

**SOCIAL NETWORKING SITES:
AN OVERVIEW OF APPLICABLE LAW ISSUES**

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*Annali italiani del diritto d'autore, della cultura e dello
spettacolo (AIDA), vol. XX, 2011,
pp. 3-38*

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*Documento depositado en el archivo institucional EPrints Complutense
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ABSTRACT

Social Networking Sites (SNS) as global providers of Internet services raise new challenges in the field of conflict of laws. The most prominent service providers have their headquarters in the US and their business models allow them to offer global services to users around the world under the same terms or conditions. SNS providers typically have recourse to standard terms intended to be applicable to all their users and include choice of forum and choice of law clauses in favour of US courts and US laws. Against this background, the present contribution analyzes applicable law issues raised by social networking sites from the perspective of the European Union (and its Member States). The article addresses the position of SNS providers in the light of the EU harmonization rules on e-commerce and the influence of the place of establishment in the scope of obligations imposed on them. Also the law applicable to the agreements concluded with users is discussed focusing on the implications of their possible characterization as consumer contracts and on the aspects related to the formation of the contract. Determining the law applicable to online activities involving SNS is also essential for the protection of rights and interests of third parties, in particular with regard to intellectual property and personality rights. Additionally, the effective enforcement of EU law to Internet activities in key areas such as data protection requires now determining the mandatory scope of international application of EU or national law with respect to the activities of SNS.

Keywords: social networks, contracts, data protection, consumers, personality rights, intellectual property, intermediary service providers, applicable law

Social Networking Sites: An Overview of Applicable Law Issues

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1. There are many different social networking sites (SNS) but in general terms they can be characterized as online communication platforms which allow users to create networks and that may combine several services in a user friendly interface¹. Those services may include e-mail, instant messaging and several means to make content available to some members of the social network or to the public in general, including profiles, blogs, photo galleries or other web pages that may contain texts, music, videos and external links. Registration in and use of SNS are typically free since the business models of these service providers are mainly based on revenue resulting from advertising which is provided alongside the web pages established and accessed by the users of the services. Facebook, Twitter, YouTube or LinkedIn are among the best known and most internationally widespread SNS.

The expansion of SNS as global providers of information society services poses new challenges in the field of conflict of laws. Determining the law applicable to the agreements concluded by SNS and to the online activities in which SNS are involved are of strategic importance to allow these service providers to comply with the law and to manage their legal risks, but are also essential to protect other rights and interests that may be affected, such as those of

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¹ See, e.g., Article 29 Data Protection Working Party, "Opinion 5/2009 on online social networking", 12 June 2009, WP 163, pp. 4-5; and J. Grimmelmman, "Saving Facebook", *Iowa L. Rev.*, vol. 94, 2009, pp. 1137-1206, pp. 1142-1144.

the users and of third parties, in particular with regard to intellectual property and personality rights. The basic features of the business models of SNS allow providers located in one country to offer global services to users around the world in circumstances in which because of the reach and popularity of these sites certain activities may affect rights and interests of third parties in any country. Furthermore, from the European perspective, the effective enforcement of the law to Internet activities in areas of great importance such as consumer protection and data protection requires now determining the international application of EU or national law with respect to the activities of SNS which are typically located in third countries, in particular in the US.

Practical importance of choice of law issues is enhanced by the existence of significant differences between substantive laws. In this connection, it is noteworthy that although common trends between US and EU laws may be identified, such as the similar approaches concerning the liability of intermediary service providers adopted in the DMCA (but limited to copyright) and the E-commerce Directive, important differences remain between EU legal systems and US law in some of the areas most relevant in connection with SNS. Examples of such differences may include: consumer contracts; limitations to copyright; data protection law; the balance between personality rights and freedom of expression; or those resulting from divergences in general contract and tort law.

Applicable law issues are dealt with in this paper from the perspective of the European Union (and its Member States). In the global context in which the most important SNS operate it is relevant that when adjudicating a dispute courts apply the conflict of laws provisions of the forum. Hence EU private international law typically only applies to the extent that a dispute is brought before a court in a EU Member State. Therefore, a close interconnection between international jurisdiction and conflict of laws has to be affirmed². However, although SNS providers having their main establishment outside the EU tend to include in their agreements choice of forum clauses aimed at granting exclusive jurisdiction to the courts of their home State³, in practice such clauses may not be effective to derogate the jurisdiction of EU Member States courts with respect to certain disputes involving SNS. The admissibility and effects of a choice of forum agreement are to be determined in accordance with the jurisdiction provisions of the forum where a dispute is brought. In particular, prorogation of jurisdiction is not effective in situations in which the agreement is null and void or if it infringes specific limitations on prorogation of jurisdiction, such as those concerning

² For the interpretation of the jurisdiction provisions of the Brussels I Regulation with regard to Internet activities, see P.A. De Miguel Asensio, *Derecho privado de Internet*, 4th ed., 2011, pp. 185-193, 565-593, 780-785 and 948-971.

³ For instance, see Section 15.1 of Facebook's Statement of Rights and Responsibilities <<http://www.facebook.com/terms.php?ref=pf>>, stating that: "You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County". Similar examples may be found in Section 14 of YouTube's Terms of Service <<http://www.youtube.com/t/terms>>; Section 8(A) of LinkedIn's "User Agreement" <http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag>; and the Section on "Controlling Law and Jurisdiction" of Twitter's Terms of Service <<http://twitter.com/tos>>.

consumer contracts⁴. Moreover, non-contractual disputes typically arise in connection with third parties not bound by any choice of forum clause with the SNS concerned.

2. The general EU legal framework concerning electronic commerce and the provision of information society services is established in Directive 2000/31/EC (e-commerce Directive)⁵. The e-commerce Directive lays down harmonized rules on issues such as the establishment of information society service providers, information duties in favour of the recipients of their services, electronic contracts and liability of intermediaries. Additionally, the "coordinated field" under Article 2(h) of the Directive extends well beyond the harmonized areas, since it refers to requirements with which such providers have to comply in respect of the taking up and pursuit of the activity of an information society service, including "those applicable to advertising and contracts, or requirements concerning the liability of the service provider".

SNS providers are to be characterized as information society services providers for the purposes of the Directive given the broad scope of this term. Indeed, the concept of information society services includes "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing [...] and storage of data, and at the individual request of a recipient of a service [...]" and extend "to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data [...]".⁶ Therefore, the inclusion of providers of SNS in the category of information society services providers in general is not controversial.

Notwithstanding this, difficulties may arise in some circumstances with regard to the delimitation of the different categories of providers in connection with the liability of intermediaries under Articles 12 to 15 of the Directive. Moreover, the features of SNS as platforms that allow the recipients of the services to upload and disseminate information create a situation in which not only the providers of SNS but also many recipients of their services may be characterized as information society services providers in connection with their activities in the SNS. For instance, that is typically the case in situations in which

⁴ In this regard it is noteworthy that the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14.12.2010 - COM(2010) 748 final- extends the Brussels I Regulation's jurisdiction rules to third country defendants.

⁵ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1.

⁶ See Recitals 17 and 18 e-commerce Directive in connection with Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (OJ 1998 L 204/37) as amended by Directive 98/48/EC (OJ 1998 L 217/18); and in Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ 1998 L 320/54).

a user of a SNS uses it for the marketing of products or services.⁷ However, this contribution focuses mainly on the law applicable to SNS and the providers of such services.

3. The e-commerce Directive is aimed at ensuring the proper functioning of the internal market within the EU by removing the legal obstacles to the freedom of establishment and the freedom to provide services in the field of e-commerce and information society services. The obstacles which the Directive is intended to remove are those arising from legal divergences in Member States and from uncertainty as to the applicable rules. In this connection, the Directive is based on the criteria that control of information society services within the EU is to take place basically at the Member State of origin and that Member States are not allowed to restrict the freedom to provide information society services from another Member State for reasons falling within the coordinated field (Article 3). Mutual recognition in tune with the requirements of the EU freedom to provide services allows information society services providers to operate within the Union if they comply with the national provisions of the Member State in which the service provider is established.

Although the e-commerce Directive does not establish additional rules on private international law relating to conflict of laws nor does it deal with the jurisdiction of courts (Article 1.4)⁸, mutual recognition within the internal market facilitates the provision of services at EU level by providers established in a Member State. Such providers can extend their activities to the rest of the Member States in circumstances in which these States are not allowed to impose within the coordinated field additional requirements to the provision of services (without prejudice of the possibility to adopt restrictive measures in exceptional situations under Article 3.4 e-commerce Directive). However, in accordance with Article 3.3 and the Annex to the Directive, the internal market clause of Article 3 does not apply to some areas, such as intellectual property rights, the freedom of the parties to choose the law applicable to their contract and contractual obligations concerning consumer contacts. In practice mutual recognition in this context is of relevance to the extent that it prevents service providers that comply with the requirements to initiate and pursue their activities in the Member State of origin from having to fulfil the requirements established in all other Member States where they provide their services.

Since the e-commerce Directive intends not only to maximise the opportunities afforded to the development of information society services by the

⁷ See H.W. Micklitz and M. Schimbacher, "§ 6 TMG", in G. Spindler and F. Schuster (Hrsg.), *Recht der elektronischen Medien (Kommentar)*, 2nd ed., 2011, at p. 1469. Additionally, on the possibility that users of SNS be regarded as data controllers, see section 11, *infra*.

⁸ In its judgment of 25 October 2010 in joined cases C-509/09 and C-161/10, *eDate Advertising*, the ECJ has held that Article 3 of the e-commerce Directive «must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule», but that in relation to the coordinated field, Member States must ensure that, subject to the derogations authorised in accordance with Article 3(4) of the Directive 2000/31 «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».

internal market but also to guarantee the protection of consumer interests at all stages of contact between the service provider and recipients of the service⁹, rules on the information to be given by the service providers –such as Articles 5 and 10- are of special significance among the harmonized provisions¹⁰. From the perspective of SNS, their users and third parties that may be affected by the activities of SNS the extent of obligations imposed on SNS to provide contact details are of great practical importance. Indeed, due to the extraordinary growth of SNS, the hundred of millions of users around the world that the most prominent SNS have, and the business and organizational constraints of SNS, users (and other interested parties) may experience great difficulties in communicating with SNS. According to the case-law of the ECJ, under Article 5(1)(c) of the e-commerce Directive an information society service provider (and hence a SNS provider) is required to offer recipients of its services a rapid, direct and effective means of communication in addition to their electronic mail address. The additional form of communication may be at the choice of the SNS provider, among others, by telephone, by fax or by an on-line enquiry template. In order to satisfy the requirement laid down in Article 5(1)(c) is necessary that the form of communication offered (and the relevant information provided about it) allows direct and effective communication.¹¹

SNS providers tend to have recourse in addition to an electronic mail address to electronic enquiry templates that allow users to contact the service provider which can reply by electronic means. Such an approach has been deemed compatible with Article 5(1)(c), but it is of interest that the ECJ held that: "[...]an electronic enquiry template may be regarded as offering a direct and effective means of communication [...] where, as is clear in the case in the main proceedings from evidence in the file, the service provider answers questions sent by consumers within a period of 30 to 60 minutes".¹² Although the kind of service concerned in case C-298/07, which referred to a company which sold automobile insurance exclusively via the Internet, was different from the typical services of a SNS, it can be concluded that the requirement of Article 5(1)(c) may be met in case the SNS provider answers the questions sent by the recipients of the service having recourse to the template within a period of time that is appropriate to establish that it offers a direct and effective means of communication. By contrast in situations in which a significant number of questions related to the service sent by its users to a SNS provider via the means of communication and contact information offered by the provider remain unanswered, the question may arise whether the SNS provider infringes the obligation laid down in Article 5(1)(c) of

⁹ ECJ Judgment of 16 October 2008, C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, paras. 19 and 22.

