Legal aspects of the Internet

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Introduction

A global society

The indisputable fastest growing media right now is the Internet, just a few years ago the Internet were for professionals only, now there is millions of Internet users all over the world. The whole concept of the Internet is, that by connecting to the Internet, which is pretty easy and cheap, instantly is either broadcasting or receiving information world wide - and the price to pay is independent of where in the world you get you information from.

From Nerd Web to World Wide Web

Since the World Wide Web (WWW) were introduced way back in 1993, the Internet started growing extremely fast. WWW is only a part of the Internet, it differs from the rest of the services on the Internet by being based on a graphical user interface and easier access to information.[1] The Internet is still growing, and probably most important, the technology is still being developed, and that will cause that this thesis might seem obsolete in just a few years, but the method and the result might still apply to the further development of the Internet. Maybe the World Wide Web will not play a significant role in the future, but the global market has been opened once and for all, with all the international problems that comes with it.

The main problem of the Internet, taken from a legally point of view is, that we have a media without any borders, and it has to be fitted into a world full of borders and dissimilarity. That is why I consider the problems arising in relation to transnational litigation, to be the most important legal problem when dealing with the Internet, - when this problem is solved the substantive law can be examined.

It is my intention to bring the law in front of this thesis, and not to elaborate too much on technical details. For that reason I have chosen to omit a big chapter of a technical description in favour of a brief introduction to the Internet. I will expect the reader to be somewhat versed in the technology and the function of the Internet.

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[1] The development looks like the change from the text-only operations system (DOS) to the windows based systems like Microsoft Windows and IBM's OS2; that development had the same effect on the use of personal computers.

I want to thank my supervisor professor dr. jur. Erik Werlauff for invaluable guidance, Anita Søgaard for her helping me with obtaining material and finally Aksel Sjællænder and Steen Treumer for their proofreading. Since this thesis is the last work to be concluded under my education, I will thank the department of business law as such, for providing me an excellent training in business administration and commercial law.

The reader of this thesis might become aware of the fact that English is not my first language, and therefore I will excuse myself for sometime using a more simple language than I would choose if I was writing in Danish. I have done this thesis in English because of the international nature of the substance in examination, but also because of the challenge of using a foreign language for a paper of this size.

Aalborg University, June 1997

Jan Trzaskowski

Presentation of the problems

Delimitation of the problem

This thesis will deal with mainly two problems: the first question is:

How to satisfy a claim that originates from an infringement made on the Internet.

The first question can be divided into four elements:

1) The question of how substantive law applies to the Internet
2) The question of international choice of law
3) The question of jurisdiction (choice of forum)
4) The question of enforcement of judgements

The second question is:

Is it possible to circumvent Danish law by a conscious choice of:
a) Server state or
b) Top Level Domain (TLD).

The idea of the first question is to define the legal framework the Internet is comprised in, especially in relation to transnational litigation. The second question is relevant due to the easy access to publish material from virtually anywhere: There is no problem in a Danish company having their homepage, "physically"[2] in Germany, and have it registered under the American .COM TLD, and yet still be able to edit it from Denmark. The problem occurs when the purpose of placing the homepage in another country is to circumvent Danish regulation, for example in the Danish Marketing Practises Act. If that is possible, we might see a electronically Delaware-effect[3], and that will obviously be a big threat to all consumer laws and other protections law.

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[2] The quotation marks are used to indicate that data can not be anywhere physical since data ex definitione is intangible. When using physical placement of data further on, it means the physical place of the computer (server) in which the data is stored.

[3] The Delaware effect derives from company law, describing the fact that the state of Delaware (US) has a very gentle company law, which has caused a huge amount of companies to be registered as Delaware-companies - and then keeping there activities wherever in the states.

It will be necessary to consider what significance the choice of TLD, physical place of server and homepage content including choice of language will have, when determining the applicable law.
In this thesis I have chosen only to deal with civil law (i.e. not criminal law) and only concerning international infringements.

Choice of method

I have chosen to divide this thesis into five parts, viz. 1) introduction, 2) substantive law, 3) procedural law, 4) EU law and regulation and finally 5) the conclusion.

Introduction

The introduction comprise besides the overall introduction, a chapter on the presentation of the problem; this chapter comprise besides this presentation of the method chosen, a list of examples that can arise in relation to the Internet, it is the idea that these situations shall be resolved in the conclusion.
This part comprises also an introduction to the Internet; this introduction is supposed to give the reader an idea of what the Internet is like and how it works technically. It is further more the purpose of this chapter to qualify the Internet, in order to discover whether the Internet shall be considered a new medium or it can be said to fall within the definition of any known media.

Substantive law

The idea of this part is to present some of the acts already regulating the Internet, in order to establish that the Internet can not be considered a lawless area and to support the examples in the introduction. This part will mainly deal with the concept of freedom of speech and especially the limitations that lies within.

Procedural law

This part comprise an examination of private international law, the choice of forum and the recognition and enforcement of judgements in relation to the Internet. The idea is to establish which state's law applies to a certain dispute and how a dispute can be carried out and which obstacles one can meet under transnational litigation. It is also the purpose of this part to establish the possibilities of mitigating the obstacles that comes with transnational litigation, especially by implementing clauses on choice of law and choice of forum.

EU law and regulation

The purpose of this part is to determine how the Internet can be regulated, and whether it is suitable to do so, I will obtain inspiration from other legislative initiatives from other states and finally give my opinion on how it should be solved. The idea of the chapter on the freedom to provide services within the EU is to present the legislative limitations that lies within the EU. Further more will the legislative limitations that lies within the freedom of speech, as established in the chapter on substantive law, be considered.

Conclusion

I have decided to divide the conclusion into four points of view, viz. the aggrieved party's, the buyer's (services or goods), the publisher's (the offensive party and the provider of goods or services) and finally the legislator's. The idea is to sum up the results from this thesis in order to give some guidelines for what the different parties can do and what they ought to do in order to protect themselves and describe how to satisfy claims deriving from infringements made the Internet.

Situations in which liability can be established

Contractual

In relation to contractual situations a dispute can arise if e.g. the sold product is defect or the contracting party disagree on the terms of the contract. In relation to the Internet such a situation can occur when a foreign company is offering either services or goods via the Internet, and the viewer is responding on the offer by filling out an electronically order form on the homepage.

Non contractual

A non contractual (tort) dispute can arise when e.g. a defamation is published on a homepage, or a foreign business has published an unfair comparison (in contravention of the Danish Marketing Practices Act), or a foreign person is publishing a copyrighted work without having proper license to do so. In these examples the foreign company or person is assumed to have his/her server registered and physical placed in the country where he/she is residing.

Danish business wants to circumvent Danish law

The examples from above can be reused to describe the circumvention situation, by imaging that it is a Danish company that are placing a server abroad, in order to circumvent any of the regulation presented above. The purpose of this question is to determine whether a circumvention intention will alter the results from above.

Brief introduction to the Internet

Purpose of this chapter

The main objective in this chapter is to describe how the Internet works, thus I will not elaborate to much on the technical details in this chapter, since it would be out of proportions in relation to the purpose of this thesis. It is furthermore the purpose of this chapter to qualify the Internet in order to establish whether and how it resembles any known media.

This chapter is mainly based on my lectures on Information Technology for Law, held 1996-1997 at the law school of Aalborg University.

Technical description

The Internet is based on two communication models called Transmission Control Protocol and Internet Protocol (TCP/IP - for short). These protocols are a set of standards for data interchange, if the Internet[4] is to be defined on the basis of these protocol, the Internet is the sum of all computers connected to each other with the TCP/IP communication model.

The purpose of the Internet is data transmission or data interchange, data is to be understood as everything that can be digitalized, e.g. data files, pictures, sounds etc. The datatransfer rate between computers are essential for how fast data can be transmitted, and therefore also for what can be transmitted. Real-time transmission are time depending, e.g. real time video needs a certain amount of pictures per second. The limit of the Internet is at the moment somewhere around real time video, some Internet radios have been founded, and Internet phones have also been available for some time, though the sound quality is rather poor. As the speed of the Internet will increase we will probably see real-time television on the Internet as well.

The Internet is operating by sending small data packages (IP packages) from computer to computer via so called routers, because most of the data transmitted over the Internet comes in lumps bigger than an IP package, the TCP protocol is used to split the data up in smaller lumps that all can be fitted into an IP package. The reason for having the protocols built like this is, that the Internet is constructed to share all the capacity between all users, which means that when a lot

[4] Spelled with a capital I - indicating that it is the one specific Internet

of people are using the Internet at the same time, the Internet will not crash, it will only slow down.

When discussing the future of the Internet, the essential question is: What force is stronger, the increasing transfer rates or the slowdown effect from the many new users, but it is not within the purpose of this thesis to discuss.

Every server[5] on the Internet has its own unique address, which consist of four 8 bit numbers[6], e.g. 123.32.35.94. Instead of using the four number address is it possible to get a domain name related to the address which could be "AUC.DK", the address is read from right to left, saying, that the computer is registered under the Top Level Domain (TLD) of Denmark (.DK)[7], and the bought domain name is AUC. Every state in the world have it is own TLD. In USA the classification have been made for the whole USA as one country, and then there have been made several TLD for different areas, like .COM for Commercial and .EDU for education. The TLD is only a guideline for where the server is registered, and not where the computer is placed, it is possible to have a computer placed in the USA, and have it registered under the .DK TLD, it works the other way round as well. The .COM TLD has turned out to be the TLD, where companies from all over the world want their computer to be registered, this is yet the closest we come to a world wide domain, even though it is still an American TLD.

World Wide Web

The latest bigger phenomenon on the Internet is the World Wide Web (WWW), which is a new protocol (called Hyper Text Transmission Protocol - HTTP) added to the TCP/IP. The WWW is based on homepages that can be viewed through a graphic interface called a web browser. This protocol made it way easier to use the Internet, and probably more important the old text-only display was changed to a more entertaining graphical display. The WWW is the main reason for the enormous growth rates of the Internet, since the WWW was introduced in 1993.

Homepages are stored servers (WWW servers), and can be accessed by typing in the homepage' s Uniform Resource Locater (URL) into the browser. A URL contains a description of which protocol to use and the address of the WWW server, e.g. "HTTP://WWW.AUC.DK"[8]. Another way to access a homepage is by clicking on a link. Most homepages contains links to other

5 A server is a computer permanently connected to the Internet

6 An 8-bit number is a number in the ranger of 0 to 255, that means that 256^4 computers can be used with the existing system.

7 pronounced: "dot DK"

8 "HTTP://" tells the computer to use the Hyper Text Transmission Protocol, and "WWW" tells the computer that the following address is a World Wide Web address.

homepages with related contents, and simply by clicking the mouse on the link the browser will call the linked homepage, e.g. on another server and in another end of the world, - the concept of Internet surfing derives from this hyper link jumping around.
When typing in an URL in the browser or clicking on a link, a request is sent to the WWW server on the address stated in the URL, asking for an electronically copy of the HTML[9] document. If the requested HTML document exist and is considered public on the WWW server, a copy will be sent via the Internet to the computer specified as the sender of the request, and some seconds after[10] appear on the screen. Real time video and audio is based on continuously sending of data packages.

The term site is used to describe one or more homepages that are stored on the same server, and are connected one way or another, e.g. a company having a site consisting of 10 different homepages each describing different things of the company. The term publisher is used for the person/company that put out a homepage on the Internet, and by the viewer is meant the person who looks on the homepage via the Internet. The person or company that offers goods or products on the Internet is called the provider (he/she will be a publisher as well).
The Internet Service Provider (ISP) is the company that rents access to the Internet. An ISP is often used by private people and smaller businesses, whereas the bigger businesses, universities etc. have there own Internet server or have bought a part in one.

Technical delimitation

I have chosen to focus on the WWW in this thesis, since I see it as the most interesting part of the Internet, being the most used, the fastest growing and the service of the Internet with the biggest potential at this time. The World Wide Web is often confused with the Internet. In this thesis the Internet will be used as the World Wide Web, so this incorrect assumption is allowed in the context of this thesis.
What I see as the most interesting about the WWW is, the easy access to information where ever it is stored, and also the easy access to publish material on the Internet is very important. The viewer of a homepage will not be able to see the size of the company behind a certain homepage, the small business will be able to put out homepages that looks as good as all its bigger competitors.

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9 Hyper Text Mark-up Language - The language in which WWW-documents are written.
10 Depending on the transfer rate available.

Three categories of homepages on the Internet

Homepages are the main subject for legal examination in this thesis, therefore I have chosen to categorise homepages in three categories, determined after there function and contents. The purpose of the categorisation is to take out the characteristic substance of the homepages one at a time, in order to evaluate each characteristic feature legally. The three categories are not meant as a final split-up of the homepage, since a lot of the homepages on the Internet contains elements from all three categories, and it would be an illusion to evaluate a homepage by one feature at a time, it should of course finally be evaluated as a whole.

