an online journal. The plaintiff and defendant, both born in Russia, met at a reunion in Russia after which the defendant went back to the US and wrote about the plaintiff online. The article was in Russian and in Cyrillic script. The website www.womanineurope.com was operated by a German company.

¹¹⁹ BGH, LMK, 305128.

¹²⁰ Urteil *eDate*, EuZW 2011, 962.

¹²¹ Heinze: Surf Global, sue local! Der europäische Klägergerichtsstand bei Persönlichkeitsverletzungen im Internet, EuZW 2011, 947, Brand: Persönlichkeitsrechtsverletzungen im Internet, E-Commerce und “Fliegender Gerichtsstand”, NJW 2012, 127.

¹²² Heinze, EuZW 2011, 947, 950, Brand, NJW 2012, 127, 130.

¹²³ Brand, NJW 2012, 127, 129.

¹²⁴ Heinze, EuZW 2011, 947, 949.

¹²⁵ Brand, NJW 2012, 127, 130.

¹²⁶ Heinze, EuZW 2011, 947, 950.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ BGH, NJW 2011, 2059.

The German Federal Supreme Court denied international jurisdiction. Because of the non-European international character of the case the decision was based on § 32 ZPO. The court held that the mere fact that the plaintiff accessed the website from Germany and that some of his colleagues gained knowledge of its content does not establish international jurisdiction.¹³⁰ It further stated that if an article is written in a foreign language and script, about events taking place abroad and is geared mostly towards recipients abroad, then the necessary domestic connection is missing and international jurisdiction should be denied.¹³¹ The court criticized the view that favors using the domicile of the plaintiff as the place of injury arguing that this would open the jurisdiction to everywhere in the world.¹³²

The article criticizes this argument stating that the principle of “predictability of potential jurisdiction” require the domicile of the defendant to be the determinative factor in personality rights cases.¹³³ By making a case-by-case analysis, as the court requires, predictability is inhibited.¹³⁴ The piece also states that focusing on the language used in online articles is not a helpful criterion especially when it comes to the English language. Also, globalization and migrations make it likely that people in Germany understand Russian and Cyrillic script.¹³⁵

D. Subject Area Specific Literature¹³⁶

The research revealed a cluster of articles that were subject specific. These works addressed consumer protection, intellectual property rights, data protection, and cloud computing.

1. Consumer Purchases within the European Regulation 44/2001

Two articles cover the online purchase of consumer products under the European Regulation 44/2001.¹³⁷ This statute can be applicable if a purchaser sues or is sued. In its Article 16(1) the regulation states that claims by a purchaser may be brought in his domicile state, while Article 16(2) states that claims against a purchaser can only be brought in his domicile state. In order for Article 16 of the Regulation to be applied there has to be a contract by a consumer for a purpose which can be regarded as being outside his trade or profession.¹³⁸ Article 15 of the regulation requires a contract between a consumer and a merchant and furthermore that the merchant directs his commercial activity towards the domicile of the consumer. The crucial element, in online cases, is the element of “directing towards.”

¹³⁰ *Id.* at 2060.

¹³¹ *Id.* at 2059.

¹³² *Id.* at 2060.

¹³³ *Id.* at 2061.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ The researched articles seldom cover just one subject area, but mostly give an overview over various subject matters, in German law as well as in European Law. Even though Fordham CLIP discusses the following articles within certain headings, they often include other topics as well, fitting under a different heading.

¹³⁷ Leible, Müller: Die Bedeutung von Websites für die internationale Zuständigkeit in Verbrauchersachen, NJW 2011, 495ff, Schäuble, Kaltenbach: Die Zuständigkeit deutscher Gerichte nach den Vorschriften der EuGVVO, JuS 2012, 131.

¹³⁸ Article 15 Section 1 EuGVO.

One of the two articles addresses this point, especially if the use of an active website is part of that element.¹³⁹ The article takes the view that the mere use of a website is not an indication that the merchant “directed towards” the purchaser’s domicile.¹⁴⁰ The article argues it is much more crucial to know if the merchant’s website tried to actually address potential costumers in other member states than his own.¹⁴¹ The article agrees with the view of the European Court of Justice in which the Court held that it should not be differentiated between active and passive websites but that rather other factors should be determinative, such as language and currency used, the domain name, displaying reviews from foreign customers or displaying a telephone number with a foreign country code.¹⁴²

2. Intellectual Property Rights

Under § 32 ZPO, a copyright infringement will be treated as an unlawful act¹⁴³ and a small group of articles address online copyright and trademark infringements.¹⁴⁴