¹⁰ See G. Howells y A. Nordhausen, "Information Obligations in EC E-Commerce Law", R. Nielsen, S.S. Jakobsen y J. Trzaskowski (eds.), *EU Electronic Commerce Law*, 2004, pp. 49-67

¹¹ ECJ Judgment of 16 October 2008, C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, paras. 25-35.

¹² ECJ Judgment of 16 October 2008, C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, para. 35.

the e-commerce Directive.¹³ In this context determining the law applicable and the competent authorities with respect to the information obligations of SNS and their duty to ensure an additional direct and effective communication means in accordance with the e-commerce Directive may be of importance.

In principle, SNS providers are bound by the rules on establishment and information requirements of service providers adopted by the Member State where they are established. The scope of application of the national provisions implementing the duties to provide information established in the Directive covers the providers established in the State concerned. In particular, the rules implementing Article 5(1)(c) of the Directive and laying down the details that the service provider has to communicate to the recipients of its services so that it can be contacted rapidly and communicated with in a direct and effective manner are typically applicable to the providers established in the Member State that adopt the legislation concerned. Because of mutual recognition, such providers can supply their services in other Member States without having to comply with the different rules on that issue that may have been adopted in their legislations, for example, if different contact details have to be provided.

Mutual recognition within the EU only favours the cross-border provision of services within the internal market by providers who are established in a Member State. Therefore a distinction is to be made between SNS providers established in a Member States and those established in third States that provide services in the EU since the latter are not covered by the Directive.

The definition of "established service provider" contained in Article 2(c) of the e-commerce Directive is key to determine if a service provider is established in a Member State. In conformity with the concept developed in the context of the freedom of establishment, a service provider is deemed to be established in a Member State where it "effectively pursues an economic activity using a fixed establishment for an indefinite period". In the Internet context, is of special relevance the clarification in Article 2(c) that the presence and use in a State of the technical means and technologies required to provide the service are not, in themselves, determinative to locate the place of establishment. Additional criteria to determine the place of establishment may be derived from Recital 19 of the e-commerce Directive. Basic is the idea that a provider is established where the service provider pursues its economic activity and hence both human and technical resources necessary for the provision of services are permanently available¹⁴. The place at which the website of the provider is accessible and the place where its activities are directed to are not determinative for that purpose. An establishment may not have a legal personality. The presence of a stable office of

¹³ According to Article 20 of the e-commerce Directive Member States have to provide for effective, proportionate and dissuasive sanctions against the infringements of national provisions adopted pursuant to the Directive. With regard to the infringement of the obligations to provide information established in Article 5 of the e-commerce Directive, it is a common feature to some national laws implementing the Directive to impose pecuniary penalties against the infringers.

¹⁴ Although in a different context, see ECJ judgment of 7 May 1998, C-390/96, *Lease Plan Luxembourg / Belgische Staat*, para. 24.

the provider actively involved in the provision of the services may be sufficient to determine that the provider is established in that country. In the situations in which a provider has several places of establishment the relevant location is the place of establishment from where the service concerned is provided and if it is not possible to determine it is necessary to determine the place where the provider has the centre of his activities relating to the service concerned.

The services of SNS can be provided at a global scale from a single country and it is well known that the headquarters of the most successful SNS providers are typically located in the US. However, in the light of the foregoing considerations, it may happen that some providers having their main establishment in a third country (such as the US) are deemed to be "established service providers" in one or more EU Member States for the purposes of the e-commerce Directive because of the broad scope of the term establishment in this context. Moreover, the possibility exists that a provider having its main establishment in a third country operates in the EU by means of one or several legal persons or permanent offices having their seat in EU Member States.¹⁵ As already noted, to the extent that the services are provided by a SNS established in a Member State such a provider will be bound by the rules on establishment and information requirements implementing the e-commerce Directive in its country of establishment.

As a result of the connection of the e-commerce Directive with the functioning of the internal market its provisions are not intended to regulate services supplied by providers established in a non-Member State (such as the US). This restriction in the scope of the EU harmonized provisions has given rise to certain difficulties in the drafting of the national legislations implementing the Directive. Although non-established service (SNS) providers remain outside the scope of the Directive, they do not benefit from mutual recognition and they are not subject in the country of origin (a non-member State) to the harmonized provisions on establishment and information requirements. However, non-established service (SNS) providers may direct their activities to EU Member States and in fact may become very successful providers with numerous users in a Member State. To prevent circumvention of the law, to ensure that the recipients of the services are not deprived of the protection guaranteed by the harmonized EU provisions and to avoid the discrimination of service providers located in the EU, it seems appropriate that the laws of the Member States impose on service (SNS) providers established in third countries that direct their activities to the Member State concerned the obligation to comply at least with the information requirements imposed on service providers established in that State. Such an approach has been followed by the Member States that in the legislation implementing the e-commerce Directive have adopted the criterion that its information requirements are applicable to the providers established in the Member State concerned and also to those not established in any Member State

¹⁵ Under Section 18.1 of Facebook's Statement of Rights and Responsibilities: "If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. Otherwise, this Statement is an agreement between you and Facebook Ireland Limited."

that direct their activities to that State¹⁶. Indeed, national legislations should ensure that SNS providers not established in the EU have to comply with the information obligations laid down by the Member States where the services are directed to. Such obligations include the requirement of offering recipients of its services a rapid, direct and effective means of communication in addition to their electronic mail address contained in Article 5(1)(c) e-commerce Directive.

The attempts of SNS providers located in the US to supply there services globally based only on the law of origin –as illustrated by the provisions in their terms of use and in the agreements with users stating that the laws of a US State govern any claim that might arise between the recipients of the service and the SNS provider¹⁷- should not affect the applicability of those information requirements imposed on SNS providers¹⁸ to the extent that under the relevant national legislation they are applicable to all information society services providers that direct their activities to the Member State concerned¹⁹.

4. The approach typically adopted by SNS providers with respect to the regulation of their relationships with the recipients of their services is based on the formulation in advance by each SNS provider of standard terms intended to govern such relationships. Indeed, although the names may differ, such as "Terms of service"²⁰, "Statement of Rights and Responsibilities"²¹ or "User Agreement"²² they are all intended to lead to the conclusion of a legally binding agreement between the SNS provider and the user. In practice a significant number of complex legal issues may arise in connection with the use of standard terms in this context.

Those issues include the determination whether the requirements for the conclusion of the contract are met, the time of conclusion of the agreement, the extent to which the standard terms form part of the contract. Also the validity of the contract or of some of its provisions may be challenged, for instance in connection with the capacity to contract, fraud or as a result of the infringement of certain mandatory provisions such as those concerning consumers or data protection.

Before addressing conflict of laws with regard to those issues, in connection with the agreements between SNS providers and users it is of great importance to consider that in the current EU framework special conflict-of-law rules for consumer contracts have been established, in particular in Article 6

¹⁶ Article 4(2) of Spanish Act 34/2002 (*BOE* 166 of 12 July 2002) concerning the implementation in Spain of the e-commerce Directive provides an example of such an approach.

¹⁷ See section 6, *infra*.

¹⁸ On the nature of the information obligations imposed by Article 5 of the e-commerce Directive as minimum standards which are to be regarded as internationally mandatory, see H.W. Micklitz and M. Schimbacher, "§ 6 TMG", in G. Spindler and F. Schuster (Hrsg.), *Recht...*, cit. at p. 1480.

¹⁹ Discussing the relevant factors to determine if the activities are directed to a Member State, see section 5, *infra*.

²⁰ E.g. Twitter and YouTube.

²¹ E.g. Facebook.

²² E.g. LinkedIn.

Rome I Regulation²³. Such provisions are aimed at ensuring adequate protection for the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the commercial party to the contract²⁴. Therefore the question arises as to what extent contracts between SNS providers and users may be characterized as consumer contracts for these purposes²⁵.

5. Under Article 6.1 Rome I Regulation –and the parallel provision on international jurisdiction of Article 15.1 Brussels I Regulation²⁶– a “consumer contract” is “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)”. SNS providers are pursuing their commercial activities when they conclude agreements with the users and hence they are to be regarded as a party acting in the exercise of his trade. By contrast the use made by the recipients of the services provided by SNS and the position and purposes of the users vary widely. For instance, users may have recourse to SNS as a platform to advance commercial, professional or political goals, but also users may be natural persons that limit themselves to use the service in connection with personal activities completely unrelated to any commercial activity. In the latter situations it is relevant to establish if users may be characterized as consumers in order to benefit from the specific conflict of laws provisions established for their protection.

When applying the Brussels I Regulation the ECJ has made clear that only private and final consumers not engaged in trade or professional activities are to be considered consumers²⁷. The ECJ has established that to determine if a person is a consumer reference has to be made to the position of the person concerned in a particular contract and that the same person may be considered as a consumer in certain contracts and as a commercial actor in others²⁸. Additionally a person who concludes a contract for a purpose which is partly related to his trade or profession and partly outside it can not in principle be regarded as a consumer²⁹. The category of consumer contracts in Article 6 Rome I Regulation extends to contracts for the provision of services and to contracts relating to intangible goods. Also contracts in which the services are not remunerated by the recipient are covered. In this regard, it is relevant that the ECJ has stressed that the requirement under Article 15(1)(c) Brussels I Regulation that a contract has been concluded by a consumer with a person who pursues commercial or professional activities can be met even in situations in which the consumer “merely indicates

²³ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008 L 177/6.

²⁴ ECJ Judgment of 20 January 2005, C-464/01, *Gruber*, para. 34; and ECJ Judgment of 20 January 2005, C-27/02 *Engler*, para. 39.

²⁵ Relationships between users and third party sites and platform applications made available by the SNS providers may raise similar issues that require a specific assessment of the circumstances and terms under which the services are provided by the third party concerned.

²⁶ *OJ* 2001 L 12/1.

²⁷ ECJ Judgment of 19 January 1993, C-89/91, *Shearson Lehman Hutton, Inc.*

²⁸ ECJ Judgment of 3 July 1997, C-269/95, *Benincasa*, para. 16.