Information only (including pictures, real time audio and video)

The first category is containing information only, the information could be text only or including pictures, real-time audio or video. Whatever features are added to a homepage of this category the main purpose is to distribute information to the viewer of the homepage, it could be a homepage describing a business and its products, or it could be some kind of non-searchable newsprovider. A site in this category can contain hyper-links to other pages, either on the same site or to somewhere else on the Internet.

Searchable information (as a data base / tool)

The second category is containing information as the main purpose as well, but it differs from the first category by having some kind of search engine. Where the first category was meant to show the viewer what the publisher wanted him/her to see, the second category is meant to show the viewer what he/she wants to see, of what is of course provided by the publisher.

Order access (selling of goods or services)

The third category includes an access to order goods or services via the homepage. The most common homepage in this category will provide a list (often searchable) of goods or services that are offered, where the viewer will be able to read (, see or hear) a description of the product he/she would like to look at. As the distinction from the second category the viewer will be able to order the goods or services via the homepage by filling out an electronically order form. "Intangible goods"[11] might as well be delivered through the Internet, avoiding all normal barriers

[11] By intangible good should be understood, objects that can be digitalized and therefore transmitted electronically via the Internet. It would most often be computer software, but also pictures and music can be subject to digitalisation. It does not take much fantasy to

in the real society, like costums and post offices[12]. Software on demand will also be regarded as a services; where a piece of software, e.g. a word-processor, is placed on a server and one buys access to use this software via the Internet using only a browser[13].

Visual description

The purpose of this section is to describe how the viewer of a homepage will experience the presentation of a homepage.

When starting up the browser on your computer you will see your local homepage, usually your ISP' shomepage. To get further around you can either use the links available at the ISP' s homepage, or you can type in another URL, getting you wherever you want. In case you are looking for something specific you can type in the URL of a search engine, and make a search there, by keywords or in registers, just like looking up a phone number in a phone book (of course the electronic search engine gives more search options). When typing in an URL in your browser you will after a short period of time be presented for the welcome page of the domain you typed in, and from that welcome page you will be presented with the options of that site. When surfing the Internet everything will be presented on your computer monitor, and you will only feel the geographical distances by the waiting time, almost like having something presented for you on a television set.

Qualification of the Internet

The purpose of an attempt to qualify the Internet, is to establish whether a homepage resembles any known media, that is already regulated. That regulation can be used either to make an analogy to give guidelines for how it will be treated in a court of law, or give ideas for how to regulate the Internet. I have chosen some media that I will compare with the Internet in order to find similarities and dissimilarities in distribution, contents and function.

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imaging music being sold one song at a time via the Internet, and then stored on a medium (e.g. a recordable CD) on the viewers computer.

12 This problem is considered a threat to the single state taxation system and a real burst to the idea of a global economy. At the moment there is no solutions for a way to watch the Internet for taxable goods - it is up to the buyer to report he/she' s purchase.

13 This is the idea of the net computer (NC), where you have a box containing only a web browser, that you connect to you phone wire and your television set. All the programs you need to run are placed wherever your favourite versions are placed, you simply do not need anything else than your browser installed on your computer.

Broadcasting (especially satellite television)

From the technical description we have learned that an Internet homepage is only sent out upon a request for it, that makes a difference to broadcasting, the difference could be described as the Internet being a passive broadcaster and the television being an active broadcaster. This is of course a technical observation, but if we look at how the viewer/recievers experiences the difference then there is only a minor difference between pressing a button on the television set or typing in an URL. If we take the example of real time video (Internet television) where we e.g. type in "WWW.DR1.DK" and compare that to when we turn on our television set and press channel button no. 2 to get the same television station, the contents you would be presented for could very well be the same. One could argue that the activity from the viewer is not much different between the two media, though the amount of information on a homepage is often more limited, why a "channel change" still is required more often on the Internet.

The distinctive about satellite television is the easier way to broadcast to a wider group of receiver, the geographical place of the up-link is not as important as ordinary television-broadcasting, just like the Internet where the place of server is not of significant importance. The contents and function of the television is rather limited compared to the Internet, where the television gives you the opportunity to switch between different channels or turn it off, the Internet can provide more interactive materiel.

Telecommunication.

When comparing telecommunication to the Internet, a certain type of telecommunication springs to mind, viz. the telephone news service, which is basically a telephone answering machine that can contain virtually all kind of information (sound only). The access to this kind of news service is provided by picking up the phone, dialling the phone number and then receiving the content of the tape recorder, in fact not very far from connecting to an ISP, typing in the URL and receiving a homepage. A more developed type of this telephone news is the bulletin board service (BBS), which is similar to the medium presented above, just with the difference that the answering machine is replaced with a computer, and it can only be accessed by using a computer. The range and forms of the information is the same as for the Internet (everything that can be digitalized), so this must be considered a known medium that comes very close to the Internet.

The difference here is that where the BBS is a node to node system, the Internet can be considered a multi node to multi node system, meaning that all homepages can be accessed from

everyone connected to the Internet, in theory at the same time, whereas the BBS can only be accessed by a limited amount of users at the same time, depending on available phone lines, and whenever the viewer wants to go to another site he/she must disconnect and then connect to another computer. Another significant difference is that, even though the BBS can be connected from all over the world, the price for the access differs depending on the distance, because the communication is carried by ordinary telephone operators, whereas the costs of using the Internet is not depending on the geographical distance to the server.

This can all be boiled down to the fact that a BBS is very much like the Internet, with the only significant difference lying in the lack of the easy access known from the Internet. The differences are not more severe than the regulation applying to a BBS will apply similar to the Internet, but this is a fact that does not help very much in relation to this thesis, since the BBS' have never been as popular as the Internet is now and for that reason not been subject to any significant studies or special regulation. But the results from this thesis will undoubtedly apply to BBS as well, at least to some extent.

Printed media (news papers, magazines etc.)

The printed media is distributed by delivering to subscribers and by sale in kiosks etc., in that way the distribution demand some kind of action from the reader. The function of the printed media resembles somewhat television-broadcasting, since the purpose here also is delivering of entertainment and news. Even though a printed media is limited in contents it is distinctive from television by delivering all the contents at once, and it is up to the reader to choose when to get what information, this is very much the idea of the Internet as well.

New separate medium versus new multi medium

The function of the Internet is kind of a combination of television-broadcasting and written media, since all the information is available at all time like the printed media, enabling you to choose yourself when to get what, and this combined with the ability to have it continuously updated. The Internet must be considered a mass-comunication medium, because of its ability to reach the masses, even though it is based on computer to computer communication.

About the contents of the Internet; it is possible to put the same contents out on the Internet as we know from other media, and even in the same form (text, pictures, sounds etc.), but notably all forms on the same medium, at the same time.

Of the media I have been examining in this chapter, the BBS' were probably the known media that resembles the Internet most, but unfortunately the BBS' have never reached the same popularity as some of the other media and have therefore never been given much space in the legal area.

The function of the Internet is distinctive from other known mass-media because of its ability to provide two way communication. This makes the Internet a lot better information-tool compared to other known media, since the available information seems endless, and it is easy to access and search.

The conclusion must be, that the Internet is not like any known media, but some of the known media can be replicated in a digital form on the Internet. The Internet should be considered a new medium with some features that in some way resembles some known media.

Danish substantive law

Purpose of this chapter.

The purpose of this chapter is to demonstrate that the Internet already is regulated, and to support the examples presented in the presentation of the problem. It is not within the purpose of this chapter to present a thorough examination of Danish substantive law, it is an introduction of some legal areas that are relevant in relation to the Internet. The idea of this chapter is as well to give a method to describe the regulation of information to the public, and to demonstrate how they will apply to the Internet.

Two different legislative approaches in media law

I have chosen to categorise the regulation of media into two categories, viz. the formal regulation and the substantive regulation. By formal regulation is meant the legislation that regulates the medium itself by e.g. setting up some requirements for what it takes to use a certain media, or how the liability should be distributed between the parties involved (like the Danish Media Liability Act - see below). By the substantive regulation is meant regulation that regulates what can be published in the media, viz. freedom of speech and the limitations to this freedom.

Freedom of speech[14]

The question of what can be legally published, can be decided by first examining what the freedom of speech comprise both in the Danish Constitution and the European Convention on Human Rights. Every law setting up rules governing liability for what is published can be seen as a limitation to the principle of freedom of speech. When determining what can be published on the Internet, all the laws and regulations can be examined for whether they can be expected to regulate the Internet as well, and by doing so, the shape of the freedom of speech on the Internet can be established.

The freedom of speech is very close connected to the idea of democracy, why we in one way or another will see the concept of freedom of speech in all democratic states. Denmark have expressed the concept in the Danish Constitution section 77, and also by adopting the European Convention on Human Rights.

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[14] See in general Collet's thesis on the freedom of speech in commercial matters

The Danish Constitution (DC)

Section 77 of the DC gives:

> *Everyone is entitled to in print, writing or speech to publish his thoughts, but yet under responsibility provided by the courts. Censorship and other preventive provisions can never again be entered.*

Everyone

Everyone seems to comprise all people with no prejudice to their sex, nationality and place of residence. It has been discussed whether people under the age of criminal responsibility is comprised, relating to the phrase "under responsibility provided by the courts". But since the responsibility is referring to both criminal and tort liability and minors as well are liable for tort, Frøbert is arguing that the freedom of speech is given for everybody to rely on.[15] People residing outside of Denmark are entitled to the freedom of speech in Denmark, even though they are not under Danish Jurisdiction.[16]

Publish his thoughts

Thoughts shall be construed widely, it comprises whatever kind of communication available, no matter if it is the publishers own thoughts or others.[17] Also communication in the form of fiction or advertisements are included as well. The right to publish does not mean that everyone is entitled to have access to publish on e.g. mass-communication media, i.e. the owner of a server on the Internet can choose by himself what shall be published on his server.

The phrase: "in print, writing or speech" is not to be construed strictly; other media is comprised as well, and especially of importance for this thesis also the Internet.[18] Everyone is entitled to publish magazine periodicals etc., but a limitation has been set up for e.g. the television broadcasting, because of technical reasons.[19] These technical reason lies in the fact that the amount of information that can be "put on the air" is limited.

Responsibility for the courts

This phrase is more a competence standard, giving that responsibility can only be established by a court of law.[20] This phrase give as well the main idea of the concept of freedom of speech, viz.

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15 Frøbert p. 35
16 Cf. Frøbert p. 37f. (e.g. Max Sørensen disagree on this subject)
17 Frøbert p. 44
18 Frøbert p. 45
19 Frøbert p. 46
20 Frøbert p. 48

that even though the freedom to provide information to the public is unlimited, the responsibility still exist. This gives that even though it is provided that one pursuant to section 77 of the DC can publish a defamation, the statute does not give that you can not be punished for doing it.[21]

Censorship and other preventive provisions

By censorship shall be understood any kind of requirement of preliminary approval of the information. By other preventive provisions shall be understood any other arrangement that prevents information from being published. The prohibition of censorship is only regarding the before publishing approval, since the afterwards approval can be determined by the courts.[22] Any arrangement that could be comprised under this prohibition shall be examined from an overall impression, especially regarding the intention and the effect.[23] This prohibition gives rise to some doubts in relation to the preliminary injunctions,[24] a discussion I will not elaborate more on.[25]

The European Convention on Human Rights (ECHR)[26]

The freedom of speech under the ECHR is defined in article 10:[27]

> *(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
> *(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The content of this provision is more or less the same as in section 77 of the DC, though it is way more detailed in its definition which gives a certainty, that are only left to dream of in the DC. The ECHR differs on some essential matters, viz. the explicit comprising of the international freedom of speech, the right to receive information and finally does the ECHR not have a explicit prohibition of censorship.

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21 See immediate below
22 As demonstrated above
23 Frøbert p. 57
24 See the chapter on dispute and enforcement
25 See Frøbert p. 57ff. for a discussion on this subject
26 Adopted in Denmark by Act no. 285 (29.04.97)
27 See in general Lorenzen p. 260ff.