The articles note that with respect to offline copyright infringements, the infringing act usually results in an injury in the same state as the “place of action.”¹⁴⁵ One of the articles suggests however that this can be different in Internet cases, if the place where the copy is saved is in a different jurisdiction than the place where the user is located.¹⁴⁶ Another article disagrees, saying that there is no distinction between the place of action and the place of injury in intellectual property rights cases.¹⁴⁷ This author argues that unlike unlawful acts against physical property, there is no physical substrate with which one can intervene and therefore there is no separation between the place of injury and the place of action.¹⁴⁸

Some articles note that the unlawful online use of a copyright protected work typically infringes two rights, the right of duplication, §§ 15 Section 1, 16 UrhG, and the right of public display §§ 15 Section 2, 19a UrhG.¹⁴⁹ These pieces point out that prior to a work being displayed on a website it has to be saved in a computer system and suggest that this saving already constitutes an infringement of the right of duplication.¹⁵⁰ The articles report that the German court will have jurisdiction in the district where the duplicating act has been committed. They further suggest that if the duplication and the later online display are so closely connected so that the duplication was primarily made for that display, then the

¹³⁹ Leibel, Müller, NJW 2011, 495ff.

¹⁴⁰ *Id.* at 496.

¹⁴¹ *Id.*

¹⁴² EuGH, NJW 2011, 505 Rdnr. 77.

¹⁴³ Danckwerts, GRUR 2007, 104.

¹⁴⁴ Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen, ZUM 2006, 1ff., Fliegender Gerichtsstand mit gestutzten Flügeln, ZUM 2009, 824ff., Die Internationale gerichtliche Zuständigkeit bei grenzüberschreitenden Urheberrechtsverletzungen, ZUM 2005, 194ff., Neue Ansätze zur Bekämpfung der Internetpiraterie – ein Blick über die Grenzen, GRURInt 2012, 225ff., Danckwerts: Örtliche Zuständigkeit bei Urheber-, Marken- und Wettbewerbsverletzungen im Internet – Wider einen ausufernden “fliegenden Gerichtsstands” der bestimmungsgemäßen Vorbereitung, GRUR 2007, 104ff.

¹⁴⁵ *Id.* at 105.

¹⁴⁶ Fliegender Gerichtsstand mit gestutzten Flügeln, ZUM 2009, 824, 831.

¹⁴⁷ Die internationale gerichtliche Zuständigkeit bei grenzüberschreitenden Urheberrechtsverletzungen, ZUM 2005, 194.

¹⁴⁸ *Id.* at 196.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 832.

claim would be considered as a unitary claim at the place of display-- the later display would include the former duplicating acts.¹⁵¹

The literature addresses the place of action for purposes of the right of public display in § 19a UrhG as the place where the upload occurred.¹⁵² One article, though, argues that the place of injury is any place where the website is accessible.¹⁵³ The article states that § 19a UrhG does not offer a basis to limit the place of injury with the consideration of the element of “intentional accessibility.”¹⁵⁴

Another article does not distinguish between § 19a UrhG and §§ 15 Section 1, 16 UrhG.¹⁵⁵ This article generally states that the mere technical accessibility of a website is insufficient to establish jurisdiction and that it should be determinative if the website, according to its content, was intended to have an effect in the jurisdiction in question.¹⁵⁶

Another problem discussed in these articles is whether the test applied to personality rights cases can be transferred to intellectual property rights cases. While some articles suggest that this is possible¹⁵⁷, others say that this approach cannot be transferred so easily.¹⁵⁸

Two articles briefly discuss online trademark infringement issues,¹⁵⁹ while one also includes a short discussion of the applicable law.¹⁶⁰ For jurisdiction over trademark claims, one of the articles suggests that the place of injury is any place where the website is accessible and that every German court would have jurisdiction.¹⁶¹ The other article refers to a decision of the German Federal Supreme Court¹⁶², saying that the Federal Court is now leaning towards a more restrictive view requiring an intentional alignment of the website to the state in question.¹⁶³

Only one article discusses the applicable law in trademark infringement cases.¹⁶⁴ In general, an intellectual property right is limited to its territory where it is registered for protection.¹⁶⁵ One interpretation of this principle is that the applicable law will be the law of the state where protection is sought.¹⁶⁶ The result is that the same mark can be registered in Germany by one person, while being

¹⁵¹ *Id.*

¹⁵² *Id.* at 833.

¹⁵³ *Id.* at 834.

¹⁵⁴ *Id.*

¹⁵⁵ Danckwerts, GRUR 2007, 104.

¹⁵⁶ *Id.* at 107.