²⁹ ECJ Judgment of 20 January 2005, C-464/01, *Gruber*, para. 39.

its acceptance, without assuming itself any legal obligation to the other party to the contract".³⁰

Under Article 6(4)(a) Rome I Regulation some contracts for the supply of services are excluded from the protection provided for by Article 6. The exclusion refers to those contracts "where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence". The location of the place of supply of services that are provided online may raise special difficulties, but the exception established in Article 6(4)(a) should be interpreted restrictively and in tune with its rationale of covering only contracts in which the services "are supplied exclusively outside the State in which the consumer is resident" and in which the "consumer cannot reasonably expect the law of his State of origin to be applied".³¹ A mere declaration by the SNS provider that its service shall be deemed solely located in its country of origin (typically a non EU Member State) should not be enough to reach the conclusion that for the purposes of Article 6 services are supplied to consumers exclusively in that country. In the typical situations in which the agreement on the use of SNS is concluded with an individual that intends to use the service while staying in its country of residence, the services provided allow the user to make content available from his own country (and in many situations to share the contents only with people located in the same area) and the agreement is presented and the service provided in the local language of the consumer, it seems that it can be convincingly argued that the services are not supplied to such a consumer exclusively in a country other than that in which he has his habitual residence. In accordance with this interpretation natural persons that conclude such agreements for a purpose outside his trade or profession would benefit from the protection granted in Article 6(1) and (2) if the relevant requirements are fulfilled.

In relation with the global reach of SNS the requirement laid down in Article 6(1) that the contract presents a close connection with the country of residence of the consumer as a condition for the protective regime to be applicable is of special interest. According to Article 6(1)(b) Rome I Regulation the special conflict of laws provisions for consumers apply if the professional by any means, directs his commercial or professional activities to the country where the consumer has his habitual residence or to several countries including that country, and the contract falls within the scope of such activities. For the purposes of interpreting this provision important guidance has been given by the ECJ in its *Pammer* judgment. The Court in *Pammer* addressed the issue of what criteria are relevant to determine if a trader whose activity is presented on a website can be considered to be directing its activity to the Member State of the consumer's domicile. In the context of Article 15(1)(c) of the Brussels I Regulation the ECJ established that the fact that a website can be consulted on the Internet in the consumer's habitual residence is not sufficient for the activity concerned to be regarded as directed to that country. Additionally it held that it is necessary that

³⁰ ECJ Judgment of 14 May 2009, C-180/06, *Ilseinger*, paras 51 and 54.

³¹ See M. Giuliano and P. Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations" (JO 1980 C 282/1), at para 5 of the comment to Article 5, referring to Article 5(4) of the 1980 Rome Convention on which Article 6(4)(a) Rome I Regulation is based.

evidence exists that the trader was envisaging doing business with consumers domiciled in the Member State of that consumer's domicile. Among the items of evidence that may be relevant in demonstrating the existence of an activity directed to the State of the consumer's domicile, the ECJ mentioned "the international nature of the activity at issue", "use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as .com or .eu"; mention of an international clientele composed of customers domiciled in various Member States, and also the fact that the website permits consumers to use its local language when it is different from the languages generally used in the State from which the trader pursues its activity³².

Albeit the list of factors considered by the Court in *Pammer* was very much influenced by the relevant facts of the main proceedings, for the purposes of Article 6 Rome I Regulation a global SNS may typically be regarded as directing its activities (among others) to the Member State where the consumer contracting the service has his residence, in particular if it provides the services in the local language of that State and the SNS has a significant number of registered users in that country. Furthermore, the widespread availability of geolocation devices that allow SNS providers to restrict access to their services to residents in certain countries may be significant in this context. For instance, in order to consider that if global online services are provided without geolocation restrictions being implemented with respect to a country in which the service has substantial effects (in particular, numerous users) that may be a factor supporting the view that the activity is directed to that country. A mere declaration by the service provider in the terms of service stating that it shall be deemed a passive website should not be determinative to exclude a finding that its activities are (also) directed to a Member State for the purposes of Article 6 Rome I Regulation if other elements support this conclusion.

The criteria that natural persons that use SNS for personal, domestic and familiar purposes completely unrelated to any professional, commercial, political or similar activities are to be regarded as consumers and that SNS active in Europe are typically to be deemed as directing their activities to EU Member States for the purposes of Article 6 Rome I Regulation may in practice have significant implications concerning the determination of the rules governing the relationship between SNS providers and such natural persons resident in a EU Member State. In particular, because as already noted the main SNS providers have their principal establishment in the US and tend to include in their standard terms a choice of law clause in favour of the law of a US State but under Article 6 Rome I Regulation such a choice may not deprive the consumer of the protection afforded to him by the mandatory provisions of the law of the country where the consumer has his habitual residence. Furthermore, EU directives harmonizing consumer contract law have traditionally included rules imposing on Member States the obligation to ensure that consumers are not deprived of the protection afforded by the directives as a result of the choice of the law of a non-member

³² ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, *Pammer*, paras. 80-84.

State as the law of the contract in the situations in which the contract has a close link with the territory of one or more Member States³³. Although the national provisions implementing the directives may prevail over Article 6 of the Rome I Regulation by virtue of Article 23³⁴, in the on-line context the key element to appreciate that such a close link exists is that the commercial activity to which the contract relates is directed to the Member State concerned. Furthermore, the new Directive 2011/83/EU ensures a better coordination with the Rome I Regulation since according to Article 28 of the Directive: « If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive» and recital 58 of the Directive states that where the law applicable to the contract is that of a third country, the Rome II Regulation should apply to determine whether the consumer retains the protection granted by the Directive.

The strategy of subjecting the relationship with all their users to US law is well-known in the practice of the most prominent SNS that have their main establishment in the US. However, the obvious need to establish restrictions with respect to certain transactions connected with users having their habitual residence in the EU has already influenced their practice. Noteworthy in this regard is section 16 of the Statement of Rights and Responsibilities of Facebook containing "Special Provisions Applicable to Users Outside the United States". After an statement that the SNS "strives to respect local laws" that section includes a special provision on consent by users for the transfer of personal data to the US but also a reference to certain specific terms that apply only for German users.³⁵ That reference leads to a text in German in which significant modifications in favour of the users are introduced with regard to the content of the contract. As it will be later discussed, those modifications are to a significant extent connected with demands resulting from EU law (and its implementing provisions) which are not specific to Germany although under the current version of the Statement the special treatment is only intended to be applied to persons having their habitual residence in Germany. A somewhat different approach has been adopted by other SNS providers, as illustrated by sections 5 (Disclaimer) and 6 (Limitation of Liability) of LinkedIn's User Agreement that begin with a notice stating that some countries do not allow such clauses "in contracts with consumers and as a result the contents of this section may not apply to you".³⁶

³³ See, in particular, Article 6(2) Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29); Article 12(2) Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144/19); and Article 12(2) Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services (OJ 2002 L 271/16).). However, more recently see Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Directives 93/13/EEC and 1999/44/EC and repealing Directives 85/577/EEC and 97/7/EC.

³⁴ See F. Ragno, "The Law Applicable to Consumer Contracts under the Rome I Regulation", F. Ferrari and S. Leible (eds.), *Rome I Regulation (The Law Applicable to Contractual Obligations in Europe)*, 2009, pp. 128-170, p. 159.

³⁵ < <https://www.facebook.com/terms/provisions/german/index.php> >.

³⁶ See also the sections on "limitation of liability" and "exclusions" of the Terms of Service of Twitter.

6. Party autonomy is a basic principle in the determination of the law of the contract under the Rome I Regulation. According to the first sentence of Article 3 "A contract shall be governed by the law chosen by the parties". This article allows parties to choose the applicable law in very flexible terms, in particular because the choice may not be express and there are no restrictions that limit the national law that the parties may select. Freedom of choice is of extraordinary value for SNS providers acting globally. It enables them to submit the relationships with users around the world to a single law with a view to facilitate legal compliance, reduce costs and prevent legal risks.

Since choice of law does not require any specific form under Article 3 Rome I Regulation, it is not disputed that a choice made in a clause in standard terms may be effective, in tune with the practice of the main SNS providers of selecting the law of a US State³⁷. Notwithstanding this, in connection with the use of such standard terms in on-line transactions uncertainties may arise in some situations with regard to the existence and validity of the consent of the parties as to the choice of the applicable law. This may be the case when the user challenges the existence of a contract or a choice of law agreement in particular because he considers that he has not given his consent or that the choice of law agreement has not been incorporated to the contract³⁸. For instance, such situations may arise when the standard terms that include the choice of law agreement are not presented in an appropriate way to the user at the time of conclusion of the contract and also in connection with the practice of on-line service providers stating in their websites that by merely using or accessing the service the user agree to the standard terms including a choice of law clause.

From the conflict of laws perspective, Article 3(5) Rome I Regulation refers questions relating to the existence and validity of the consent of the parties as to the choice of the applicable law to the provisions of Articles 10 (consent and material validity), 11 (formal validity) and 13 (incapacity). Although other issues raised by Articles 10 and 13 will be discussed later, the reference of Article 3(5) to Article 10 means that in principle the existence of a choice of law agreement is to be determined in accordance with the law chosen in the disputed agreement. Because of the reference to Article 11 the formal validity of choice of law agreements in consumer contracts falling under Article 6 are governed by the law of the country where the consumer has his habitual residence.

Restrictions to party autonomy significant to contracts between SNS and users may arise in particular from the special protection granted to consumers under Article 6 Rome I Regulation but also from the rules on overriding

³⁷ For instance, see Section 15(1) of Facebook's Statement of Rights and Responsibilities ("The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions"). Similar examples may be found in Section 14 of YouTube's Terms of Service; Section 8(A) of LinkedIn's "User Agreement"; and the Section on "Controlling Law and Jurisdiction" of Twitter's Terms of Service.

³⁸ G. Busseuil, "Le choix de la loi applicable au contrat électronique", in S. Corneloup and N. Joubert (dirs.), *Le Règlement communautaire "Rome I" et le choix de la loi dans les contrats internationaux*, 2011, pp. 397-419, at pp. 402-404.

mandatory provisions of Article 9, that will be later discussed in connection with data protection law. Choice of law agreements in consumer contracts which fulfil the requirements of Article 6(1) are subject to the limitations established in paragraph 2. Pursuant to this provision, parties are allowed to choose the applicable law but such a choice may not deprive the consumer of the protection afforded to him by the mandatory provisions of the law of the country where the consumer has his habitual residence. Therefore, the judge has to make a comparison between the relevant mandatory provisions of that country and the rules of the law chosen by the parties. To the extent that the latter offer less protection to the consumer they are to be replaced by the provisions of the country where the consumer has his habitual residence that function as a minimum standard of protection.

The acceptance, albeit with restrictions, of party autonomy in consumer contracts under Article 6 Rome I Regulation³⁹ favours the strategy by SNS providers of subjecting the relationships with service recipients –consumers and others- around the world to a single law. However, the need to respect the standard of protection resulting from the mandatory provisions of the country of the residence of the consumer leads to exclude the application of certain provision of the chosen law with respect to consumers resident in countries providing higher protection than the law chosen by the parties. This situation is acknowledged by some SNS providers in the drafting of their standard terms to the extent that they envisage the non application of some clauses to consumers resident in countries where the relevant terms are contrary to mandatory provisions. Nonetheless, under Article 6 Rome I Regulation the application of rules of the country where the consumer has his residence instead of the less protective provisions of the law chosen by the parties is not influenced by a specific reference in the contract in this regard. Indeed, if the requirements to apply Article 6 are met, paragraph 2 requires the judge to compare by its own motion the results reached when applying the rules of the different legal systems involved in order to apply to the consumer transaction those that provide the consumer with a higher level of protection. This conclusion is also relevant in general terms with respect to the national provisions implementing the mandate of certain consumer related directives to ensure that the consumer does not lose the protection granted by the relevant directive by virtue of the choice of the law of a non-member country if the contract has a close link with the territory of the EU. Due to the mandatory nature of those provisions, the protective measures in favour of the weaker party should prevail over the chosen law in all cases in which the content of the latter does not reach the protection granted by the harmonized EU rules.