The ECHR has a similar definition of freedom of speech as the DC, which comprises all forms of expression, also expressions on the Internet seems to be comprised because of the non-media definition.[28] Article 10(1) gives furthermore a right to receive information, a right that comprises among other the right to receive radio and satellite television signals.[29] Also access to the information on the Internet seems to be comprised under this provision. Also the commercial freedom of speech is comprised under this provision, though the protections seems to be of a lower degree.[30]

This provision gives that licensing of some media is not prevented by this provision, among these are broadcasting, which is not further defined. The question is whether publishing on the Internet should be considered broadcasting under this provision. When looking up the word in a dictionary, the concept of broadcasting only seems to comprise television and radio transmitting. Since no authors seems to have dealt with this question, I will only give a cautious guess that licensing the Internet might be allowed, but only based on technical reasons, as are the background for allowing licensing of ordinary broadcasting. If licensing of a media is introduced, a refusal shall be covered under article 10 (2).[31]

Article 10 (2) gives the reasons that can legitimate limitations to the concept of freedom of speech (expression). First the provision gives that duties and responsibilities comes with freedom of speech, which resembles the phrase "under responsibility provided by the courts" under the DC, this provision gives that these responsibilities and duties shall be prescribed by law, and it shall be necessary in democratic society. The provision gives furthermore what interests that can legitimate regulations of duties and responsibilities, viz. national security, territorial integrity and public safety. A more thorough study of this question, would be very relevant in relation to this thesis, but is due to the limitations of this project omitted.

Limitations to the freedom of speech

The Danish Marketing Practices Act (DMPA)

28 Lorenzen p. 267
29 Lorenzen p. 263f. and 266f.
30 Lorenzen p. 275
31 Lorenzen p. 276ff.

The purpose of the DMPA is to regulate competition, protect consumers and consider superior social interests. The overall purpose is to create and maintain a healthy market by maintaining a loyal and fair competition. The Act is drafted in very general terms in order to be flexible.

The DMPA applies to all actions taken by professionals, with a view to selling products or just influencing the market in general. I will not go into detail about which people, companies or societies fall within the scope of the Act, but just establish that professional businesses are included, and some societies can exceptionally be included as well, but the professional criterion is critical.[32]
Since the Act does not define the specific media covered, but only regulates the actions, it is obvious that also violations of the Act made on the Internet will be comprised,[33] as long as the violation is made by a professional party in order to influence the market in any way.

The geographical scope of application is mainly the Danish territory, both Danish and foreign businesses taking marketing actions in Denmark, but also Danish businesses' actions against other Danish businesses in a foreign territory can be comprised.[34]

The DMPA contains a general provision in section one, expressing that "no action may be made in contravention of fair trading practices", and that is all that can be derived from that provision. Further construction of the provision is left to the courts.[35] Besides the general provision the Act have some specified provisions that are a supplement to the general provision.
In order to regulate the competition, there are provisions for copying of products, use of distinctive company- or product brands (section 5) and fair comparison of products in advertisements. The main purpose is to forbid a business to take improper advantage of another company' s marketing effort.

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32 Also public businesses that resemble private businesses are included pursuant to section 1 of the Act, cf. Madsen p. 155-156 for a more thorough examination of the question.

33 The Danish Consumer Ombudsman (DCO), who plays an important role in the DMPA, has been accusing The Disney Corporation of violating the DMPA by having some material on an American Internet server, which implies that also the DCO considers violations made on the Internet to be comprised by the Act. Whether the content of a foreign server can be violating the DMPA is another question that I will deal with later on in this thesis.

34 See Madsen p. 161.

35 In section 17, the Danish Consumer Ombudsman is empowered to set up guidelines for fair marketing practices, after consulting relevant organisations. The guidelines are not binding, but will most often be followed by the courts.

In order to protect the consumers, a set of rules is set up, mainly in section 2 and 4 giving a set of rules in order to keep advertising fair and reliable. It is prohibited to advertise and offer bonuses, unless the value is of negligible value (section 6),[36] and access to holding competitions that rely on the principle of random is delimited in section 9.

In order to regulate from the point of view of society as such, the Act forbids actions like sexual discrimination and improper use of naked people to promote unrelated products.

The Danish Copyrights Act (DCA)

The DCA is mainly based on EU-directives,[37] the Berne Convention[38] and Nordic legal Principles. The copyright to a certain work is not bound to any kind of formality, the right is obtained through the production of the work. It is important to notice that a copyright is only a protection against copying and unjustified publication of the work, it is not protection against similar work produced without knowledge of the original work, i.e. it is not a priority protection.

The object of the protection is given in section 1 of the DCA to be literally or artistic work, whatever the form is, that gives that also digital productions is comprised in the section. Section 1 (2-3) gives that describing maps or drawings and computer programmes is regarded as literally works. Section 4 and 5 deals with derivative works and compilations, respectively, stating that the arranger obtain an individual copyright over the work, but he/she can not dispose the work in a way that conflicts with the copyright of the original work.

It is a basic requirement that the work shall be original,[39] i.e. being produced on the basis of a personal creative process. There is no requirement regarding the quality or the quantity,[40] as long as the work is original and by that being in some way distinctive, e.g. a word or tone can not be subject to a copyright.[41]

Chapter 5 of the DCA comprises the neighbouring rights, which are copyrights deriving from the capture of the performance of works. It is a protection of the production as such, e.g. the performance of an artist, sound recordings etc. One of these can be relevant in relation to the Internet, that is section 71, stating that also catalogues, tables etc. can be copyrighted even though

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36 A fixed maximum for a legal bonus is around 0.5 ecu, but still depending on the value of the main product, Madsen p. 206.

37 Koktvedgaard p. 43f.

38 Koktvedgaard p. 36ff.

39 Koktvedgaard p. 66

40 Koktvedgaard p. 68

41 Koktvedgaard p. 88f.

the data contained can not be regarded as original, just the effort of making the compilation can justify a copyright protection.[42]

The most important content of the protection is given in section 2, giving the copyright owner exclusive right to dispose the work, in regard to the production of copies and the providing of the work to the public, in original or in a modified form (translation etc.). Chapter 2 of the DCA gives some limitations to the copyright, among these are of special interest section 12 about reproduction for private use. This provision gives that private people can make a few copies of a copyrighted work for private use (i.e. non-profit).[43] To this wide access to reproduction is some limitations, among these is the one given in section 12 (2) no. 4 of special interest for this thesis, prohibiting the reproduction of a work in digital form as long as the copy will appear in a digital form as well. This gives that the copying from a CD to a computer (sampling) is prohibited, but the copy from a analogue tape to the computer is legal, as well as the copying from a CD to a analogue tape. This provision is pretty interesting in relation to surfing the Internet, since what is really happening when surfing the Internet is that a copy of a homepage is being sent via the Internet, i.e. a digital to digital reproduction, that gives the main rule that surfing the Internet is a chain of infringements of copyrighted works. Thus it does not take much fantasy to come to the conclusion that the reproduction is done with the consent of the publisher (he could remove it from his homepage). But probably only for the surfing, not for further use of the material, - unless anything else appears from the circumstances.

It is given in section 19 and 20 that the copyright regarding a transferred copy is somewhat consummated, that is in regard to the right to distribute the copy and the right showing the copy to the public. Some modifications are listed in the provision, but I will not examine these further. [44] This gives that if somebody have bought a copy of a work, he/she has the right to show it to the public, but digitalizing the work in order to put it out on the homepage would be considered a reproduction, of which the copyright owner has the exclusive right to.

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42 Catalouges, tables etc. can also be protected under section 1, see Koktvedgaard p. 63f.

43 Koktvedgaard p. 146ff.

44 See Koktvedgaard p. 109ff for a more thorough examination of the question. Koktvedgaard is arguing that the consumption should be regarded as regional (EU), and not global as one might understand from reading the provision. Since this question is of no special significance I will only refer to the discussion in Koktvedgaard p. 115.

The Danish Trademarks Act (DTA)

The DTA is mainly based on EU directives, and to the widely adopted Paris Convention, which means that the principles described in this section applies in some way to all the states within the Paris Convention, and especially the EU-states. I will not spent much time on describing the formal procedure for registration of trademarks, I will only establish that a trademark in Denmark can be obtained in two ways, viz. by registration or by using the trademark, the latter way is a special Nordic tradition.[45]

A trademark can also be considered a copyrighted work, but the copyright does usually disappear when it is registered as a trademark, see Koktvedgaard p. 83.

The geographical scope of application is by tradition only the territory of the state, and it applies as well for the DTA, but also well-known international trademarks can cause the refusal of the registering of a trademark in Denmark[46].

A trademark is distinctive from other intellectual property by being bound to a product or service, thus a trademark can be so well known, that it has a value in itself. It is given in section 1 of the DTA that a trademark is a distinctive feature for goods or services that is used or is intended to be used in regard to a business. In section 2 gives what kind of shapes a trademark can appear in, that is all kinds of signs with the ability to distinguish a business products from other businesses, and especially words, letters, numbers, figures etc.

The content of the trademark protection is provided in sections 4 to 6 of the DTA, that is mainly that the trademark owner can prevent anyone that is, without his consent, using the trademark professionally, as long as the use regards the same or similar products and there is a risk for confusion of the products.[47] Section 4 (2) gives that even though the limitation of subsection 1, the trademark owner can prevent anyone from using his/her trademark commercially in general as long as, the user would obtain improper benefits from the use. Section 4 (3) gives some guidelines for what is considered professionally use, the list that is not exhaustive, comprises marketing, placing the brands on products, offering the products for sale, importing and exporting the product under the brand etc.[48] Section 4 (3) no. 3, forbids the export of products under the

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45 Koktvedgaard p.297, states that trademarks in the future will only be accepted by registration.

46 Based on the EU-directive, See Koktvedgaard p.293

47 Section 4 (1)

48 See Koktvedgaard p. 315

brand, this is a special provision protecting Danish brands, i.e. even if the product is not meant for the Danish market, the export of the product under the name is forbidden. The protection does also apply to brands that looks like the trademark,[49] what it takes to establish that a brand looks like the trademark depends on the general impression of the brands and their function[50].

Section 5 of the DTA gives some limitations to the protection of a trademark, stating that the trademark owner can not prevent anyone from, in compliance with fair marketing practice, using his/her own name, address and other statements regarding the nature of the product.

Section 6 is dealing with the concept of consumption, i.e. the trademark owner can not prevent anyone from using the brand in relation to products already marketed in the European Union, by the trademark owner or with his/her consent. This means that the trademark owner can not prevent any resale of his/her products, that does also include the parallel import, as long as the product have been marketed in the EU.[51] Two limitations is set up in connection to consumption, the first is that it is only the fair and loyal use that the trademark can not prevent and secondly the consumption does not apply if the trademark owner has reasonable reasons to prevent the marketing, especially if the condition of the products have changed since the trademark owner sold them. What will be considered fair and loyal use is to be determined by the courts, but it seems that the concept of consumption only opens for a very limited use, and the loyalty seems to be very important[52].

Trademark law is by tradition very close to the competition law, and that is why the trademark regulation only applies to professionals, e.g. the situation where a private person want to make himself a T-shirt with a company' s brand on it, is not comprised by the DTA, but when he decides to sell these T-shirts in order to make a profit, the brand owner can prevent him/her from doing that under the DTA. Also the rules about improper benefits and fair and loyal use mentioned above, is more a competition consideration than a intellectual property consideration. Section 5 of the DAJA can be seen as a parallel provision to the DTA.

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49 Section 4 (1)

50 Koktvedgaard p.327

51 It has been discussed whether the consumption is regional (EU) or global, but it seems pretty clear that the intention was to draft a provision on regional consumption, see Schovsbo p. 161. But the final conclusion on this issue is to be made by the ECJ, cf. UfR 1997.486V

52 Koktvedgaard p. 317f.

One of the big questions in relation to this thesis is the question of what it takes to establish marketing of the product in the EU. This gives rise to the question is it marketed in the EU by setting up a homepage in the USA, that is accessible from the EU or what does it take.[53] On the this question I will in general refer to the discussion in the section on the Rome Convention in the chapter on private international law (see below).

The EU Trademark Regulation (EUTR)

Instead of registering a trademark in every EU state one at a time, an application for a so called EU-trademark, can by only one registration give the right to a trademark in all EU states. The EU-trademark can only be used to register the trademark for all states as one.

Since the content of the EUTR resembles the DTA in its function, with the difference that the European Union is to be regarded as one state, I will omit a further examination of this regulation.

Formal regulation

Formal regulation is defined as regulation that intends to regulate the medium as such, i.e. not the regulation described above regulating the content of the medium.

The Danish Media Liability Act (DMLA)

The scope of the DMLA is to set up rules for who is subject to liability deriving from infringements made by media. The purpose is to limit the number of subjects being liable as a result of an infringement, e.g. so that the paperboy, the news-stand owner or the sound technician will not be charged with accessory to defamation. The purpose is also to define who is liable for defamation etc. made by anonymous sources.

The scope of the Act is defined in section 1 and is limited to 1) domestic periodical publications, 2) media broadcasting on the basis of a license issued pursuant to the DRTA[54] and 3) other electronically information systems. It is obvious that the Internet is not comprised in the first two items, but it might be comprised in the third item.[55] The third item differs from the other two by

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53 It seems like no authors have spent time on this subject, even though it seems pretty important, also regarding older media as the satellite television.