¹⁵⁷ *Id.*

¹⁵⁸ Die internationale gerichtliche Zuständigkeit bei grenzüberschreitenden Urheberrechtsverletzungen, ZUM 2005, 194, 196, Fliegender Gerichtsstand mit gestutzten Flügeln, ZUM 2009, 824, 835.

¹⁵⁹ A German trademark is infringed if a website contains an identical mark or there is a likelihood of confusion.

¹⁶⁰ Joahnes, GRURInt 2004, 928, Danckwerts, GRUR 2007, 104, It should be noted that one article is 9 years old and it therefore does not take into account current court developments.

¹⁶¹ Joahnes, GRURInt 2004, 928.

¹⁶² BGH, GRUR 2005, 431.

¹⁶³ Danckwerts, GRUR 2007, 104, 105.

¹⁶⁴ Joahnes, GRURInt 2004, 928, 929.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

registered in the US by another.¹⁶⁷ This peaceful coexistence is disrupted when it comes to advertisement on the Internet, requiring a rights holder to observe all trademark rights in the world.¹⁶⁸ The discussion in the article therefore focuses on whether the mere online existence of a mark already constitutes an infringement or if there needs to be some domestic connection.¹⁶⁹

According to the article, most scholars regard mere accessibility as insufficient but there is no real consensus about what a domestic connection should look like.¹⁷⁰ According to this article, there is at least consensus that the appearance of a website is a factor to be considered, such as the top level domain, or contact information provided.¹⁷¹ Others, such as the Hanseatic Higher Regional Court, require a domestic economic effect.¹⁷² The article regards this development as promising, even though in his view it is complicated to determine what exactly a commercial effect is.¹⁷³

3. Data Protection

Another group of articles address data protection.¹⁷⁴ Most focus on national issues rather than truly international jurisdiction questions. One notable article addresses the question of when a company with no branch in any of the EU member states is subject to the German Data Protection Laws.¹⁷⁵ According to § 1 Section 5 BDSG¹⁷⁶, a foreign company is subject to the German Federal Data Protection laws if the company collects, processes or uses personal data domestically, unless the data carrier is merely used as transit. The discussion in the literature revolves around the element of “domestic data collection.”¹⁷⁷ According to this article, a company collects data domestically, if the supply or offer is, on its face, directed towards German users.¹⁷⁸ The article rejects a more technical view that suggests the applicable law should depend on whether software is located on the user’s computer that collects data, or if the user provides his data voluntarily by filling out online forms.¹⁷⁹

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 931 citing OLG Hamburg, CR 2002, 837.

¹⁷³ *Id.*

¹⁷⁴ Personlichkeitsrecht und Geo-Dienste im Internet – z.B. Google Street View/Google Earth, ZUM 2010, 292, Jotzo: Gilt deutsches Datenschutzrecht auch für Google, Facebook & Co. bei grenzüberschreitendem Datenverkehr, MMR 2009, 232.

¹⁷⁵ Jotzo, MMR 2009, 232, 235.

¹⁷⁶ Federal Data Protection Act

¹⁷⁷ Jotzo, MMR 2009, 232, 235.

¹⁷⁸ *Id.* at 237.

¹⁷⁹ *Id.* at 236.

4. Cloud Computing

A few, more recent articles address cloud computing and its legal and technical aspects.¹⁸⁰ One article addresses applicable law issues in connection with unlawful acts within the Rome II regulation.¹⁸¹ The author argues that this issue is complex because cross border problems are imminent.¹⁸² The article argues that the place of injury is the location of the server where the data was stored at the moment of the injury.¹⁸³ According to this view, there is no injury at the place where the data is downloaded.¹⁸⁴ Because of the haphazardness and unpredictability that comes with this view, the article suggests applying the “escape clause” of Article 4(3) Rome II, which provides for looking at the contract between the provider and the user.¹⁸⁵

Another article addresses the applicability of law with respect to copyright issues and argues that the principle of linking protected rights to a state’s territory would require a cloud provider to obtain licenses every where in the world.¹⁸⁶ The article says that even though this solution is not practical, courts have not yet had the chance to address this issue.¹⁸⁷

E. Miscellaneous Articles

In addition to the themes described above, the research results included articles addressing a great variety of subjects related to the Internet, *inter alia* substantive law issues, online dispute resolution, virtual life games and their impact on real life, sport and movie licenses, and the Google Books settlement.¹⁸⁸ These are just a few examples of the diverse areas covered by the surveyed scholarship.

¹⁸⁰ Nordmeier: Cloud Computing und Internationales Privatrecht – Anwendbares Recht bei der Schädigung von in Datenwolken gespeicherten Daten, MMR 2010, 151ff., Rechtsfragen des Cloud Computing, ZUM 2010, 281ff.