With respect to the content of contracts between SNS providers and their users, the mandatory application of the minimum substantive standard of protection resulting from EU law to consumers having their habitual residence in a Member State may have particular influence with regard to the application of the provisions on unfair terms. In order to make the comparison with the law

³⁹ B. Ubetazzi, *Il Regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, 2008, p. 87.

chosen by the parties for the purposes of Article 6(2) of the Rome I Regulation and Article 6(2) of the Directive 93/13/EEC on unfair terms in consumer contracts the delimitation of the contractual terms that are to be considered unfair and hence that will not be binding on the consumer is of special relevance. According to Article 3(1) of the Directive: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".⁴⁰ Additionally, the Annex to that Directive contains a non-exhaustive list of the terms which may be regarded as unfair and Article 4 provides additional criteria as to the assessment of the unfair nature of the terms.

The practice of some SNS providers offer illustrations of the kind of terms included in their agreements that may be regarded as unfair in the European context, since they refer to the possibility of those terms not applying in certain jurisdictions. In addition to clauses on limitation of liability, warranties, amendments, choice of law and jurisdiction, the extent of the licence granted by the user to the SNS provider may be of special relevance. Such licences have traditionally been drafted in very broad terms⁴¹ that can be regarded as going beyond what is necessary to provide and exploit the service.⁴² From the European perspective it is noteworthy that certain service providers have expressly limited the scope of the licence with regard to users having their habitual residence in a European jurisdiction, in order to restrict it in the sense that the SNS provider is only authorized to employ the content posted by the users with respect to the use or in connection with the service provided.⁴³

7. The basic provisions on the law applicable to the contract in the absence of a choice by the parties are found in Article 4 of the Rome I Regulation. As already noted, contracts for the use of SNS are usually based on standard terms drafted in advance by the SNS that include a choice of law agreement. To the extent that the parties choose the law applicable to the contract under Article 3 recourse to Article 4 is not necessary. Therefore, Article 4 may become especially significant in this context with regard to situations in which it is found that there

⁴⁰ The majority of Member States have implemented the fairness test without reference to the "good faith" criterion, see J. Stuyck, "Unfair Terms", in G. Howells and R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, 2009, pp. 115-144, at pp. 123-124.

⁴¹ According to Section 2.1 of Facebook's Statement of Rights and Responsibilities: "For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it."

⁴² Considering as unfair and non binding on the consumer a clause on the scope of the licence granted by users to Google contained in Google's Terms of Service, see Judgment of the Landgericht Hamburg of 07.08.2009 -324 O 650/08- paras. 50-51.

⁴³ See paragraph 1 of the special terms applicable to Facebook users resident in Germany, according to which: "1. Ziffer 2 gilt mit der Maßgabe, dass unsere Nutzung dieser Inhalte auf die Verwendung auf oder in Verbindung mit Facebook beschränkt ist."

was no consent by the user to the choice of law clause or for other reasons such clause was non existent or invalid.

Article 4(1) of the Rome I Regulation establishes the law applicable to certain categories of contracts by means of fixed and direct rules that only in exceptional circumstances may be disregarded. Identification of the characteristic performance to determine the law of the contract is only required in those cases where the contract cannot be categorised as being one of the specified types listed in paragraph 1 or where the elements of the contract fall within more than one of those types. The first step to determine the applicable law is to ascertain if the contract can be categorised as being one of the specified types listed in paragraph 1. If that is the case, the applicable law is determined in accordance with the fixed rules of paragraph 1, and the resulting law can only be disregarded under the exception clause of Article 4(3).⁴⁴ The categories of contracts listed in paragraph 1 include: sale of goods; contracts for the provision of services; contracts relating to a right in rem in immovable property or to a tenancy of immovable property; franchise contracts; distribution contracts; sale of goods by auction; and contracts concluded within regulated markets in financial instruments.

Therefore, the first issue to be addressed is if contracts concerning the use of SNS can be categorised as falling within only one of the types set forth in Article 4(1). Although contracts governing the relationships between SNS providers and their uses are complex agreements that may include provisions on a wide variety of issues, such as licensing of IP rights, collecting and processing of personal information or delivery of advertisements, it can be argued that such contracts can be regarded in typical situations as contract for the provision of services falling within Article 4(1)(b). The inclusion in the contract of a licence by the user to the SNS provider with respect to the information that the user posts in the SNS should be in principle regarded as functionally subordinate to the use of the service provided by the SNS not preventing its characterization as a contract for the provision of services⁴⁵. Contracts between SNS providers and users mainly refer to the terms under which the providers that offer certain services carry out their activities and the conditions under which the recipients can make use of the services⁴⁶. Indeed, basic in the content of these contracts are the conditions under which users can make use of the SNS, the terms on how users can share information by using the services of the SNS and on the (lack) of warranties by the provider with respect to the provision of the service. Also agreements concerning advertising in the SNS are typically to be regarded as contracts for the provision of services between the SNS who act as provider of the advertising services and the advertisers who make use of the service.

⁴⁴ U. Villani, "La legge applicabile in mancanza di scelta dei contraenti", in N. Boschiero, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, 2009, pp. 149-172.

⁴⁵ See P.A. De Miguel Asensio, "Applicable Law in the Absence of Choice to Contracts relating to Intellectual or Industrial Property Rights", *Yearbook PIL*, vol. X, 2008, pp. 199-219, at p. 208.

⁴⁶ ECJ Judgment of 23 April 2009, C-533/07, *Falco*, para. 29. See B. Ubertaini, "Licence Agreements Related to IP Rights and the EC Regulation on Jurisdiction", *IIC*, vol. 40, 2009, pp. 912-939.

Article 4(1)(b) states that a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. This provision makes explicit with regard to contracts for the provision of services the widely accepted result of applying the characteristic performance test, since the service provider was also traditionally considered as the party who effects the characteristic performance. Recourse in Article 4(1)(b) to the habitual residence of the service provider as connecting factor favours predictability as to the law applicable to the contract in comparison with the use of other elements that may raise special difficulties when applied to the online environment such as the determination of the place where the services are provided⁴⁷. For these purposes, the habitual residence of the service provider is to be determined in accordance with Article 19 Rome I Regulation (the place of central administration of a company or where the contract is concluded in the course of the operations of a branch or other establishment the place where the branch or establishment is located). The escape clause of Article 4(3) that permits the application of a different law is drafted in very restrictive terms and as an exceptional device that is only to be applied in cases in which the contract is manifestly more closely connected with a country other than that of the place where the service provider has his habitual residence.

In the light of the foregoing considerations it can be concluded that the law applicable to the contracts between SNS providers and the users of their services in the absence of choice is typically the law of the country where SNS provider is located. This result is in tune with the preferences of SNS providers as expressed by the choice of law agreements they usually include in their standard terms.

By contrast the situation is the opposite with regard to consumer contracts covered by Article 6 Rome I Regulation. In accordance with Article 6.1 in the absence of choice consumer contracts are to be governed by the law of the country where the consumer has his habitual residence. This solution leads to the eventual application of diverse laws to the different contracts concluded by a SNS provider that acts at international scale.

8. The law applicable to the formation and validity of the contract may be of great practical importance in connection with agreements regarding the use of SNS. Among others, disputes may arise as to the existence and the content of the contract. In particular, it may be controversial if a contract has been concluded and to what extent the standard terms drafted in advance by the SNS provider have been accepted by the user and have been incorporated into the contract. The result will be determinative to establish if certain terms are binding on the user. Some practices of SNS providers acting globally may result especially

⁴⁷ Such difficulties arise with regard to the interpretation of the EU provisions on international jurisdiction since Article 5(1)(b) Brussels I Regulation grants jurisdiction in contractual matters to the courts of the place where the services were provided or should have been provided; although the ECJ has already provided some guidance on the interpretation of the notion of the place of provision of the services under Article 5(1)(b), in particular in its judgment of 9 July 2009, C-204/08, *Rehder*, the specific difficulties posed by the application of the rule to the online provision of services remain open.

controversial in this context. For instance, as a result of the expansion of the business model from the US to other States SNS providers may be interested in ensuring that translation of the standard terms does not alter the content and meaning of the terms. To achieve that goal recourse has been taken to the inclusion of a preliminary declaration in the standard terms stating that if the translated version of the agreement conflicts with the English version, the English version prevails⁴⁸. However, to the extent that such a declaration is introduced in the standard terms presented in other languages with a view to conclude agreements to provide the services in the local language in non English-speaking countries to users resident in those countries and that interact and contract with the SNS provider in their local language, it can be argued that the English version should not be binding on those users who subscribe to (or use) the service in a different language⁴⁹.

From the conflict of laws perspective, the basic criterion is that in accordance with Article 10(1) Rome I Regulation, the law applicable to establish if the contract was concluded and which is its content, in particular to what extent certain standard terms are to be regarded as contract terms binding on the user is the law which would govern the contract under the Regulation if the contract or term were valid. Therefore, articles 3, 4 and 6 previously discussed are also applicable with respect to the existence, content and validity of the contract and reference has to be made to the previous discussions on those issues. Notwithstanding the general rule in Article 10(1), paragraph 2 contains a special rule which relates only to the existence of consent intended mainly to address the issues raised by the implications of silence by one party as to the formation of the contract. Recourse to Article 10(2) can result in a decision releasing from the contract a party who would have been bound under the law applicable in accordance with paragraph 1. Under the special rule of paragraph 2 a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Controversies concerning contracts between SNS providers and users may relate to the validity of some clauses or the agreement itself, not only because they might be regarded as unfair but also in relation with the numerous agreements between SNS and minors in which like other users minors dispose of their intellectual property rights over the contents they introduce in the SNS that can be very valuable in the future⁵⁰. When lack of capacity is invoked as a ground for

⁴⁸ "This agreement was written in English (US). To the extent any translated version of this agreement conflicts with the English version, the English version controls", see <<http://www.facebook.com/terms.php?ref=pf>>.

⁴⁹ According to Article 5 Directive 93/13/EEC: "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language." II-902(1) of the Draft Common Frame of Reference includes a similar obligation with respect to all contracts that have not been individually negotiated, see *Draft Common Frame of Reference (Interim Outline Edition)*, 2008, p. 142.

⁵⁰ See S. Hetcher, "User-Generated Content and the Future of Copyright: Part Two – Agreements Between Users and Mega-Sites", *Santa Clara Computer & High Tech. L.J.*, vol. 24,

contract invalidity the solution to determine the applicable law is not to be found in the Rome I Regulation since no uniform rules have been adopted within the EU. In accordance with Article 1(2)(a) questions involving the status or legal capacity of natural persons are excluded from the Regulation, without prejudice to Article 13. The provisions on incapacity of Article 13 are aimed at protecting a party who in good faith believed himself to be contracting with a person of full capacity if certain conditions are met. However, those special provisions are not intended "to prejudice the protection of a party under a disability where the contract is concluded at a distance, between persons who are in different countries, even if, under the law governing the contract, the latter is deemed to have been concluded in the country where the party with full capacity is".⁵¹ Due to the lack of uniform rules, the court in each EU Member State will determine contractual capacity in accordance with its own system of private international law. National systems vary in this regard, since some countries subject capacity to the law of the nationality, others to the law of the country of domicile, others to the law of the place where the contract was entered into and others to the law governing the substance of the contract.