54 See above

55 bet. 1205/19 p. 104.

requiring registration before the Act applies to the medium, whereas the first two items applies directly to the media.

The content of section 1, no. 3 is that a medium that comprise texts, pictures and sounds that are broadcasted periodically to the public, provided that it has the character of dissemination of news that resembles the media under 1) and 2). On the face of it, the Internet seems to be included under item 3, as long as the content is in some way news related[56] and the content is in some way made available to the public. It emerges from report 1205/90 p. 108 that it is also a requirement that it is within the purpose of the medium that it should be reached by the public.[57] It is also a requirement that the information has the character of dissemination of news that resembles the media under 1) and 2), i.e. one-way communication.[58] This criterion shall not be understood in such a way that the Internet shall be omitted just because it is a medium that uses two-way communication. The requirement for one-way communication refers to the content of the news, that the news should only be communicated one way, and the availability of the opportunity to search the news by keywords should not be enough to omit the Internet either, since it is no different from picking out your favourite section of the paper.

Taken from report 1205/90, it appears that the purpose of the third item is that the existing massmedia should have an opportunity to broadcast their news via other channels, like telephone-based news or "tele-data",[59] but also other media that resemble these known media are comprised in section 1, no. 3, e.g. Cyberzines. So by a purposive construction of the Act, the Internet seems to be included under section 1 no. 3, as long as it is broadcasting news (one way) in a way that resembles the media under section 1 no. 1 and 2 with the similar contents, but the Act will not take effect automatically, a registration is still necessary.

The Danish Press Tribunal has the power to refuse a registration of a newsprovider, but such a refusal can be tried by a Danish court of law.[60]

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56 The Danish newspaper Jyllands-Posten have registered its homepage to the Danish Press Tribunal.

57 But it will not omit a news-provider just because it have a narrow audience.

58 Bet. 1205/90 p. 108

59 Which appears to be some kind of an electronically network, like the Internet described in report 1205/90 p. 92.

60 On the other hand, the tribunal is not obligated to make a thorough examination of the news-provider, so the fact that some Internet based media have been registered can only be taken as an indication of the Internet being included.

Conclusion

I have now established that Cyberspace is not lawless, but it appears, of course, that many of the laws have not been made with the Internet in mind. It is only natural that the substantive law is the one of the two categories that applies to a greater extent to the Internet, since the scope of the substantive regulation is to regulate a certain behaviour, and in that connection the choice of medium is not of significance, whereas the purpose of the formal regulation is to regulate a specific medium or a medium with specific characteristics, and since the Internet is still so new, no laws have yet been passed to regulate it: Formal law can be said to be more medium bound, the DMLA is an example of an opening for a new media, it requires that the new medium resembles the known media; and is still based on registration.

When asking which laws applies to the Internet a common question arise when the acts are used to regulate a certain medium, like the phone; it seems to be a strict construction, like not letting a fax call being comprised in the concept of a phone call.[61]

As it appears from the examination of Danish substantive law, quite a number of laws have taken effect in relation to the Internet as well. One of the most significant problem is that some of the laws, viz. the DTA and the DMPA only regulate professionals' behaviour on a medium where professionals and privates are playing in the same field. One of the more absurd consequences of that differentiation is that a company will not have any legal instruments against a private person using the company' s trademark when registering a domain name, as long as the private person does not have any profit-intention behind the registration.[62]

Another big question regarding the Internet is whether the content of a homepage can be said to be a part of the private sphere or should be considered provided to the public. The latter option seems most reasonable since the homepage can be reached by virtually everyone.

Though publishing on the Internet in certain instances can be regarded as non-professional use, like the example from above, publishing on the Internet is ought to always be regarded as public use. This gives that copyrighted material can not legally be used on a homepage without a

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61 Georg Ferdinansen, Forbrugerstyrelsen

62 Though the ordinary liability in tort exist, but it sets up some requirement that can be hard to satisfy, e.g. the proval of a loss

license, unless it falls within some of the exceptions in the DCA;[63] it would be an infringement of the copyright owners exclusive right to provide copies the work to the public

When it comes to the downloading of material on the Internet the DCA has the special rule on not letting digital to digital copying in under the right to make copies for private use, a rule that makes a lot of sense, but the problem is that it regulates the private sphere, an area where it is very hard to carry out a strict enforcement.

63 E.g. the right to quote

Private international law

Purpose of this chapter

In the past chapter I have been looking at some areas of the law which are relevant in relation to the Internet, assuming that the medium is governed by Danish law. In this chapter I will focus on the international perspective, in order to find out when the Internet is governed by Danish laws, and what effect the choice of server-country and TLD have.

In general

Private international law is the formal, national regulation that applies when establishing the which state' s substantive law is governing the matter, i.e. this is one of the first questions to ask, in order to establish whether there is any idea in commencing proceedings. It is important to notice, that the substantive law governing a matter will not necessarily be lex fori,[64] but it is the overall main rule that it is lex fori' sprivate international law that is used when determining the international choice of law. This gives that the private international law is national law, setting up guidelines for which law to use in a certain dispute.

The international choice of law is not as developed as the choice of forum,[65] the main regulation in the European Union is the Rome Convention, but this Convention does only apply to contractual matters. Since it is proven pretty difficult to agree on a common legislation on the private international law, another approach have been used, viz. harmonising the substantive law. The most successful of these initiatives has proven to be the CISG; when the states in relation to a dispute all have the same set of substantive law governing the matter, the international choice of law will be of no interest.

The question of which state' s law applies to a certain matter is basically dealt with in almost the same way both in Europe and in the United States of America.[66] The main rule is the so called "contacts approach" which can be divided into two approaches, viz. the single contact approach and the aggregate contacts approach.[67] The whole idea of the contacts approach is to find the natural seat of the matter, by weighing up relevant factors. The idea of the single contact

64 The law of the state in where the court of law is residing
65 See the following chapter
66 Lookofsky p.293
67 Lookofsky p. 292f.

approach is to set up one single factor being decisive for the choice of law in certain matters, e.g. as the lex rei sitæ.[68]

Thus I have specified the main rule as the contacts approach, a modification can be made in the way that most often the rules regarding choice of law yields to the parties choice of law, or to be more correct, the private international law recognise the concept of party autonomy. It is important to notice that it is lex fori's private international law that is to be used when deciding which state's law shall apply when determining whether the agreement of derogation is valid.

It is widely accepted, that the international choice of law only refers to the substantive law and not the formal private international law of that state, this principle is adopted in the Rome Convention as well.[69] This principle eliminates renvoi, i.e. the idea of a matter being sent back and forth between to state's law, because both state's private international law refers to the other state's law as to apply.

Lookofsky is stating, that this formal approach in order to decide the applicable law is not lived out in real life, the fact is more, that the judges merely consider what the result of the dispute should be, and then goes backwards applying the better legal rule.[70] This approach can be regarded as a safety valve, giving the judges the possibility to modify a private international rule if the result would contravene with the public policy of the state. This approach can only be made in relation to the non-statutory private international law, but the statutory private international law will most likely have a provision regarding contravention of public policy,[71] thus it is more narrow than in the non-statutory regulation.

Choice of law in contract

The Rome-Convention[72]

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68 The law of the state where the real property is located.

69 Article 15

70 Lookofsky p. 295, "justice breaks the rules, when rules breaks the justice", see also Siesby in UfR 1984.305B

71 E.g. article 16 of the Rome Convention

72 The EU Convention on the Law Applicable to Contractual Obligations etc., adopted in Denmark by Act 305 of 1.09.91

The Rome Convention is drafted in connection with the Brussels Convention[73] as an attempt to harmonise the legislation on international litigation in the European Union. The protocol that should empower the ECJ to finally construe the Convention is not yet accepted, why the final construction still lies within each state, i.e. we might see some discrepancies within the EU in relation to the construction of the Convention.[74] The Rome Convention differs from the Brussels Convention by not having a requirement for mutuality, i.e. the Rome Convention applies to all transnational contracts, whether it is between contracting states or not.[75] The Convention yields to more specific provision regarding the choice of law.[76]

The Convention applies only to situation where the choice of law is between two or more states, that should be understood as it is applying to all disputes regarding the international choice of law, but not necessarily all contracts concerning international matters.[77] The Rome Convention yields to conventions adopted before the adoption of the Rome Convention, that is of importance in relation to the Hague Convention, examined below, concerning international sales of goods.

The scope of application for the Rome Convention is given in article 1, stating that it applies to contractual obligations in all situation where a choice of law is to be decided, it is, as described above, up to each state to shape the concept of contractual obligation. Articles 1 (2-4) provides some limitations to the scope of application; that is of interest for this thesis that, agreements on arbitration and jurisdiction is not covered and the questions involving the status or legal capacity of natural persons is not comprised.[78] In these situation national private international law will apply.

The main rule of the Convention is the parties right to choose the applicable law. Some limitations to that rule is set up in article 3 (3) regarding the situation where all the relevant elements are connected to one state, and article 5 regarding the situation where one of the parties is to be considered a consumer, i.e. actions made outside his trade or profession. The result of a derogation in these situations is that the law chosen shall govern the matter, but without

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73 See the following chapter.
74 Phillip p. 128f.
75 Article 2
76 Article 20, Cf. Phillip p. 131f.
77 Phillip p. 130
78 Except for the rule in article 11.

derogating from any mandatory rules[79] in the state of which the contract has the closest connection.

The choice of law shall be expressed or demonstrated with reasonable certainty, a choice of forum will under normal circumstances not be sufficient to establish a choice of law. When determining the material validity of a clause, the law of the state that would govern the contract if it was valid, shall apply.[80] I will not elaborate on what it takes for a choice of law clause on a homepage to take effect, I will only establish that it has to be expressed or demonstrated with reasonable certainty.

The choice of law in absent of an agreement is regulated in article 4, giving that the law of the state that have the closest connection applies. This is the contacts approach as introduced above, but this article combines the contacts approach and the single factor approach by setting up some presumption rules. The presumption rule of interest in relation to this thesis is that the law in the state where the party, who is to perform the characteristic obligation of the contract shall apply, but this is notably only a presumption rule and therefore not binding.[81] The characteristic obligation will usually be the delivering of goods or services, a money obligation will very rarely be considered the characteristic obligation of a contract.[82]

Articles 5 and 6 gives some modifications to the closest connection rule, regarding certain consumer contracts and individual employment contracts respectively, only article 5 will be subject to examination in this thesis. The consumer definition is similar to the consumer definition in the Brussels Convention,[83] providing that only the situation where the consumer can be regarded outside his trade or profession, and the other party can be regarded as being dealing within his trade or profession. Furthermore has one of three criteria, given in article 5 (2), to be satisfied, that is of interest in relation to this thesis, that either 1) the contract is concluded in the consumer state on the basis of a special invitation or by advertisement in that state or 2) the professional party or his agent received the consumer' s order in the consumer country. If these requirements are satisfied the law of the consumer state shall govern the contract. This exception has been made to avoid that the consumer, following the closest connection rule (presumption),

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79 Rules that can not be derogated from, - different from international mandatory rules, described below in connection to article 7

80 Article 3 (4) referring to article 9

81 Article 4 (5)

82 Phillip p. 145

83 See the following chapter

should accept the law of the state in which the professional party is residing.[84] As mentioned above the parties autonomy is also delimited in relation to consumer contracts, so that the parties can not derogate from mandatory rules protecting the consumer in the consumer state. This gives that if both the consumer state and the state of which law is chosen have mandatory rules governing the consumer, the law giving the consumer better rights is to apply, notably only if the above mentioned requirements are satisfied.

Though the question of what shall be considered advertisement, seem very relevant, no authors have apparently dealt with the definition. The question is necessary when dealing with media where the group of recipients is not well defined, like e.g. satellite television and the Internet.
By advertisement comprised by this provision can be understood information that is communicated by a commercial business with a view to influence sale of certain products.[85] The provision requires furthermore that the advertisement shall have taken place in the consumer state, i.e. it shall have been the intention of the advertisement that it should be reached by the consumer in that state.[86] This is easy to establish when we are e.g. considering an ad in a newspaper, since the main group of recipients is usually pretty well defined; it seems natural that only the main recipients can rely on the consumer state' s law, and not the states in which just a few copies are shipped to. But the question seems to get more complicated when dealing with the Internet, since the group of recipients is not very well defined, actually a publisher will normally accept consumers from all over the world. It seems natural that if a publisher provides a service via a homepage, then the publisher by accepting a customer, also accepts the consumers law to apply, since the service provider is the most immediate to define a group of people, i.e. who he/she will provide the service to. As an offer on a homepage can be considered binding for the publisher, when a customer accepts it, the publisher is ought to explicit define the group of recipient on the homepage.