¹⁸¹ Nordmeier: MMR 2010, 151, 153. In general, in the presence of a contract between cloud provider and user Rome I governs. In the context of unlawful acts Rome II is applicable.

¹⁸² *Id.* at 156.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Rechtsfragen des Cloud Computing, ZUM 2010, 281, 284f.

¹⁸⁷ *Id.*

¹⁸⁸ Kaufmann: Verhinderung brisanter Onlineveröffentlichungen – Effektiver Rechtsschutz durch einstweilige Verfügung, MMR 2006, 714ff., Gesmann-Nuissl, Wünsche: Neue Ansätze zur Bekämpfung der Internetpiraterie – ein Blick über die Grenzen, GRURInt 2012, 225ff., Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen, ZUM 2006, 1ff., Bull: Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen NVwZ 2011, 257ff., Müller, Broscheit: Das Internationale Online-Schiedsgericht JustFair - Ein Bericht. Eine Ankündigung. Oder ein Nachruf? SchiedsVZ 2006, 197ff., Rösler: Haftung von Medientauschbörsen und ihrer Nutzer in Nordamerika, Australien und Europa MMR 2006, 503ff., Rechtsbeziehungen in der virtuellen Welt ZUM 2007, 272ff., Klickermann: Virtuelle Welten ohne Rechtsansprüche? MMR 2007, 766ff., Adolphsen, Mutz: Das Google Book Settlement GRUR Int 2009, 789ff., Ott: Die Google Buchsuche - Eine massive Urheberrechtsverletzung? GRUR Int 2007, 562ff., Teil 6.2 Uniform Domain Name Dispute Resolution Policy Bettinger Hoeren/Sieber, Multimedia-Recht 32. Ergänzungslieferung 2012, Süßenberger, Czychowski: Das „Erscheinen“ von Werken ausschließlich über das Internet und ihr urheberrechtlicher Schutz in Deutschland - Einige Argumente Pro und Contra GRUR 2003, 489ff., Henning-Bodewig: Herkunftslandprinzip im Wettbewerbsrecht: Erste Erfahrungen - Anmerkung zu OLG Hamburg „Active Two“ GRUR 2004, 822ff., Die Murphy-Entscheidung und ihre Auswirkungen auf Sport- und Filmlizenzen im Online-Bereich ZUM 2012, 93ff.

III. Conclusion

Our research suggests that in comparison with the US,¹⁸⁹ there has not been a substantial body of scholarship published over the last decade that addresses jurisdictional issues for Internet activity. The majority of the analyzed articles discuss multiple subject areas with respect to both German and European Law. Consequently, categorization was often difficult. Across the literature, the scholarship tends to concentrate mostly on questions related to territorial jurisdiction. Notably, the scholarship seems most interested in how courts determine whether they have power over litigants and whether that determination is soundly reached.

Within the discussion of the courts' power over litigants, three trends can be identified in the opinions. First, this report shows that one view regards the mere accessibility of a website as a determinative factor that establishes jurisdiction everywhere in the world. This concept is often called "flying jurisdiction." A second view adds the element of "intention" and would require intentional accessibility. Finally, the report shows that the third view treats the German Federal Supreme Court's *New York Times* decision as introducing a new test wherein the website needs to have an objective domestic connection. Articles discussing this case focus on three main issues. First, articles describe the test as too vague and too imprecise to achieve legal certainty, however they note that the court at least made clear that mere accessibility is insufficient. Second, some articles raise the question of whether that test can and should have a broader application beyond the scope of personality rights cases, e.g. in intellectual property rights infringement cases. Lastly, a few articles find it unfortunate that the *eDate* decision of the European Court of Justice failed to establish equal treatment of § 32 ZPO and Article 5(3) of the European Regulation 44/2001, and missed the chance to create uniformity in Europe and Germany.

In summary, this report indicates that, aside from the *New York Times* and *eDate* decisions, no consensus on the treatment of international jurisdiction can be identified in Germany. Articles are aware of the problems and pitfalls in Internet related cases, however clear solutions are seldom offered. Furthermore, the identified articles resist favoring one opinion, but rather focus on balancing advantages and disadvantages. The coexistence of German and European Law, the different treatment for different subject matters and the interaction between different statutes preclude the identification of any real consensus views. Going forward, however, the German Federal Supreme Court and the European Court of Justice decisions have set the stage for further development.

¹⁸⁹ See Fordham CLIP, INTERNET JURISDICTION: A SURVEY OF LEGAL SCHOLARSHIP PUBLISHED IN ENGLISH AND UNITED STATES CASE LAW (June 2013)

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