9. Intellectual property licensing is a key component in contracts concerning the use of SNS⁵². From a conflict of laws perspective different issues have to be addressed. First, in order to establish if some terms of the licences are to be regarded as unfair as a result of the imbalance in the parties' rights and obligations that arise under the contract, the previous considerations on the law

2008, pp. 829-867, at p. 832, considering that "millions upon millions of such agreements – particularly those between UGC (user generated content) megasites and minors- are unconscionable and therefore invalid on their terms".

⁵¹ See M. Giuliano and P. Lagarde, "Report...", *cit.* in the comment to Article 11 of the 1980 Rome Convention on which Article 13 of the Rome I Regulation is based.

⁵² In addition to the terms of Facebook previously referred to, examples may be found in all other SNS considered. For instance, see the Section "Your rights" in the Terms of Service of Twitter: "[...]By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). [...]You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use. [...] Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services. We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media. [...] You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit. Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software that is provided to you by Twitter as part of the Services. This license is for the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms."

applicable to the formation and content of the contract and in particular with regard to the protection of users that are entitled to protection as consumers become determinative to establish the law governing the determination of which provisions should be regarded as unfair.⁵³

The law applicable to licence clauses that are an element of a broader contract on the provision of SNS services is in principle the law of the contract for the provision of services that is to be determined in accordance with the criteria previously discussed. However, because of the existence of a specific rule on the law applicable to the subject matter of licences –intellectual property rights-⁵⁴, characterization of certain issues becomes relevant.

Matters falling within the scope of application of the conflict of laws rules on intellectual property rights are typically governed by the law of the country of protection regardless of the law applicable to the contract that governs the contractual aspects of the transaction. Transferability of intellectual property rights (including the issue of whether a license or transfer may be granted), conditions of validity of the transfer and license and issues concerning third party effects of these transactions –such as those related to their entry in public registries and the priority between transfers and licenses- are typically considered as elements inherent to the intellectual property rights and hence falling within the scope of application of the conflict of laws rule on the rights as such. Therefore these issues are governed by the respective law of protection regardless of the law applicable to the contract⁵⁵. The law of protection is in this case the law of each country for which rights are licensed or transferred. The foregoing has very significant practical implications, since parties are not allowed to exclude the application to those issues of the respective *lex loci protectionis*. Application of the law of protection concerned to those questions remains unaffected by the choice between the parties of the law applicable to the contract.

Copyright and related rights are the main component of licences of user generated content in the framework of agreements between SNS providers and users. Copyright and related rights licensing poses some specific challenges. In particular, such contracts are to a great extent influenced by the attributes of copyright and the content of substantive copyright law that protect authors by imposing significant restrictions to the freedom of contract.

Characterization of transferability as an issue governed by the law applicable to the copyright itself has significant implications since in most

⁵³ See Sections 5 and 6, *supra* and also the contribution by A. Cogo in this volume.

⁵⁴ See Section 14, *infra*.

⁵⁵ See A. Metzger, "Transfer of Rights, License Agreements, and Conflict of Laws: Remarks on the Rome Convention of 1980 and the Current ALI Draft", J. Basedow, J. Drexler, A. Kur and A. Metzger (eds.), *Intellectual Property in the Conflict of Laws*, 2005, at pp. 67-69; P. Mankowski, "Contracts Relating to Intellectual or Industrial Property Rights under the Rome I Regulation", S. Leible and A. Ohly (eds.), *Intellectual Property and Private International Law*, 2009, at pp. 42-47; and Y. Nishitani, "Contracts Concerning Intellectual Property Rights", in F. Ferrari and S. Leible (eds.), *Rome I Regulation – The Law Applicable to Contractual Obligations in Europe*, 2009, at pp. 74-80; and N. Boschiero, "I contratti relative alla proprietà intellettuale alla luce della nuova disciplina comunitaria di conflitto. Analisi critica e comparatistica", N. Boschiero, *La nuova...*, cit., at pp. 470-479.

copyright legislations certain rights cannot be transferred or licensed. This is especially true for systems that recognize moral rights as inalienable rights which in principle cannot be waived. This is common in most continental European legislations, as well as in other systems in which the copyright regime includes certain restrictions to transferability aimed at protecting authors. At any rate, significant divergences are found in national legislations as to the possibility for the author to waive his moral rights. These aspects have become very prominent in the context of the new models of licensing related to the Internet that allow for derivative works. For instance, the possibility of waiving moral rights and the potential scope of a waiver have been regarded as one of the most pressing questions for Creative Commons licenses.⁵⁶ These issues are determined by the scope of protection of moral rights under each copyright regime and hence fall within the scope of the choice of law rule on the copyright and as such cannot be characterized as contractual issues. Indeed the law applicable to the extent of moral rights and to determine if they are waivable by means of a license is the law applicable to each copyright and not the law applicable to the contract. This situation raises additional difficulties with respect to multistate licenses that are relevant in connection with the functioning of SNS since under their terms of service usually envisage that users grant a worldwide license to the SNS provider with regard to the use of content that they post in the SNS..

Furthermore, since limitations and exceptions to copyright are basic elements of the scope of protection of copyright that balance the different interests involved according to the policies of the respective copyright regime, these issues also fall within the scope of application of the conflict of laws rule on copyright. The same rule also applies to the possibility of waiving those exceptions or limitations. This can be of great relevance to the position of certain licensees. All of the above mentioned issues are governed by the law applicable to the copyright itself or the law of the country for which protection is claimed and, with regard to contracts, the law of the country for which rights are licensed. The law applicable to the formal validity of the contract can be distinguished from the formalities or other requirements imposed as a prerequisite for the license of the industrial property rights; only the latter fall within the scope of application of the *lex loci protectionis*.

10. According to Article 9(1) Rome I Regulation: "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". To the extent that the contract falls under the scope of application of the overriding mandatory provisions of the law of the forum – including EU law- these provisions prevail over the law of the contract. Moreover, under certain circumstances overriding mandatory provisions of third countries

⁵⁶ C. Maracke, "Creative Commons International. The International License Porting Project – Origins, Experiences, and Challenges", *JIPITEC*, 2010, 1, pp. 4-18, p.7.

may also prevail over the law of the contract, as established in article 9(3) Rome I Regulation.

Among the norms that may be characterized as overriding mandatory provisions and are of special relevance for the regulation of contracts involving SNS providers are those concerning antitrust law⁵⁷, consumer protection⁵⁸, data protection and the possible limits resulting from other fundamental rights that may be involved in the access and use of certain Internet services⁵⁹. Application of antitrust law –that may be of special relevance in connection with private enforcement in an area where monopolistic situations have been identified and with respect to the terms applicable to providers of external applications that can be accessed by the SNS users- offers a good example of how the scope of application of these overriding mandatory provisions is not determined under the same criteria that the law applicable to the contract. Antitrust law prohibitions may apply to international contracts resulting in certain clauses being automatically void regardless of the law applicable to the contract, because the interests involved in antitrust law demand that the law applicable concerning antitrust prohibitions is the law of the country where the market is, or is likely to be, affected (Article 6.3 Rome II Regulation).

11. Collecting and processing personal data is essential to the business model of SNS providers that to a great extent rests on the exploitation of user data for advertising. Indeed, users supply certain personal information when registering and post in the SNS contents that include personal data⁶⁰. Due to the differences in the level of data protection between the EU and other countries including the US, determining the scope of international application of EU law is of great importance in this regard both to ensure persons affected adequate protection of their rights in Europe and to allow SNS providers acting

⁵⁷ See the contribution by E. Camilleri in this volume.

⁵⁸ See the contribution by M. Granieri in this volume. In connection with Article 9 Rome I Regulation it has become controversial if certain mandatory norms which may be aimed, among other social goals, at protecting a weaker party are covered by the definition of overriding mandatory provisions contained in article 9.1. Although the reference in the definition to the safeguarding of public interests may be invoked to limit the concept of overriding mandatory provisions in line with the restrictive German concept of *Eingriffsnormen*, the foundations of article 7 Rome Convention as predecessor of Article 9 Rome I Regulation, the origin of the definition used in article 9 that is to be found in the *Arblade* decision of the Court of Justice dealing with the protection of employees (Judgment of 23 November 1999, C-369/96 and C-376/96, *Arblade*) and the subsequent case law concerning the protection of agents (Judgment of 9 November 2000, C-381/98, *Ingmar*) and consumers (Judgments of 26 October 2006, C-168/05, *Mostaza Claro*; and 6 October 2009, C-40/08, *Asturcom*) may be invoked in favour of a broader interpretation of the term overriding mandatory provisions so that it shall encompass provisions that may protect a weaker party. At any rate, with respect to the protection of consumers in international contracts, the specific conflict of laws provisions of article 6 restrict the practical significance of the specific provision on overriding mandatory rules.

⁵⁹ See ECJ Judgment of 24 November 2011, C-70/10, *Scarlet Extended* and the contribution by F. Donati in this volume.

⁶⁰ M. Peguera Poch, "Publicidad online basada en comportamiento y protección de la privacidad", in A. Rallo Lombarte y R. Martínez Martínez (dirs.), *Derecho y redes sociales*, 2010, pp. 355-380

internationally to predict to what extent they have to comply with the obligations imposed by EU data protection legislation. Applicability of EU data protection legislation is determinative of the mechanisms and conditions under which data protection should be collected and processed. In particular, in connection with the contractual relationship between SNS providers and users, it is noteworthy that the content of the privacy policies of SNS providers and the means to collect data and obtain consent for the processing and transfer of personal data have to be adapted to the requirements of EU law⁶¹ if applicable to the activities concerned. Such obligations are typically enforced by the public authorities responsible in each Member State for monitoring the application of data protection legislation.

Additionally, with respect to the relationships between SNS providers and users, the overriding mandatory nature of EU data protection law determines that its applicability to the situations covered within its scope of application can not be affected by agreements on choice of law between the parties. The characterization of EU data protection rules as overriding mandatory provision is in tune with the meaning of data protection as an essential value of the EU recognised in Article 8 of the EU Charter of Fundamental Rights which must be respected in all EU policies pursuant to Article 16 of the Treaty on the Functioning of the European Union. Therefore, if needed recourse can be taken to Article 9.2 Rome I Regulation to ensure in EU Member States the unrestricted application of the overriding mandatory provisions of the law of the forum (including EU law) within their territorial scope of application.

The scope of application of EU and national data protection law is also determinative of under which circumstances SNS users are to be regarded not only as data subjects but also as data controllers and hence assume controller responsibilities and obligations. Beyond the obligations imposed on SNS providers as data controllers of user data, the significance of SNS as platforms that allow users to share and post contents that may disclose private information concerning other persons leads to situations in which users of SNS may be characterized as data controllers in accordance with EU legislation. In particular, the extent of access restrictions to the information posted by the user and the interpretation of the so-called "household exception"⁶² and other possible exemptions are to be considered in this regard⁶³. For the purposes of the present contribution the focus of attention remains on the applicability of EU data protection legislation to the activities of SNS providers.