Another question that arise is where a contract is concluded on the Internet, since this i further more a requirement for the consumer state' s law to be applicable. This is as well a very difficult question, with two possible answers, all depending on whether the provision shall be understood as the place where the provider is or where the consumer is at the time of conclusion. It seems

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84 The consumer would most often have the obligation to pay for goods in consumer contracts.

85 This definition is inspired by a definition brought forward by the Commission in EFT 95/C 291/06.

86 Phillip p. 153

like the purpose of this requirement is that when a contract is concluded at the physical location of the provider, then it would be unfair to let the consumer state' s law apply. I will by that argument conclude that it is the physical place of the consumer that is of importance.

Another question of interest is which state' s law shall apply in relation to the formal validity, i.e. whether the contract is binding the parties. Article 9 is dealing with this subject, giving that it shall be valid in either 1) the state of which law is governing the matter under the Convention or 2) in the state in which the contract is concluded, if both parties are present in the same state or 3) in either of the states where the parties are residing. Article 9 (5) gives that consumer contracts (as defined above) are only valid, if the formal requirement of the consumer state is satisfied.

Article 7 is dealing with international mandatory rules, which are national rules that can not be derogated by choice of law, different from the mandatory rules described above, since these can not be derogated from in national law, - international mandatory is not widely used in Danish law.

Since the Rome Convention is based mainly on what was accepted to be private international law in Europe, the national private international law, outside the scope of application of the Rome Convention, will not differ much from the regulation given in the Rome Convention, though it might be a bit more protective.

The 1955 Hague Convention on law applicable to sales

As mentioned above, this Convention is adopted in Denmark before the Rome Convention, which gives that the Rome Convention yields to this Convention, in relation to the scope of application, i.e. in relation to international sales of goods, but only between two parties, who are dealing within their profession; consumer sales has been moved to the Rome Convention. Some further limitations to the scope of application exist,[87] but these are of no interest for this thesis, and will not be subject to further examination.

The Convention appear markedly similar to the regulation in the Rome Convention. Two differences is to be mentioned, viz. the more strict requirements for derogation and the single factor approach.[88]

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87 See article 1

88 Lookofsky p.332f.

First, article 2 of the Convention gives that a designation must be contained in an express clause, or unambiguously result from the provisions of the contract, this must be regarded somewhat more strict than the "reasonable certainty".

Secondly, where the Rome Convention had the contacts approach with presumptions, the Hague Convention, has a single factor approach as its main rule, viz. the law of the state where the provider was residing at the time of conclusion of the sale.

Choice of law in tort

The Hague Convention on product liability[89]

This Convention is not adopted by Denmark, but it might even though give some arguments for which law shall apply in tort.

This Convention gives that the law of the state where the harmful event occurred shall apply if 1) the injured party is domiciled there or 2) the tortfeasor is carrying on its business there or 3) the product is bought there. If the tortfeaser is carrying on a business in the state where the injured party is domiciled or the product is sold there, then the injured party' s domicile state' s law shall apply. If neither of these situation applies the law of the state where the harmful event occurred shall apply if requested by the aggrieved party, otherwise the domicile state of the tortfeasor is to apply.

The main rule under this Convention is, the single factor approach of lex loci delicti.[90] This main rule is modified in situations, where the closest connection is not to the state where the harmful event occurred, i.e. where the two parties both are domiciled in the same state (or the product bought in the domicile state), this is what goes under the name of lex communis[91] (the common domicile).

Intellectual property

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89 See Siesby 123f. for a more thorough examination

90 The place where the harmful event occurred

91 See below

The Berne Convention and the Paris Convention on copyrights and trademarks respectively, gives that the law of the state in which the protection of an intellectual property is claimed shall apply, this seems to be the general rule when dealing with intellectual property.[92] This rule can be regarded as a lex loci delicti rule as well.

The EU television without frontiers directive

The scope of this directive is to bring forward some common minimum requirements for commercials and the content of transborder television. The Internet and similar services are not comprised in the directive, since all services that are providing information on a individual basis falls outside the scope of the directive.[93] The supervision of the broadcasting organs lies under the Member States that have authority over the organ.[94] This directives gives further more that a Member State has the power of supervision over broadcasting from non-Member States, as long as the up-link or frequency is provided by that Member State.

This first point is not very specific defined, it has also given rise to a dispute between the Commission and The United Kingdom.[95] This dispute was caused by, among other reasons, a provision in the United Kingdom' s Broadcasting Act, giving United Kingdom power to supervise broadcasting organs on the basis of an up-link criterion, i.e. the state where the signal is transmitted to a satellite. The ECJ concluded that article 2 (1) should be construed in the way that the supervision should lie under the state where the broadcasting organ is established.[96]

If the directive applied to the Internet, this would give that the formal criterion of place of server and TLD is of no significance, but only the establishment is of significance. Unless the information is provided from a non EU-state, then the TLD and place of server could be of significance.

The non-statutory choice of law in tort

Denmark have not adopted any convention on conventions on this matter and the number of cases on choice of law in tort, in Denmark has been limited, and there has been some discrepancies between the judgements, so I do not think it is possible to bring forward a set of rules describing the Danish choice of law in tort with undoubtedly certainty. Many of the authors I have referred

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92 Koktvedgaard p. 356ff., See the Berne Convention articles 6bis (3), 7 (8) and 14 (2a)
93 Article 1 (a)
94 Article 2 (1)
95 Case C-222/94
96 See UfR 1997.128B

to under this section are using much time on describing the common European choice of law in tort, since they are referring to foreign principles when discussing the Danish cases. This approach have lead to some principles that can be said to be the common European core in choice of law. One of the reason for this examination will only lead to a set of guidelines is that the judges to some extend will rely on a fairness considerations (rule of reason), which is a pretty queer specimen.[97]

In general the contacts approach can be said to be the main rule, though with one significant presumption, viz. the law of the place where the harmful event occurred (the principle of lex loci delicti). The idea of this principle is to establish some predictability, especially for the aggrieved party.[98] There are two modifications to the principle of lex loci delicti, viz. 1) where the harmful event is committed in one state and it has influence on another state' s territory (distance damage) and 2) where the harmful event does not have any or only limited connection to the territory.

Distance damage as described above has not been discussed very thoroughly in Danish literature, and probably because the lack of existence of Danish caselaw on the matter. In Germany and Switzerland is the injured party given the opportunity to choose either of the states,[99] a principle that is also established in the Danish Environmental law.[100] This seems like a reasonable result as long as the tortfeasor could predict that the damage would occur in another country. The question of distance damage is very important in relation to the Internet, but unfortunately it does not seem like there is much help to get in the literature or the caselaw, for that sake. A dispute on this matter could be resolved by asking in which favour should the predictability be[101] and by considering objective factors, - as describe below.

When there is no or only limited connection to the state where the harmful event occurred, it seems like the contacts approach take effect, in order to establish the most reasonable result. A certain type of cases has been subject to a very thorough examination in Danish literature, viz. the situation where both the tortfeasor and the injured party are domiciled in the same state, and travelling together. The main rule in this situation is that the shared law should apply (lex communis), since it would probably fit better into their expectations, but notably not in relation to

97 See below
98 Schmidt p.221
99 Schmidt p. 222
100 See Schmidt p.222
101 Cf. Siesby in UfR 1984.305B

e.g. the applicable road traffic act. This rule have been used in some Danish cases,[102] but especially one Danish judgement differs from this pattern, viz. the case of the hunting trip to Scotland.[103]

> *In this case two people interesting in hunting, found each other in a hunting magazine in order to go on a hunting trip to Scotland. The trip was planned via a Danish travel agent, and a car was rented from Denmark (to be picked up in Scotland). During the stay in Scotland both of the parties were driving by turns, when one of the party by some kind of hazardous driving crashed the car, leading to the death of the other party, - the driver got a fine and was prohibited from driving in Scotland for another three years. Due to procrastination from the surviving relatives' lawyer proceedings was not commenced before a three years limitation period under Scottish law was due, - under Danish law the limitations period was 5 years.*

From the facts of the case all factors are leading towards Danish law as applicable from a lex cumunis consideration, and that is also the result that the Danish town court arrived at. But the Danish High Court came to the conclusion that Scottish law should apply including the three year limitation period, probably on the basis of a rule of reason.

The case is discussed by Siesby and Nørgaard,[104] it seems like both agree on, that the judgement is entered on the basis of a rule of reason, but Siesby argues that the rule of reason should have been in favour of the surviving relatives, and not as Nørgaard argues in favour of the tortfeasor. Siesby argues that the case is an example of abuse of the contacts approach, since the only elements connecting the dispute to Scottish law is the registering of the car[105] and the third party liability insurance, of which non of them, according to Siesby are significant enough to establish Scottish law as the proper law. Nørgaard argues that the initiative to commence proceeding lies on the surviving relatives, and for that reason would it be reasonable that the procrastination should be to the detriment of the surviving relatives.

This case gives us the ultimate security valve, which illustrates that the discretion of the judges very well can be based on a fairness considerations, - assuming that the judgement is not wrong (as Siesby claims).

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102 See e.g. UfR 1953.945Ø, UfR 1967.406Ø and Assurandør Societetets domssamling 1968B p.26

103 This case (UfR 1982.886V) have given rise to some dispute between Siesby and Nørgaard in UfR 1984.305B, 1985.46B, 85.130B and 1985.237B.

104 See the note above for a more detailed presentation of the two gentlemen' s arguments

105 Which could have been registered in any country, since AVIS is an international company, with establishements all over the world.

Another type of situations where it can be difficult to establish the proper law, is the situation where the harmful event does not have any connection to a territory, e.g. one person injures another on a vessel in international sea or in space. In this situation can it be relevant to consider the nationality of the vessel or the common nationality of the parties.[106]

The Internet is often described as a Cyberspace, i.e. a parallel world without any connection to the material world. This could lead to the question of whether the Internet, in relation to choice of law, could be considered a no man' s land on the same footing as space or international sea, and therefore will lead to the presumption as the TLD state as the proper law. Even though this idea may sound cute, it does not seem to have any value, not least because the Internet is in fact connected to the material world, even though it consists of only non-material bits and bytes.

Factors of relevance in relation to choice of law on the Internet

There is no caselaw or literature dealing with choice of law on the Internet, but by using the guidelines described above, I will try to give some guidelines for which state' s law is ought to apply in the conflict of law. The question of applicable law is very much a question of what is most reasonable, and by that fact it is also a very political question.

In contractual disputes the law of the state where either the provider or the consumer are domiciled applies, the domicile can often easily be established since the services or goods normally provided are to be delivered or provided in the material world, but in Cyberspace the domicile of the buyer and the provider is not necessarily of any significance. When buying goods or services on the Internet, which is to be delivered via the Internet, neither of the parties will necessarily be aware of where the other party is domiciled. To describe the complexity of this problem is here an example:

> *A French serviceprovider is providing services from a homepage placed on server in Spain and registered under the .COM TLD. The language chosen is English and nothing on the homepage is pointing towards either France or Spain. The buyer is domiciled in Denmark but registered under the .COM TLD, he uses his international creditcard to pay for the services and the service is to be delivered via the Internet.*

It seem like the contract is concluded between two Americans (.COM TLD), but all other factors are pointing somewhere else, but without neither of the parties being aware of it.

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106 Siesby p. 126, and Schmidt p. 236

The same example can be used to describe the same complexity in relation to tort, viz. if the French serviceprovider was publishing a defamation or a copyrighted work on the homepage, causing a loss in Denmark.

It seems like the factors for establishing the closest connection are many, and some of the factors will not be clear for the other party. I have chosen to examine these factors below:

The uploading state's law

This state will be the state in which the publisher is domiciled, and therefore the state in which the publisher can be said to carry on his/her business. This state will not necessarily be known by the viewer or the aggrieved party as well, unless it is written on the homepage or it can be established from any of the other factors examined below.

If the nationality (domicile) can be established from the homepage itself that state' s law will apply in all commercial contracts concluded on the basis of the homepage, unless other factors are pointing strongly towards another state' s law (the "law of the provider" rule is still only a presumption rule). If the contract is to be considered a consumer contract, the domicile of the provider is not of significance.

In relation to tort either the place where the harmful event is committed or where it did take effect is of interest. Regarding the place where the harmful event is committed, it can be said to be the uploading state, since the uploading of harmful materiel itself can be considered a harmful action, but only in relation to situation where that action is illegal, e.g. an uploading of a copyrighted work is illegal digital to digital copying, committed in the uploading state. See below about the server state' s law in relation to publishing.

If the nationality (domicile) of the provider is not known by the viewer (buyer), it can be hard to establish which law shall apply in commercial contracts. The question is to who' s detriment shall it be that the offer on a homepage does not comprise the domicile of the provider; the provider or the buyer? The buyer will have an idea, that the domicile of the provider is consistent with the TLD unless otherwise is given, but it will on the other hand not be reasonable to let e.g. American law apply when the only connection is the .COM TLD. If the TLD and the domicile of the provider is consistent, that state' s law is ought to apply, since it would be in compliance with the reasonable expectations of the buyer. If the domicile of the provider can not be established

from any of the factors examined below then it would be natural to exclude the domicile of the provider as a factor, and rely on other objective factors.

The server state's law

The server state is the place where the harmful content or an offer is "physically" located, it can be said that the serviceprovider or publisher is carrying on his/her business via that homepage in the server state. But the server state is not known by the buyer and the content can be moved to a server in another state, without any hard work or significant disturbance, so it will not be in compliance with the expectations of the buyer to let that law apply. Under EU law a server will not constitute establishment, but only providing of services,[107] a systimatism giving that the provider' s domicile is still where he/she is established, which must be in compliance with common sense.

In relation to tort, the defamation or the illegal publishing of a copyrighted work can be said to be done in the server state, since the existence of the material on the server is the basis for making the material public. It depends on whether it is the intention and the action to publish or it is the publishing itself that is more significant. The server state' s law is ought to apply when it is the providing to the public that is of significance, e.g. a tort claim regarding a loss for revenue of book published on the Internet (for the copies reproduced by the viewers).

This strict distinction will probably not last in real life, since the judges might look for the more reasonable result, which would most likely be the uploading state' s law for one reason among others; that it is in compliance with the expectations of the publisher. The server state is in general a very doubtful criterion, because it is in fact of no significance, so my opinion is that this criterion can only be used to support a choice of law based on other factors, and notably not be the one significant factor.

The TLD state's law

The TLD is, as described in the chapter on a brief introduction to the Internet, only of a formal nature, since the TLD-nationality does not necessarily have any connection to the material of a homepage or to the publisher. The TLD resembles in relation to choice of law, the value of the register state of a vehicle. The Hague Convention on traffic accidents, gives that in solo accidents

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[107] See the chapter on the freedom to provide services

will the register state' s law apply,[108] this systematism does not really apply to any of the situations that can occur on the Internet, since these are all based on the existence of at least two parties.

Though the TLD is only of a formal nature, it might have some value in relation to the international choice of law, since the TLD gives the supposition that the person or company behind a certain TLD is also domiciled there. A supposition that is more vague in relation to presuming that a company behind a .COM TLD is American than a company behind a .DK TLD is Danish, because the .COM TLD might be considered an international TLD (but it is still an American TLD).

There is one situation where the TLD will be the most significant factor, viz. the registering of a domain. The choice of law in this situation is ought to be based on the law in where the register is placed and as regarding a dispute on a trademark infringement in relation to a registration, the law where the right to an intellectual property is claimed (i.e. where the register is placed). This situation is not deriving from a publishing on the Internet, and is by that fact not comprised under the scope of this thesis.

The downloading state

The downloading state can be virtually any state in the world and it is obviously that an Internet publisher can not cope with all laws of all possible downloading states. The downloading state can be relevant when dealing with consumer contract, the question is whether the offer is marketed in the consumer state (the downloading state). Taken from a technical point of view, it is the viewer him/herself who takes the initiative, and not an action from the provider. This situation resembles satellite television a lot, because the situation is here, that e.g. an American company advertising for a product in the Unites States via an American satellite television station. The company knows that the commercials can be viewed by a lot of people outside the United States, but it would not be within reason to establish that the American company should observe rules in all possible receiving states.

What is important is whether it is the intention of the publisher to market his/her products in the downloading state; this is to be determined by the objective criteria examined below.

Objective factors

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[108] U1985.48B

By objective factors is meant factors that objectively can be used to determine where a publisher is pointing his/her marketing or offers to. i.e. what is the group of recipients. The group of recipients can be of relevance in relation to the question of whether a company should observe a state' s marketing legislation or in relation to tort to establish where the harmful event took effect and how severe it was.

Who have access?

The access to a homepage can easily be delimited by the TLD or domain of the viewers computer, so that e.g. the homepage can only be downloaded from computers under a certain TLD, e.g. the .DK, only giving access to servers registered under this domain. This option is not widely used on the Internet, but some sites are limited to internal use only, others have limited access based on a user id, which is normally for commercial cyberzines (e.g. Jyllands Posten). Maybe one of the reason for not using this option might be the fact that geographical delimitation would contravene with the spirit of the Internet, viz. the global access to data even though the site is only of interest for a local range of people.

It is important to understand in relation to this question, that many non-US companies have registered their servers under the .COM domain, since it have become the best idea of a world wide domain. This makes things a bit more complicated, since the .COM TLD is formally an American TLD.

The blocking of access for certain TLD or domains is easily circumvented, by connecting to a computer under an accepted TLD or domain. But even though a blocking of unwanted viewer-TLDs will not be strictly effective, it will by all good reasons lead to the result that the law of blocked state will not apply. The viewer making an conscious circumvention of the blocking in order to download the homepage, can by no means have a legitimate expectation of his/her state' s law should apply. Furthermore would it not be reasonable that the publisher should be forced to respect another state' s law, when he/she have done anything possible to deny access from that state.

Who have access to buy?

Even though a homepage can be viewed by everyone, the provider of goods or service can explicitly delimit the group of people of who he/she will contract with. The group of recipients can also be defined e.g. by setting postage rates for different areas of the world. This can have effect in relation to a contract if it is strictly respected, but if the provider is by fact selling goods

or services to someone from outside the defined group, he accept this enlargement of the recipient group.

In relation to commercial information only (i.e. no access to buy via the Internet), it will be significant whether the product is available in the state, it is not within reason that an American company promoting a product only available in the United States, shall observe e.g. Danish marketing regulation.

The choice of language

This factor can seem very relevant, since the choice of language in many situations will narrow down the group of recipients, like e.g. the use of the Danish language will most likely lead to the recipients being Danish. Even though the language might give some guidelines for the recipient group, other factors can lead to that the group of receivers is everyone that speaks Danish all over the world. Since English is the common language of the Internet the choice of using the English language on a homepage will not necessarily give any significant relationship to a certain state.

The choice of TLD

The choice of TLD might as well give a supposition that the homepage is at least directed towards the TLD state, but again; choosing the .DK TLD gives a stronger presumption for the Danish market than the .COM gives for the American market.

Conclusion

The choice of law is by many regarded as one of the toughest disciplines in the field of law, and for good reasons. The Danish caselaw seems pretty scarce, so that most authors are taking principles from the courts throughout most of Europe in order to establish some general principles. It seems unreasonable to try to establish what could be considered Danish private international law, it will due to the scarcity of judgements be a very ill-founded result, so the approach of finding a common European core seems way more reasonable, but the result will still be no more that general principles of which a lot of modifications might apply, due to exceptional conditions and the discretion of the judges.

It seems like the main rule in private international law is the closest connection approach, whatever it is relied on as a single or multi factor test. But still a rule of reason seems to apply as well, that is if the closest connection approach by any reason does not give the most reasonable

result, then it seems like the closest connection result is altered. This gives in fact that the choice of law is simply a matter of by the judges discretion to find the law that will give the most reasonable result, probably with prejudice to what the parties could reasonably expect.

Although the existence of statutory choice of law provides some guidelines for the judges to follow, the Conventions are all equipped with safety valves in case the guidelines might give an unwanted (unreasonable) result.

The main rule (only a presumption rule) on choice of law in contract is the place of the provider of goods or services, but if the contract is concluded with a consumer, on the basis of either a special invitation or an advertisement in the consumer state then the consumer state' s law is to apply.
The main rule tort is the law of the place where the harmful event occurred, if the harmful event is committed in another state then it seems like the aggrieved party can choose between those two states.

When determining where the harmful event has occurred on the Internet and where a provider in relation to a consumer can be said to advertise (in order to establish the consumer state' s law to apply) we have to rely on some objective factors; these objective factors shall be used to establish the recipient group on the basis of the content of the homepage.

The party autonomy is widely accepted and it plays a significant role in relation to contracts and will probably be important as well for the provider of goods or services on the Internet. The provider will usually have his/her law to apply under the Rome Convention, but in relation to consumers is the main rule that the consumer' s state' s law shall apply. It is important to bear in mind that in relation to consumer contracts, mandatory rules can not be derogated, so even if the provider has a choice of law clause on his/her homepage, and it is expressed or demonstrated with reasonable certainty, it will not deprive the consumer for rights given in the consumer state in mandatory rules. It is important to notice that the burden to prove that it is not a consumer that a provider has dealt with, lies on the provider.

Dispute and enforcement

Purpose of this chapter

The purpose of this chapter is to establish where a company or person should be sued, when we have found that a claim can be established under some state' s law, and also how the claim can be enforced. Finally I will use some space on describing how to issue an injunction, since it might in many cases be the first thing one want to do.

Dispute

The first question that a court of law must ask itself, whenever a case is brought before it, is the question of jurisdiction, - does the court have jurisdiction over the case? When it comes to persons and property within the courts territory, it is widely accepted among nations, that the court will have jurisdiction.[109] When it comes to person or property outside the courts territory - the extraterritorial jurisdiction - the jurisdiction will most often be based on a statute. The scope of the extraterritorial jurisdiction is only limited by national law, and to some extend public international law, which I will not elaborate more on. Another limitation lies in the international conventions that the country might have adopted, - thus this is still within national law. In Denmark we have three sets of rules that deals with jurisdiction for the Danish courts, viz. The Danish Administration of Justice Act, The EC Judgements Convention (The Brussels Convention) and the Lugano Convention.[110]

The Danish Administration of Justice Act (DAJA)

The question of jurisdiction under Danish national law is regulated in chapter 22 of the DAJA, and the Act applies to all cases where Denmark have not any convention obligations modifying national law.[111] The main rule is stated in section 235, giving that a defendant is to be sued in the court of law of the defendants domicile, unless otherwise is provided by law. Companies or other legal persons is to be sued in the court of law where the headquater is located.[112] To this main rule of domicile based jurisdiction is some exception in the form of exceptional jurisdiction, some of them will be subject to further examination below.

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109 Lookofsky, p 11.

110 There is more specific regulation of jurisdiction in some acts.

111 See section 247

112 Section 238, The headquater of a company can be established from the articles of association.

Of interest in relation to this thesis is how the DAJA applies to foreign persons, companies or other legal persons, that is dealt with in section 246. Section 246 is concerning jurisdiction over persons, companies and other legal persons not having a homecourt in Denmark, i.e. they are not domiciled in Denmark. Section 246 refers to some of the sections containing the bases for the exceptional jurisdiction, below is examined those of importance in relation to this thesis:

Business forum

Section 237 and 238 (2), provide that the homecourt of the place where a person, company or other legal person is carrying on a business, will have jurisdiction over a case, as long as the legal proceedings is regarding the business.

Performance forum

Section 242, states that the party to a contract can be sued in the court of law of the place where the obligation in dispute is to be performed, as long as it is not an money-obligation.[113]

Tort forum

Section 243, states that the place where an infringement has occurred can be base for jurisdiction

Jurisdiction by agreement

Section 245 gives that the litigants can choose a forum by agreement, but the agreement is notably not binding to a consumer, i.e. a person that does not act in his/her course of business in relation to a person who does.

Section 246 gives furthermore in subsection 2 and 3, two exceptional jurisdictions that only applies to foreigners, viz. the stay forum and the property forum, i.e. the place where the defendant stays when the writ is served and the place where the defendant has property. These two exceptional forums can not be used against defendants domiciled in the EU.[114] These two bases of jurisdiction is not accepted in relation to enforcement under the Nordic Judgement Convention, see below.

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113 In Danish law a money-obligation is to be performed at the creditor, so if this exception was not made, a creditor would always be able to bring proceedings before his/hers homecourt.

114 Article 3 of the Brussels Convention, see below for a definition of domicile under the Brussels Convention.

Most of the exceptional jurisdiction resembles somewhat the exceptional jurisdiction under the Brussels Convention, I will refer to that section for a more thorough examination of the different types of exceptional jurisdictions.

The Brussels Convention[115]

The Brussels Convention is adopted in most of the EU-states, and is made under the title of article 220 of the European Treaty. The ECJ have been empowered to govern this Convention, which means that the ECJ will have the last word in interpreting and shaping the Convention. Most of the situations where there has been a discrepancy between the Member States definition of a matter in the Convention, the ECJ have ruled that the matter shall be interpreted as an independent definition - see below for examples.