Article 4 Directive 95/46/EC⁶⁴ is the basic provision establishing the scope of application of the national laws implementing the Directive. A

⁶¹ See Article 29 Data Protection Working Party, "Opinion 15/2011 on the definition of consent", 13 July 2011, WP 187, pp. 18-24.

⁶² In tune with the criteria established by the ECJ with regard to situations in which a person publish personal information of other data subjects using other Internet services or platform, in particular web sites, see ECJ Judgment of 6 November 2003, *Lindqvist*, C-101/01, paras. 46-47; and ECJ Judgment of 16 December 2008, *Satamedia*, C-73/07, para. 44.

⁶³ See Article 29 Data Protection Working Party, "Opinion 5/2009 on online social networking", 12 June 2009, WP 163, pp. 5-7.

⁶⁴ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281/31).

distinction is to be made between SNS providers as data controllers depending on whether they are established in a EU Member State or not⁶⁵. According to Article 4(1)(a) the law applicable to the processing carried out in the context of the activities of an establishment of the controller on the territory of a Member State is the law of the State where the controller is established, in tune with the significance of the country of origin principle in the internal market within the EU. Additionally, when the same controller is established on the territory of several Member States, the criterion is that each establishment has to comply with its own national law to the extent that the processing is carried out in the context of its activities. Therefore, SNS providers established in a Member State are in general terms obliged to comply with EU standards. Application of data protection rules is not restricted to data subjects on the territory or of a nationality of a Member States. As already noted in connection with the definition of "established service provider" in the e-commerce Directive, SNS providers having their main establishment in third States (such as the US) may be deemed as having an establishment in one or more EU Member States for the purposes of Article 4 Directive 95/46/EC. The decisive element for the purposes of Article 4(1)(a) is the effective and real exercise of activities in the context of which personal data are processed and that element is usually present in countries in which a provider has an stable office actively involved in the provision of the services even if it has its main establishment in a third country.⁶⁶ With respect to controllers having their headquarters in third states the degree of involvement of establishments on the territory of Member States when processing personal data is key to determine if Article 4(1)(a) applies.

The territorial scope of application of EU data protection law extends also to situations where the service provider is not established in the EU. With respect to those service providers, Article 4(1)(c) Directive 95/46/EC, establishes the application of the law of the Member State(s) where the controller "for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community". Interpretation of this controversial provision is key to determine to what extent SNS providers (controllers) that lack an establishment for the purposes of Article 4(1) within the EU are subject to EU data protection legislation. The prevailing view in its interpretation leads to broaden the scope of application of EU law to a significant extent, in line with the position adopted by the so-called "Article 29 Data Protection Working Party" established in the framework of the EU. According to the position adopted by the Working Party, among the situations covered by Article 4(1)(c) are those where the controller (SNS provider) from outside of the EU uses data centres, computers, terminals or servers situated on the territory of a Member State for the storage and remote processing of personal data. In this connection the use by controllers located abroad of cookies and

⁶⁵ See Article 29 Data Protection Working Party, "Opinion 8/2010 on applicable law", 16 December 2010, WP 179, pp. 10-23.

⁶⁶ See Article 29 Data Protection Working Party, "Opinion 8/2010 on applicable law", 16 December 2010, WP 179, pp.11-12.

similar software devices in the computers of users within the EU has also been considered as the use of equipment in the Member State's territory for the purposes of Article 4(1)(c)⁶⁷. Because of the unsatisfactory consequences resulting of such a broad scope of application of EU data protection law it has been suggested to complement the criterion based on the use of equipment in the EU territory with another that considers if the controller directs its activities to the EU territory in line with the approach adopted in Article 15(1)(c) Brussels I Regulation and Article 6(1) Rome I Regulation⁶⁸.

12. Activities carried out in the framework of SNS may affect the rights of third parties other than the SNS provider and the users involved. In those circumstances, non-contractual disputes may arise. Uniform rules have been adopted in the EU concerning the law applicable to non-contractual obligations. Such conflict of laws rules are basically contained in the Rome II Regulation⁶⁹ that has universal scope of application (art. 3) and hence its provisions are applicable by the courts of the Member States to all situations falling within its scope (Articles 1 and 31).

However, non contractual liability issues with regard to SNS providers have arisen especially with regard to the protection of intellectual property rights and in the area of privacy and personality rights. In these areas the general provisions of the Rome II Regulation are of little significance. According to Article 1(2)(g) "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation" remain excluded from the scope of the Rome II Regulation⁷⁰. By contrast, non-contractual obligations arising from an infringement of an intellectual property right are the object of a special provision in Article 8 of the Regulation. Pursuant to this special provision the general conflict of laws rules of the Regulation, in particular, Article 14 on freedom of choice and Article 4 do not apply to disputes regarding the infringement of intellectual property rights. Similar is the situation with respect to liability arising out unfair competition and acts restricting free competition in the light of the special provisions of Article 6.

13. The law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality is an issue of the outmost importance with regard to the activities of the users of SNS. It also encompasses

⁶⁷ See Article 29 Data Protection Working Party, "Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites", 30 May 2002, WP 56, pp. 9-12; and "Opinion 1/2008 on data protection issues related to search engines", 4 April 2008, WP 148, pp. 10-11.

⁶⁸ See Article 29 Data Protection Working Party, "Opinion 8/2010 on applicable law", 16 December 2010, WP 179, p. 24; and F. Jotzo, "Gilt deutsches Datenschutzrecht auch für Google, Facebook & Co. bei grenzüberschreitendem Datenverkehr?", *Multimedia und Recht*, 2009, pp. 232-237

⁶⁹ Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (*OJ* 2007 L 199/40).

⁷⁰ See H. Unberath and J. Cziupka, "Art 1 Rom II-VO", T. Rauscher (Hrsg.), *EuZPR/EuIPR Kommentar*, 2011, paras. 44-46.

possible liability claims against data controllers (Article 23 Directive 95/46/CE) and not only SNS providers but also SNS users that post content may be considered data controllers in situations in which they process personal data and can not benefit from the so-called “household exemption”. Due to the exclusion of the Rome II Regulation, the law applicable to violations of privacy and rights relating to personality are to be determined in each EU Member State in accordance with its own local rules⁷¹. Additionally, the outcome of litigation in this field is influenced by the need of Member States to respect fundamental rights, in particular private life and freedom of expression within the margins of appreciation allowed to them in accordance with the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Although the debate has been intense and it remains open especially in the light of the review clause of Article 30 Rome II Regulation no uniform approach has yet emerged in the EU concerning conflict of laws on this crucial issue. There is a wide range of proposed solutions including approaches based on the victim’s habitual residence (in combination with a foreseeability rule), the country of the publisher’s establishment, recourse to the *lex fori*, the extension to this subject of the general rules provided for in the Rome II Regulation and even the refusal to establish uniform conflict of laws rules in this field.

In the absence of common rules, national responses diverge to a significant extent⁷². Only a few Member States have specific provisions on the law applicable to violations of privacy and rights relating to personality and hence the prevailing approach is that these situations are subject to the general provisions on the law applicable to non-contractual obligations in the forum national legislation. Although recourse to the *lex loci delicti commissi* is a solution common to many national systems, the application of this criterion leads in practice to different results in particular in the light of the complex interpretation of the rule with regard to Internet activities. Indeed, in connection with violations that are the result of illegal content being distributed via Internet services, special difficulties arise because the place of the event giving rise to the damage and the place where the damage materialises may not be the same and additionally the damage can materialise in many places.

Against this background a EU wide unitary analysis on the law applicable to violations of privacy and rights relating to personality is not feasible. The features of SNS and the conditions under which contents are posted and distributed by users of those services should be a relevant element in the interpretation of the rules on applicable law. In particular, SNS allow users to restrict to other selected users access to certain information. With respect to defamatory or similar infringing contents the fact that access is limited to a

⁷¹ Application of the uniform jurisdiction rules of the Brussels I Regulation to violations of rights relating to personality in the Internet raises also the need to adapt the criteria established in the ECJ Judgment of 7 March 1995, C-68/93, *Shevill* with regard to the interpretation of Article 5(3) Brussels I Regulation, see joined cases C-509/09 and C-161/10, *eDate Advertising* and the Opinion of Advocate General Mr. Cruz Villalón of 29 March 2011.

⁷² J.J. Álvarez Rubio (dir.), *Difamación y protección de los derechos de la personalidad: ley applicable en Europa*, 2009, pp. 129-203.

restricted number of users of the SNS does not exclude the possibility of serious violations of personality rights in particular in circumstances in which the contacts allowed to access the information are closely related to the injured party. However, that may be a key element when interpreting conflict rules based on the *lex loci delicti commissi* approach or on the use of the place in which the damage occurs as a connecting factor. In contrast with the difficulties raised by situations in which information is made available in websites that may have a potential global audience, the fact that postings in SNS services may be limited to a community of users should be of great significance when the information has been made available to be shared by a community basically located in a limited territory regardless of the global nature of the service used.

14. The expansion of SNS takes place in a global context in which significant uncertainties exist as to the scope of protection of intellectual property rights and the characterization of certain activities as infringements. Some introductory remarks concerning the substantive perspective may be useful before addressing applicable law. First, the protection of trademarks and names deserves special attention in the light of the extraordinary significance for companies and other actors of their presence in some SNS for commercial and marketing purposes. Essential for the protection of trademarks in this regard is the determination of when the use of a sign in the framework of a SNS by a third party is to be regarded as use in the course of trade as a trademark in order to establish that such prerequisite to infringement is met⁷³. The determination of the circumstances under which protection against unfair competition is available may also be of importance in this regard. Due to the position of SNS providers in connection with the assignment of Internet addresses or URLs to their users that may include trademarks, the possible liability not only of users but also of social networking sites has to be addressed.

With regard to copyright, among the biggest challenges are those that affect the status of so-called user generated content (UGC), a term that basically refers to the information that users of SNS make available or post in those services. Concerning the creation of UGC, beyond the determination of what is capable of being owned in copyright, ownership issues are key to determine if the work is owned only by the user or if it has to be characterized as a collective work or a work in which another form of initial co-ownership can be established⁷⁴. However, from the perspective of traditional content owners, uploading and distribution of UGC poses special risks of massive copyright infringement. The most prominent sites for the upload of UGC combine the distribution of original works, copyright works licensed from the copyright owner, copyrighted works uploaded without permission... Particularly relevant in this context is the discussion on the possible infringement resulting from non-commercial derivative

⁷³ ECJ Judgments of 23 March 2010, *Google France and Google*, C-236/08 to C-238/08; 25 March 2010, *BergSpechte*, C-278/08; 8 July 2010, *Portakabin*, C-558/08; and 22 September 2011, C-323/09, *Interflora*.

⁷⁴ See S. Hetcher, "User-Generated Content and the Future of Copyright: Part One, Investiture of Ownership", *Vand. J. Ent. & Tech. L.*, vol. 10, 2008, pp. 863-892, at pp. 883-890.

works that use protected content⁷⁵. The deep transformation of social practices related to culture brought about by technological innovation requires a review of the balance between access to creative works and protection of copyright. Therefore, the scope of limitations and exceptions to copyright become decisive to determine to what extent the making of derivative works for their distribution in platforms for UGC amount to an infringement of rights. In the light of the foregoing, applicable law issues may become of great practical importance as a result of the diverging views on this regard among the different jurisdictions. Indeed, in addition to uncertainties remarkable differences exist as illustrated by the contrast between the US flexible approach based on fair use and the closed list of exceptions and limitations to copyright existing in the EU where given the limited level of harmonization differences also remain between Member States⁷⁶.