The scope of the Convention is defined in title I, article 1,

> *This Convention shall apply in civil and commercial matters whatever the nature of the court tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*
> *This Convention shall not apply to:*
> *1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;*
> *2) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;*
> *3) social security;*
> *4) arbitration*

It is given from the provision that the Convention only includes international disputes, and further more is the Convention to be used ex officio (article 19 and 20). The scope of application for the Convention is civil and commercial cases, whatever the nature of the court tribunal.[116] The provision gives some exceptions from the general scope of application, e.g. the status or legal capacity of natural persons. These exception is to be understood as it changes the general principle only if the main substance of the dispute is included in the exceptions,[117] it is the main substance of the dispute that is important when determining whether it is included in the Convention or not. It is important to notice in relation to this thesis, that this Convention only

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115 Adopted in Denmark by Act 1986-06-04-325

116 This provision expresses that it is the substance of the dispute that is important, not whether it is a special; civil, commercial or administrative court

117 Jenard, p.10

applies to civil cases, i.e. not public cases or criminal cases (except for liability that derives from the criminal cases).
The Convention is exclusive, in the way that only the rules in this Convention may be used when establishing a forum for a case against a defendant domiciled in another contracting states (article. 3).

The main rule of jurisdiction in the Convention is giving in article 2,

> *Subject to the provisions of this Convention, persons domiciled in a Contracting State, shall, whatever their nationality, be sued in the courts of that State.*
> *Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of the State.*

This provision establishes that the main principle is jurisdiction based on domicile, the nationality of the defendant is of no significance. It turns out that the Convention due to a conscious choice, made by the draftsmen of the Convention,[118] omits a definition of domicile . Article 52 defines how to find out where the defendant is domiciled, it deals with three steps. First the court of law has to use its own substantive law to establish whether a party is domiciled in the country where proceedings have been instituted.[119] If the court comes to the conclusion that the party is not domiciled in the country of the court, the court has to find out whether the defendant is domiciled in another Contracting State, by using that state' s law.[120] If the party' s domicile under the law of his/hers nationality is depending on another persons domicile, then that country' s law should be used when establishing the domicile.[121] If the party is not domiciled in a Contracting State under any of the three above mentioned steps then the Convention does not apply.[122]

When it comes to define the domicile of a company or another legal person, article 53 gives that the domicile is to be determined by the private international law of the court (lex fori). In

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118 Jenard, p.15f

119 If the state have a special procedural definition of domicile, like Denmark have in section 235 (2) of the DAJA, then it have to be used, see above

120 This gives a defendant the possibility to invoke domicile in a Contracting State when sued under the DAJA.

121 e.g. a minor.

122 With some exceptions, see article 16 about exclusive jurisdiction, this article will not be subject to further examination under this thesis, except for article 16 (5) about enforcement, see below

Denmark we rely, as most of the EU Member States, on the headquater of the company or legal person when determining the domicile for use in procedural law.[123]

In sections 2 to 4 are listed some exceptions from the main rule of domicile based jurisdiction, viz. the special jurisdiction, jurisdiction in matters relating to insurance and jurisdiction over consumer contracts. These examples of specific jurisdiction are distinctive by being based upon the substance of the legal action. The specific jurisdictions listed in section 2 (especially article 5) are optional, i.e. the plaintiff can choose between either the domicile of the defendant or any of the specific jurisdictions, as long as the specific jurisdiction applies to the matter in dispute. The specific jurisdiction under section 3 and 4 must be used in regard to cases of respectively insurance or consumer contracts. In relation to this thesis four of the specific jurisdiction is relevant, viz. contract forum, tort forum, branch forum and consumer forum:

> *Article 5 (outtakes)*
>
> *A person domiciled in a Contracting State may, in another Contracting State, be sued:*
> *1) in matters relating to a contract, in the courts for the place of performance of the obligation in question...*
> *...*
> *3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;*
> *...*
> *5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;*
> *...*

Performance forum[124]

In contrast to the performance forum under the DAJA this performance forum also includes pure money-claims. The ECJ has stated that the word; "contract" is to be interpreted as an independent concept, e.g. it is also including the relation between an association and its members.[125] It is the obligation in dispute that matters, when determining the performance forum.[126] This give the situation that the performance forum can be different depending on who of the contracting parties that is entering legal proceedings, i.e. whether it is the provider suing the buyer for not paying for the goods or it is the buyer suing the provider for delivering defective goods.

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123 Andersen p.138f
124 Jenard p.22ff
125 Peters
126 The principle is made clear in the De bloos (case 14/76).

It was established in the Tessili case[127] that the court of law should use its own private international law in order to establish where the obligation in dispute is to be performed, and by that means where the forum is, e.g. if a Danish provider want to sue a foreign company for not paying for delivered good, the Danish court of law should first determine which state' s law applies to the contract (and that is Danish law - see the chapter on private international law), and under Danish law a money-obligation is to be performed at the creditors domicile, that gives that the Danish court of law can hear the case.[128]

Tort forum[129]

This forum is extremely relevant in relation to the Internet, since most of the civil cases deriving from infringements on the Internet probably will turn out to be a tort claim. The first question that arise in relation to the tort forum is how the place where the harmful event occurred is to be defined. It has in earlier cases been determined that the tort forum applies both to the place of where the harmful event was committed and where it took effect,[130] this main rule is somewhat modified by the cases mentioned below.

Another question that arise is, where does the harmful event occur on the Internet, the Shevill case can give a answer to that.

> *Shevill (C-68/93)*
> *Fiona Shevill lived in Great Britain, and owned three companies all placed in contracting states. In the French based newspaper "France Soir", a defamation was published accusing Shevill's companies for being involved in whitewashing of drug money, - a statement that was withdrawn in the next paper. The issue of France Soir was published in 252 500 copies in Europe, of which about 230 copies was sold in Great Britain.*
> *Shevill sued the French paper in Great Britain for the defamation, and that gave rise to a dispute before the ECJ. The ECJ came to the conclusion that France Soir could only be sued in Great Britain under the tort forum for the loss occurred in Great Britain, but for the entire loss by suing in France.*

> *Marinari (C-364/93)*
> *Marinari who lived in Italy was depositing some promissory notes worth 752 500 000 USD in a branch of the Bank of London in Manchester. The clerks at the bank saw the content of the packages and refused to give the notes back to Marinari and notified the police which resulted in Marinari got arrested. All charges against Marinari was dismissed later on, and Marinari sued the bank for his loss, in an Italian court of law.*

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127 Case 12/76

128 The Danish High court came to another result in UfR1993.802Ø but it is obviously a wrong judgement, see UfR1994.287B.

129 Jenard p.25f

130 e.g. case 21/76 of 20.11.76, Mines de potass d' Alsace

Marinari claimed that he could sue the English Bank in Italy under the tort forum since the loss had taken effect in Italy, but the ECJ came to another conclusion, i.e. the forum did not have a close enough connection to the harmful event.

The Shevill case is interesting in relation to defamation, and probably other infringement given rise to a tort claims, on the Internet, since the way the Internet works in many way resembles how subscription to papers or magazines works. In the Shevill case the France Soir was published in France, but was available to virtually everyone who might want to read it, either by buying a copy or receiving it on the basis of subscription, even though the paper is mainly written for the French audience. This would not be much different from a Danish publisher publishing a cyberzine in Danish, this magazine would be mainly published for a Danish residing audience, because of the choice of language, but as the France Soir virtually everyone (world-wide) would have access to the magazine. The only difference between the two situations is that it is way easier to subscribe and get a magazine via the Internet than by ordinary mail.

These judgements from the ECJ gives us the pattern, that the main rule is that the aggrieved party can choose either to sue in the state where the harmful event took effect or where the harmful event was based. A modification to that rule came by the Shevill case, stating that when using the tort forum under a defamation claim (and probably other tort claims) the plaintiff could only sue for the damage in that state. Furthermore was it established under the Marinari case that the place where the loss take effect can not be used as a tort forum if the place does not have any relation to the harmful event, since it would ruin the purpose of the provision, i.e. the aggrieved party would virtually always be able to commence proceedings before its homecourt, claiming that the damage took effect in his fortune or reputation where he/she lives.

In relation to determine where the harmful event took effect on the Internet, we have to use the objective factors described in the past chapter, in order to define the group of recipients.

Branch forum[131]

The idea of this provision is that a company can be sued where it has a branch, or more precisely where it has a center of business.[132] This forum does only apply to companies having its main business in a Contracting State,[133] otherwise national law is to be used. It is furthermore a

131 Jenard p.26

132 Schmidt p.70

133 Whether the main company is domiciled in a Contracting State should be established by the pattern described in article 53 (see above).

requirement, that the matter in dispute is deriving from some kind of contact to the branch. The definition of a branch is determined by the ECJ to be an independent concept, also including a subsidiary company, i.e. the parent company can be sued in the state where its subsidiary companies is domiciled, the parent company can be said to carry on business through its subsidiary.[134] A lawyers occasionally used office in Copenhagen, with no employers was not considered a branch by the Danish high court.[135] A homepage in a state will not be enough to establish branch forum there.

Consumer forum[136]

The Brussels Convention contains a special regulation for jurisdiction in matters relating to insurance (section 3) and Consumer contracts (section 4), the section of insurance will be omitted for further examination in this thesis. The consumer forum shall be determined by section 4, as well as the insurance forum shall be determined by section 3.

A consumer contract is, in relation to the consumer forum, a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession (consumer).[137]

The forum is concerning proceedings in relation to consumer contracts, regarding the providing of goods or services whether it is sold cash or credit (whatever the nature of the credit). It is a requirement that the contract is entered on the basis of a special invitation to the consumer or an advertisement made in the consumers state, and that the steps necessary for concluding the contract was made in the consumers state.[138]

When a consumer contract is entered with a company not based in a Contracting State, but via a branch, agency or other establishment in a Contracting State, that state shall be considered the domicile of the company.[139] Finally contracts of transport is excluded from the scope of this section.

The consequences of the consumer forum is, that the consumer can sue in either the state where the contracting party is domiciled or in its own state. And the contracting party is limited to only suing the consumer in its state (the consumers state).[140]

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134 Schotte GmbH

135 U 1991.52Ø see Andersen p.141

136 This section was originally only containing regulation for financing of sales to consumers, but is later amended to regulate consumer contracts in general, see Schmidt p.79

137 Article 13

138 Article 13

139 This is a modification to the branch forum, mentioned above, but notably only regarding consumer contracts.

140 Article 14

The requirements for establishing consumer forum are the same as for establishing that the consumer state' s law applies under the Rome Convention, why I will refer to the discussion above in the chapter of private international law on this subject

Jurisdiction by agreement

Article 17 applies to forum agreements where at least one of the parties has its domicile in a Contracting State, and the substance of the agreement gives the court in a Contracting State jurisdiction over disputes that may arise between the parties in a particular relationship. Such an agreement conferring jurisdiction shall be either in writing or confirmed in writing, or in a form which accords with practises in trade or commerce, that the parties should be aware of, no further formal requirements can be set up by a Contracting State.[141] If an agreement of derogation is concluded, the court of law chosen has exclusive power of the disputes, i.e. all other courts in the contracting states shall dismiss the case.

Article 17 (4) gives further more, that if the agreement was concluded only for the benefit of one of the parties, the party who does not benefit from the agreement will retain all the rights to bring proceedings after the Convention.

The Freedom of derogation of jurisdiction is limited by the provisions in section 3 to 5, about insurance cases, consumer contracts and exclusive jurisdiction.[142] Regarding consumer contracts, the departing of the rules of section 3 can only be done after a dispute arise or when the consumer gets more opportunities of forum or finally if the consumer and the contracting party is domiciled in the same state at the time of conclusion, that states forum can be given exclusive power over any dispute arising from the contract.

In relation to the Internet the question of whether the jurisdiction have been derogated by consent can be relevant when a publisher of a homepage writes something like: "all agreements concluded from this homepage will be governed only by X-court". Since consumer contracts is not subject to derogation of jurisdiction, the question is only whether a clause like the above, will take effect against a professional, concluding a contract on the basis of a homepage like the above.

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141 See case 150/80, Elefanten Schuh, in this case a lingual requirement was overruled by the ECJ.

142 Jenard p. 38

The question can be boiled down to whether a clause on a homepage will satisfy the requirement for a clause in writing; the requirement is satisfied if the jurisdiction clause is clearly presented in the exchange of documents, either in writing or by telex.[143] The fact that also telex is accepted indicates, that the provision does not give a formal requirement, which gives that any other electronically media will satisfy the requirement as long as the clause is clearly presented or if it is made clear from trade practises, either in general or between the parties.