Because IP rights are exclusive territorial rights their protection with respect to activities carried out in a SNS having a potentially global reach may face particular difficulties. The basic criterion, widely accepted from a comparative perspective and that has to be reaffirmed in the context of SNS, is that the applicable law to the protection and infringement of intellectual property rights is that of each country for which protection is sought. In general, determining if a work is protected, to what extent a given conduct constitutes an infringement of IP rights, the remedies available against such acts and the holder of the rights, corresponds, by virtue of the rule *lex loci protectionis*, to the law of the country where the alleged infringement occurs. However, with respect to initial entitlement or authorship differences may be found. Indeed, the opposition between *lex loci protectionis* and *lex originis* which has become very relevant in the field of copyright is in practice almost limited to the choice of law rule on initial ownership or authorship. In contrast with the *lex loci protectionis* criterion, application of the *lex originis* favours a single location,⁷⁷ leading usually to the application of the law of the domicile of the creator or the place of first publication. The idea that the law governing the original title or author of the works is divisible from the protection of the rights has been accepted in some countries⁷⁸, but in most systems that issue remains governed by the *lex loci protectionis*.

With respect to the law applicable to a non-contractual obligation arising from an infringement of an IP right, a formulation of the *lex loci protectionis* criterion may be found on Article 8 EU Rome II Regulation⁷⁹, which refers to the

⁷⁵ M.W.S. Wong, "Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use", *Vand. J. Ent. & Tech. L.*, vol. 11, 2009, pp. 1075-1139, at pp. 1104-1136.

⁷⁶ See L. Guibault, "Why Cherry-Picking Never Leads to Harmonisation (The Case of the Limitations on Copyright under Directive 2001/29/EC)", *JIPITEC*, 1, 2010, pp. 55-66.

⁷⁷ H. Schack, *Urheber- und Urhebervertragsrecht*, 5th ed., 2010, pp. 483-490.

⁷⁸ D. Moura Vicente, "La propriété intellectuelle en droit international privé", *R. des C.*, 335 (2008), pp. 260-294.

⁷⁹ See N. Boschiero, "Infringement of Intellectual Property Rights. A Commentary on Article 8 of the Rome II Regulation", vol. IX, *YPIL*, 2007, pp. 87-114; and S. Bariatti, 'The Law Applicable to the Infringement of IP Rights under the Rome II Regulation', S. Bariatti (ed.),

law of the country for which protection is claimed. Its wording makes clear that it does not necessarily lead to the application of the *lex fori*, inasmuch as courts of member States may be competent to adjudicate infringements of foreign intellectual property rights⁸⁰. The *lex loci protectionis* rule has a distributive nature. A situation of multiple infringements (of parallel national rights) occurring in different States is to be governed by the laws of each of the countries for which protection is claimed. Different laws shall apply if protection is sought for the territory of several states except when a supranational unitary intellectual property right is involved, as it is the case with EU trademarks.

The key element to determine the place of protection also with regard to contents that have been uploaded and distributed by users of SNS is to establish where the exclusive rights are infringed. Traditionally, it has been considered that location of different activities involved in the distribution of contents in the Internet may lead to different results to the extent that the relevant acts are connected with different countries. For example, with respect to the digitalization of a work such place should be located in the territory in which the non-authorized digitalization of a work takes place; concerning its uploading, in the country from which the work is uploaded on an Internet server or where the service in which it is uploaded is provided; and as regards its distribution of the work at the place in which the user which receives or downloads the protected work is located. Notwithstanding this, application of the *lex loci protectionis* rule to situations concerning the parallel download of works protected by copyright has provoked prolonged argument. Application of the law of origin (even if understood as the place of establishment of the person that uploads the contents) in cases in which a work has been made available to the public by a platform such as an SNS and members of the public located in different countries had access to those contents or downloaded them may undermine the proper meaning of the *lex loci protectionis* rule⁸¹. Territoriality of intellectual property rights and the *lex loci protectionis* rule lead basically to the distributive application of the laws of all those countries in which the relevant conduct or activity –the alleged infringement of IP rights- has a direct and substantial impact⁸². The law of each protecting country is typically applicable inasmuch as the activity produces effects in its respective territory. This interpretation favours parallel results in the interpretation of Articles 6 –unfair competition- and 8 Rome I Regulation what may be appropriate especially when considering that delimitation between the respective

Litigating Intellectual Property Rights Disputes Cross-Border: EU Regulations, ALI Principles, CLIP Project, 2010, pp. 63-88.

⁸⁰ J.J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, 2nd ed., 2011, pp. 143-191.

⁸¹ S. Bariatti, "Internet e il diritto internazionale privato: aspetti relativi alla disciplina del diritto d'autore", *AIDA*, 1996, 59, 74 ; and A. Ohly, "Choice of Law in the Digital Environment – Problems and Possible Solutions", in J. Drexler and A. Kur (eds.), *Intellectual Property and Private International Law*, 2005, at pp. 249-250.

⁸² See, e.g., J.C. Ginsburg, "The Private International Law of Copyright in an Era of Technological Change", *R. des C.*, 1998, t. 273, pp. 243-405, at 323; and J. Drexler, "Internationales Immaterialgüterrecht", *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Bd. 11, 5th ed., 2010, p. 1483.

scopes of IP rights and unfair competition law remains uncertain in many national laws, in particular with respect to the protection of signs⁸³.

The view that infringement can be established in those territories where the relevant activities produce substantial effects or are directed to⁸⁴ has to be affirmed also with regard to contents made available in SNS. This approach has achieved significant acceptance from an international and comparative perspective as illustrated by the Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of 2001⁸⁵. With a view to ensure a balance between territoriality of IP rights and the global reach of Internet activities, provide certainty to the use of industrial property rights on the Internet and facilitate the application of existing laws, the Joint Recommendation is based on the so-called principle of proportionality, establishing that an infringement can be found only to the extent that the relevant activities have significant effect within a given jurisdiction.⁸⁶

Activities carried out by users of SNS raise certain specific considerations with respect to the assessment of to what extent distribution of content in those services produces such a significant effect in a given country. First, in some situations the application settings under which the contents are made available in the platform may contribute to a finding that distribution of the content takes place only among a limited number of users of the platform. This finding may be significant not only from the substantive law perspective –for instance when interpreting limitations to copyright- but also with regard to the application of the *lex loci protectionis* in order to geographically restrict the territory where IP rights

⁸³ P.A. de Miguel Asensio, "The Private International Law of Intellectual Property and of Unfair Commercial Practices: Coherence or Divergence?" S. Leible and A. Ohly (eds.), *Intellectual Property and Private International Law*, 2009, pp. 137-190, pp. 182-190.

⁸⁴ ECJ Judgment of 12 July 2011, *L'Oreal*, C-324/09, para 63

⁸⁵ Adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization at the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO (September 24 to October 3, 2001), WIPO Publication No 845.

⁸⁶ As stated in the Preface to the Joint Recommendation, this approach basically influences the determination whether, under the applicable law, an infringement has taken place without addressing the determination of the applicable law as such. In this context, see also Article 3:602 CLIP Principles that contains a specific provision designed as a substantive criterion that set limits to the possibility to establish an infringement under the law of the country of protection. According to Article 3:602(1)(b) a finding of infringement is possible to the extent that the activity by which the right is claimed to be infringed has substantial effect within, or is directed to the State or the States for which protection is sought. This provision is intended to be applied at the level of substantive law and hence it does not derogate from the law of the country of protection principle but requires self-restraint when establishing which activities infringe local rights, in particular when the relevant activities are carried out through multi-state or ubiquitous media such as the Internet. Article 3:602 CLIP Principles has a broader reach than the Joint Recommendation, since it encompasses all types of intellectual property not being limited to industrial property rights in signs, see A. Metzger, "Applicable Law under the CLIP Principles: A Pragmatic Revaluation of Territoriality", J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena - Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, 2010, pp. 157-178, at pp. 172-173; and A. Kur and B. Ubertaini, "The ALI Principles and the CLIP Principles: A Comparison", S. Bariatti (ed.), *Litigating Intellectual Property Rights Disputes Cross-Border: EU Regulations, ALI Principles, CLIP Project*, 2010, pp. 89-147, at pp. 121-122.

may be deemed infringed when establishing the law or laws that govern the infringement. By contrast, contents may also be submitted to SNS and published in the Internet in circumstances in which such contents are generally available in similar terms than when platforms other than SNS are used to publish content on the web without access restrictions. In those situations, in order to determine where the relevant activities –distribution of allegedly protected content or use of allegedly infringing signs as URL- produce significant effects and infringements may be located, similar considerations to those made with regard to the treatment of Internet sites in general can be applied even if in these cases SNS are used as platforms for the distribution of contents.

Indeed, recourse by users to the services of a SNS having a global reach that potentially directs its activities to almost all countries in the world does not prejudice a finding that the contents distributed by the users may be deemed as directed to a specific country or region. A number of factors can be relevant when making that assessment that apply also to those situations in which the Internet presence or the distribution of contents is made by using services provided by SNS. The configuration and content of the web pages or similar means under which the contents are made available by the SNS user shall turn out to be fundamental in most cases⁸⁷: the language used, the conclusion of contracts with local residents, the reference to an international or local clientele or audience, the provision of geographic contact addresses, the nature of the information or content provided (that can appear clearly aimed at a certain territory). Also, circumstances such as promotion of the web page in other media directed to a certain country or in web sites or directories addressed to a given market may be relevant to consider that commercial activities carried out through that web site produce substantial effects in that country. Further, current technologies make possible territorial delimitation of Internet activities, providing precise information, for instance, about the territory in which the user that intends to access some contents is located, such as those based on IP filtering and geolocation technologies, that may be useful to restrict activities to certain countries,.

In some situations the *lex loci protectionis* criterion may lead to the simultaneous application of many national laws -mosaic approach-, because activities carried out by using the services of SNS may have significant effect simultaneously within a great number of jurisdictions. Such cases may impose a heavy burden on the competent court and on the party seeking to enforce his IP rights of different jurisdictions before the courts of a given country. In this context, it is noteworthy that with a view to improve the current situations certain proposals for reform have been put forward that envisage the introduction of

⁸⁷ Among the factors to be considered when determining if a person directs his activities to a State in the framework of the ALI Principles, language and currency are expressly mentioned, see Comments to § 204 ("Indicia such as language may be particularly probative with respect to the Internet") and § 207(6); see also Article 3 ("Factors for Determining Commercial Effect in a Member State") of the WIPO Joint Recommendation. Although in a different context the discussion of this issue with regard to the application of the consumer protection rules on jurisdiction and applicable law contained in Article 15.1.c) Brussels I Regulation and Article 6 Rome I Regulation are also relevant, see ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, and section 5, *supra*.

conflict of laws provisions to make possible some deviations from the *lex loci protectionis* criterion in situations concerning the enforcement of IP rights against Internet activities affecting many countries⁸⁸. Although it is expected that these efforts may influence future legislation, the drafting of such provisions raises significant challenges⁸⁹. Firstly, the need to determine the situations and the subject matter covered by the exceptional rule. Secondly, the need to guarantee that the rule does not deprive the alleged infringer from his rights under the law of each country of protection and especially the possibility to rely on the limitations and exceptions to the IP right available under the relevant laws. Additionally, establishing the criteria to determine the single law or the several laws to be applied is a complex task⁹⁰.

⁸⁸ § 321 ALI Principles on the law applicable to cases of ubiquitous infringement covers the situations in which "the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded". Hence the concept of "ubiquitous infringement" is used in broader terms and includes typical multi-state infringements carried out in Internet. However, the lack of definition of "ubiquitous" activity and "multiple States" in the ALI Principles seems to be a potential source of uncertainty and conflicts when applying § 321 and the "method of simplification" it proposes. See A. Ohly, "Choice...", *cit.*, at p. 254. The provision on ubiquitous infringement of Article 3:603 CLIP Principles is restrictive as to the situations covered. It refers only to cases in which the infringement arguably takes place in every State in which the signals can be received. Therefore this provision seems to be only applicable to Internet activities that may infringe copyrights or unregistered trademarks in every member state of the WTO since the existence of the right in all countries can not be assumed in case of rights subject to registration, see A. Metzger, "Applicable...", *cit.*, at pp. 173-176; and A. Kur and B. Ubertazzi, "The ALI...", *cit.*, at pp. 122-124. The restrictive scope of application of the provision allowing for the application of a single law is related to the idea that the importance of the objectives underlying the application of the law for which protection is claimed can not be underlined even with the global digital networks given that it remains the basic criterion to ensure that the territorial nature of intellectual property rights and its policy foundations are respected internationally, see A. Kur, "Applicable Law: An Alternative Proposal for International Regulation – The Max-Planck Project on International Jurisdiction and Choice of Law", 30 *Brook. J. Int'l L.*, 2004-2005, pp. 951-981, p. 973.

⁸⁹ See D. Yokomizo, "Intellectual Property Infringement on the Internet and Conflict of Laws", *AIPPI Journal*, May 2011, pp. 104-114, at pp. 108-109.

⁹⁰ A key issue when establishing a special provision on infringements affecting a multiplicity of countries that deviates from the traditional mosaic approach in order to determine a single law or a limited number of laws as applicable is the connecting factor to be used in the choice of law rule. In this respect, a basic similarity but also significant divergences may be found between the approaches of the ALI Principles and the CLIP project. Both sets of model rules -§ 321 ALI Principles and Article 3:603 CLIP Principles- rely on the closest connection test to determine the applicable law. However, important differences appear when comparing the factors used to determine the country with the closest connection in the two set of Principles. § 321 ALI Principles includes four possible factors that may be considered, among others, when establishing the State or States with close connections to the dispute: the place of residence of the parties; the place where the parties' relationship, if any, is centered; the extent of the activities and the investment of the parties; and the principal markets toward which the parties directed their activities. This list of factors chosen tends to favour the cross-border application of the legislation of the rightholder's home state. Article 3:603(2) CLIP Principles establishes that a court is to consider all the relevant factors in determining which State has the closest connection with the ubiquitous infringement, and lists for factors in particular that may be relevant: the infringer's habitual residence; the infringer's principal place of business; the place where substantial activities in furthering of the infringement in its entirety have been carried out; and the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety. Compared

15. Because of the role of SNS providers in supplying a platform that enable users to post contents, a crucial aspect of liability resulting from activities in SNS is related to the determination of to what extent SNS providers may be characterized as intermediary providers of information society services and under which circumstances they may be held liable in connection with the activities of the users of their services. In practice, rightholders may have particular interest in bringing an action against SNS providers, in particular because they are in a position in which they can block access to the damaging content and remove it from the SNS, they have relevant information to locate the users and if damages are sought they have more financial means than individual users. Indeed judicial practice regarding IP infringement disputes in the Internet illustrates the importance of claims against intermediaries⁹¹.

However, from the comparative perspective significant differences exist as regards the criteria to determine to what extent SNS providers and other intermediaries are to be held liable for the activities of their users. In the EU Articles 12 to 15 e-commerce Directive establish basically that certain situations cannot give rise to liability on the part of intermediaries since their purpose is to restrict the situations in which intermediaries may be held liable pursuant to the applicable national law.⁹² Within the EU determining under which circumstances an internet service provider that operates a service that allow the storage of information transmitted to it by its users falls within the scope of the limitation of liability of Article 14(1) on hosting may require detailed analysis.⁹³

Differences in this field relate to the fact that many countries lack specific provisions on liability of intermediaries, but also that between jurisdictions having specific rules based partly on similar foundations significant differences may remain. Even the comparison with the US, where the same sort of provisions exist, show that important differences remain. For instance, in the US the provisions on intermediary liability do not have a horizontal nature, contrary to the situation in the EU where the rules cover liability regardless of the subject matter concerned and not only civil liability but also criminal liability. In the two

to the list of factors listed in § 321 ALI Principles it has been noted that the CLIP Principles are more respectful with the position of the user or alleged infringer what may be especially appropriate when considering that these provisions amount to a certain privilege for the rightholder by enabling him to claim against multisite infringements under one applicable law, see A. Metzger, "Applicable...", *cit.*, at p. 176.

⁹¹ For instance, in the EU see ECJ Judgments of 23 March 2010, *Google France and Google*, C-236/08 to C-238/08 and 12 July 2011, *L'Oreal*, C-324/09; and in the US, see *Viacom International v YouTube Inc* 2010 WL 2532404 (SDNY June 23, 2010) and *Tiffany (NJ) Inc v eBay*, (SDNY, No 04 Civ.4607(RJS).

⁹² ECJ Judgments of 23 March 2010, *Google France and Google*, C-236/08 to C-238/08, para. 107; and 12 July 2011, *L'Oreal*, C-324/09, para. 107. Discussing the need of reform of the liability provision of the e-commerce Directive, see G. Spindler, "Reformperspektiven der Providerhaftung im deutschen und europäischen Recht", M. Leistner (Hrsg.), *Europäische Perspektiven des Geistigen Eigentums*, 2010, pp. 212-228, at pp. 225-228.

⁹³ ECJ Judgments of 23 March 2010, *Google France and Google*, C-236/08 to C-238/08, para. 112; and 12 July 2011, *L'Oreal*, C-324/09, para. 112.

main areas of interest, namely intellectual property rights and rights relating to personality, substantive differences remain. In particular, in the field of copyright due to the more detailed content of the provisions of the DMCA that result in some practical differences⁹⁴ and in the area of personality rights because according to its prevailing interpretation section 230 Communications Decency Act⁹⁵ gives SNS providers immunity against claims concerning infringements of personality rights that go well beyond the liability limitations of the e-commerce Directive.

Because of the significant differences between legal systems as to the liability limitations and exceptions of intermediaries applicable law issues may become of great practical importance. Intermediaries should adapt their business models to reduce the exposure to liability in the light of the applicable law, for instance when assessing to what extent they have a duty to act with a view to preventing or stopping illegal activities and if they are required to implement prior filtering with respect to certain illegal contents in addition to notice and takedown procedures. Moreover, the legal implications of the activities of Internet service providers in order to establish liability are rather different among jurisdictions and it is a very relevant issue in the development of business models by some SNS providers. Indeed, national laws on secondary liability vary to a great extent and the view prevails that the US tends to be more liberal with the imposition of such liability⁹⁶.

From the conflict of laws perspective, in the EU potential liability of Internet service providers with respect to the information stored in their servers and other situations in which they may be regarded as intermediaries can be deemed an issue concerning the determination of persons who may be held liable for acts performed by them and the liability for the acts of another person, in accordance with the wording used by the Rome II Regulation. Indeed, pursuant to Article 15 Rome II Regulation this issue seems to fall normally within the scope of the law applicable to non-contractual obligations, including the *lex loci protectionis* with respect to the infringement of the intellectual property right. Hence, the law of the country for which protection is claimed applies also to determine the liability of Internet service providers including the limitations or exemptions from liability for Internet intermediaries.

With regard to the position of SNS providers application of the *lex loci protectionis* to determine their liability as intermediaries raises special difficulties because as a result of the global offering of their services by those providers and their repercussions in numerous countries around the world a special risk has been

⁹⁴ See R. Matulionyte and S. Nérison, "The French Route to an ISP Safe Harbour, Compared to German and US Ways", *IIC*, vol. 42, 2011, pp. 55-73, pp. 68-73.

⁹⁵ See *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846-47 (W.D. Tex. 2007); *Zeran v. America Online*, 129 F.3d 327, 330-31; and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-24.

⁹⁶ L.J. Oswald, "International Issues in Secondary Liability for Intellectual Property Rights Infringement", *American Business Law Journal*, vol. 45, 2008, pp. 247-282, pp. 248-249.

identified that intermediaries would have to bear unacceptable uncertainties⁹⁷. Therefore, the idea has been advocated of establishing a special rule that provides an exception to the *lex loci protectionis*⁹⁸ in connection with the provision of services that enable service recipients to carry out infringing activities that may be clearly detached from the service provider, as it may happen in the case of SNS. In the drafting of such rule, the introduction of appropriate safeguards deserve special attention and also the fact that special difficulties may arise when establishing and applying the connecting factor to determine the single applicable law, as illustrated by the CLIP Principles⁹⁹. An exceptional conflict of laws rule departing from the *lex loci protectionis* for these cases contributes, among other goals, to facilitate the global provision of SNS services. Notwithstanding this, its implementation may require careful consideration of all other interests involved, in particular to the extent that users tend to make use of global SNS services to post and make available contents that in practice may have substantial repercussion in a limited number of jurisdictions (not rarely, only one) and in those circumstances non-application of the *lex loci protectionis* with regard to the liability of the SNS provider as intermediary may raise special concerns.

⁹⁷ G. Dinwoodie, R. Dreyfuss and A. Kur, 'The Law Applicable to Secondary Liability in Intellectual Property Cases', *Journal of International Law and Politics*, vol. 42, 2009, pp. 201-235, pp. 205-209.

⁹⁸ Y. Nishitani, 'Copyright Infringement on the Internet and Service Provider's Liability –A Japanese Approach from a Comparative Perspective', A. Schulz (ed.), *Legal Aspects of an E-Commerce Transaction*, Munich, 2006, pp. 41-53, pp. 52-53.

⁹⁹ Article 3:604 CLIP Principles introduces an innovative and detailed provision with a view to make possible to apply a single law in those situations:

"Article 3:604: Secondary infringement

(1) Subject to paragraph 2, the law applicable to liability based upon acts or conduct that induce, contribute to or further an infringement is the same as the law applicable to that infringement.

(2) In case of facilities or services being offered or rendered that are capable of being used for infringing and non-infringing purposes by a multitude of users without intervention of the person offering or rendering the facilities or services in relation to the individual acts resulting in infringement, the law applicable to the liability of that person is the law of the State where the centre of gravity of her/his activities relating to those facilities or services is located.

(3) The law designated by paragraph 2 shall only apply if it provides at least for the following substantive standards:

(a) liability for failure to react in case of actual knowledge of a primary infringement or in case of a manifest infringement and

(b) liability for active inducement.

(4) Paragraph 2 does not apply to claims relating to information on the identity and the activities of primary infringers."