I will like in the section of choice of law clauses, not to go into a more thorough examination of what it takes to establish that a clause on a homepage is clearly presented, the answer will usually result from the circumstances.

Silent acceptance of jurisdiction.

If proceedings is brought before a court of law, which have not jurisdiction over the case, it shall have jurisdiction if the defendant appears in court, as long as the appearance is not just to contest the jurisdiction, or the case is included in some of the exclusive jurisdictions under section 3 to 5. Even an agreement of derogation of jurisdiction yields for the silence acceptance of jurisdiction under article 18.[144] The contest of the jurisdiction shall be presented for the court no later than in what is by national procedural law regarded as the first legal proceeding.[145]

Examination of jurisdiction

Section 7 of the Convention is dealing with the question of who is to decide whether the jurisdiction is valid. Article 19 deals with the exclusive jurisdiction comprised in article 16, by this provision the court of law is by own motion to dismiss a case of which it has no jurisdiction over, due to a exclusive jurisdiction. Article 19 deals with situation where the defendant defaults, by setting up two requirements to the court, viz. first by own motion to examine its own jurisdiction and secondly by staying procedures until the defendant has been able to receive documents instituting the proceedings, in sufficient time to enable his/hers defence.

It is a requirement that the documents mentioned above is delivered at the defendants domicile, but it is not a requirement that the content is brought to the defendants knowledge. Whether the

143 Schmidt p.91, Phillip p.80

144 Elefanten Schuh

145 Elefanten Schuh

documents have been received in sufficient time to enable the defendant to prepare his defence, is up to the court to decide.[146]

The Lugano Convention

The Lugano Convention is a parallel-convention to the Brussels Convention, adopted by the EEC states. The Lugano Convention does like the Brussels Convention, only apply between states that have adopted the Convention. The Lugano Convention is a modified version of the Brussels Convention. The most important difference is the interpretative authority of the ECJ given under the Brussels Convention does not apply to the Lugano Convention. In relation to states that have adopted both Conventions, they will still have the caselaw of the ECJ to rely on, since the Brussels Convention is to be used without prejudice to the Lugano Convention when the defendant is domiciled in the EU.[147]

Since this difference is the only one of interest regarding this thesis, a further examination of the Convention will be omitted.

Recognition and enforcement of foreign judgements

In general

When a judgement is considered final and conclusive,[148] it prevent the litigants from any kind of re-litigation within the state, where the judgement is rendered. In relation to a judgement that is meant to be enforced (both in and outside the forum state), is it more important to establish whether the judgement is applying to the principle of res judicata,[149] i.e. the judgement is recognised by the state, either by putting up some limitations to the possibility of re-litigation[150] in the state or by accepting the judgement as enforceable in the state. The principle is recognised (in one form or another) in all legal systems, at least as regards the effects of judgements rendered within the recognising state.[151] Conventions respectively constitution-provision are adopted both in Europe and the United States, respectively, in order to create regions in which judgements rendered within the region can be recognised and enforced in another state within the region. These obligations to recognise and enforce judgements within the regions does only apply to

146 Jenard p.40
147 Lookofsky p. 137
148 In Danish: "Formel retskraft"
149 In Danish: "Materiel retskraft"
150 Cause of action estoppel (In Danish: negativ retskraft)
151 Lookofsky p.491

these regions, i.e. the individual states retain its sovereignty in relation to decide to which extend, the state will accept judgements from states outside the region.

I have chosen only to focus on the situations where the forum state is different from the state in which a judgement is to be recognised or enforced, since it is not within the scope of this thesis to discuss how national judgements are enforced in the forum state.

Recognition and enforcement under Danish law

In Danish law recognition and enforcement is dealt with in the third book of the DAJA, section 3; only the question of the basis for enforcement (chapter 45 of the DAJA) is subject to examination in this thesis. Denmark, and of course among other states, has adopted certain conventions on the subject of enforcement and recognition of judgements. These Conventions regulates the basis of enforcement, by modifying the principle of res judicata in national law, it can also be decided as the Convention is setting up limitations to the range of objections available to bring forward, against a judgement from another Convention State.

The Danish Administration of Justice Act

The Danish Minister of Justice is by section 479 of the DAJA empowered to set up regulations for enforcement of foreign judgements, a power that have not yet been used.[152] This fact gives the rule, that no foreign judgement can be enforced under the DAJA, in absence of a treaty obligation to do so, or a royal decree.[153] Denmark has adopted the Brussels Convention, The Lugano Convention and the Nordic Judgement Convention on this matter,[154] and furthermore is a few special conventions omitted in this thesis.[155] This gives that, litigants that can not get their judgements enforced, through any of the three conventions, is obliged to commence new proceedings before a Danish court of law.

Under Danish law, foreign judgement is somewhat relied on when hearing the new case, but since the DAJA does not prevent the litigant from receiving a full hearing of the case, this statement does not seem to be of an significant value.[156] An exception to this rule was made by the Danish Maritime and Commercial Court, in a case where the obtaining of a survey report was

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152 Eyben (1991) p.36

153 Lookofsky p.495

154 These Conventions are examined in the section of foreign recognition of Danish judgements, since it is the same rules applying to all contracting states.

155 See Schmidt p.122

156 Hvidberg in J1970.397ff.

denied, since the request should have been brought before the court of law in Switzerland, where the case was first heard.[157]

Convention obligations

About the Brussels Convention, the Lugano Convention and the Nordic Judgement Convention see immediately below under Foreign recognition of Danish judgements.

Foreign recognition and enforcement of Danish judgements

The Brussels Convention

Article 25 is giving a definition of the idea of judgements, it provides that a judgement in this Convention is a judgement delivered by a court or tribunal of a Contracting State, whatever the judgement may be called. In regards to recognition, article 26 gives that a judgement entered in a Contracting State shall be recognised in the another Contracting State without any special procedure being required. By recognition is meant, that the judgement will have the same power as it had in the rendering state.[158] This main principle is modified by article 27, setting up some criteria for not recognising foreign judgements, that is among others if the recognition is contrary to the public policy in the recognising state, or if the defendant was not duly served in order to prepare his defence, or if the judgement is irreconcilable with a prior judgement given in a dispute between the same parties of which is sought recognition.[159] Furthermore gives article 28 that judgements conflicting with section 3 to 5 (insurance, consumer and exclusive jurisdiction - see above) of the Convention. Finally article 29 gives that the substance of a foreign judgement, rendered in a Contracting State, can under no circumstances be reviewed. Furthermore about recognition, the regulation of lis pendens,[160] dealt with in section 8, can be regarded as a kind of recognition, not of the judgements but of the courts of the other Contracting States.

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157 UfR1955.407SHK, See Schmidt p.122

158 Jenard p.43, see Schmidt p.124; stating that this provision is to be finally construed by the ECJ. Lookofsky p.514, states that providing a judgement with the same res judicata effect as a similar judgement in the enforcement state would be more within the concept of full recognition.

159 This could also be from a judgement rendered in a non-Contracting State, see article 27 (5).

160 The lis pendes regulation, gives that a new case of the same matter with the same litigants, as pending before another Contracting State' s court of law, is to be either dismissed or stayed. This question will not be subject to further examination under this thesis.

Article 16 (5) gives that in relation to proceedings concerning enforcement of judgements, the enforcing state is given exclusive power, i.e. extraterritorial proceedings concerning enforcement in another Contracting State, is to be dismissed by the motion of the court, see above under examination of jurisdiction.
Article 31 gives that a judgement entered in a Contracting State and being enforceable there, shall be enforced in another Contracting State, on the application of any interested party. In relation to enforcement the same exhaustive list of criteria as for recognition, applies, i.e. that the substance can not be questioned[161] and only the criteria listed in article 27 and 28 applies regarding refusing the enforcement (recognition).

To sum up the most important regulation regarding recognition and enforcement, first the judgement has to be recognised without questioning the substance, and only the criteria listed in articles 27 and 28 can be used to refuse recognition. A consequence of recognition is that the judgement is to keep the ability to enforcement, as it had in the rendering state, i.e. it can be enforced in the enforcement state to the same extend as it can in the rendering state.
Section 2 of title III in the Convention deals with the procedure of enforcement, an examination of this subject is omitted in this thesis.

The Lugano Convention
See the Brussels Convention

The Nordic Judgement Convention[162]
The scope of application of the Nordic Judgements Convention is all civil judgements, entered in the Nordic Countries.[163] Some limitations are listed in the Convention, but an examination is omitted because to it does not regard any of the judgement relevant in this thesis.
Under this Convention is a judgement rendered in another Contracting State enforceable in any other Contracting State, as long as it is enforceable in the rendering state, and as long as it does not contravene with the public order of the enforcing state.

This Convention is of limited interest, since the geographical scope of application is somewhat limited and also because, the future legislation must lie within the European Union - why I will not elaborate more on this subject.

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161 Article 34 (2)
162 Adopted in Denmark by consolidation Act no. 635 of 15.9.86
163 Finland, Norway, Sweden and Denmark

Recognition and enforcement of arbitration awards

Arbitration can be chosen both before and after a dispute arise, and by doing that some benefits regarding enforcement can be obtained. Especially the New York Convention, examined below, is adopted by a lot of states, among others the United States of America. This makes arbitration a significant and practical alternative to the ordinary dispute resolutions. Choosing arbitration delimits somewhat the legal remedies available, since the judgement is final and conclusive. Furthermore does an agreement of jurisdiction, most often take away the jurisdiction from all ordinary courts.[164] The New York Convention can as the other judgement convention be regarded as a limitation of arguments for not recognising and enforcing the award.

The New York Convention

The Convention applies to all international[165] arbitration award, whether it is rendered by a permanent or temporary body,[166] as long as the matter in dispute can be subject to arbitration. The main rule of recognition is set up in article 3, pursuant to which each Contracting State shall recognise arbitration awards as binding, and enforce them in accordance with the rules of procedures of the territory where the award is relied upon (being enforced). Article 5 gives an exhaustive list of arguments that the defendant can prove[167] in order to resist enforcement; i.e.:[168]

1) a party's incapacity or the agreement's invalidity; or
2) insufficient notice of the arbitration proceedings; or
3) an award beyond the agreement's scope; or
4) unauthorised or illegal arbitration procedures; or
5) a non-binding award.

Furthermore article 5 (2) gives two ex-officio defences (i.e. These defences is to be plead by the recognising/enforcing court of law); these are if the award is contrary to the public policy or the matter is not subject to arbitration in the recognising/enforcing state.[169] The Convention does not give the defendant any power to question the substance of the award.

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164 By the means, that a case can be dismissed upon an objection from either of the parties. But for example the silent acceptance of jurisdiction under article 18 of the Brussels Convention still applies, even though a agreement on jurisdiction is entered.

165 Any award not being considered domestic in the recognising/enforcing state.

166 Article 1 (2)

167 The burden of proof lies on the defendant, Lookofsky p.640

168 As described in Lookofsky p.640

169 In fact just a more specific public policy clause.

Injunction

Like enforcement, an injunction is to be issued by the homecourt of the defendant, it lies within the sovereignty of the states.

Danish law[170]

Injunction is dealt with in chapter 57 of the DAJA. An injunction is a interlocutory remedy, i.e. the court of law can on short notice and pretty quickly issue an injunction, but it has to be followed up by a confirmatory action. In order to get these injunctions issued, some requirements have to be satisfied, mainly is it necessary that the claim can not be carried properly out through ordinary justice, and the applicant has to prove or make probable that the action conflicts with the applicant's rights.[171] The provision gives furthermore that the applicant shall prove or make probable that the defendant intent to infringe that right, which is of course no problem when the infringement lies in the content of an already published homepage.

Section 643 of the DAJA provide that an injunction can only be issued when the regulation of punishment and tort does not provide sufficient protection, and the injunction is not out of proportions.

The injunction can also be refused if the defendant provides sufficient security,[172] just as the injunction can be depending on a security provided by the applicant, to protect the defendant from sustain losses from the injunction.

Conclusion

The choice of forum seems to be way more well regulated than the choice of law, it is important to notice that whereas the choice of law is connected to the matter in dispute, the choice of forum is connected to the defendant or the plaintiff, i.e. connected to the litigants (persons, either real or legal). Choice of forum is connected to choice of law, in the way that it is lex fori's law that applies to the question on choice of law, this gives that the choice of law can give a different result depending on where the judgement is entered.[173]

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170 See in general Andersen p. 283ff.

171 Section 642 of the DAJA

172 Section 642 (1)

173 If the choice of law regulations in the states are unlike.

The choice of forum is strongly connected to the question on recognition and enforcement, i.e. it does not give much sense to achieve a judgement over a person without being able to enforce it. For this reason is it natural to divide the world (as it is seen from Denmark or other EU/EEC-Member States) into two groups of states, viz. the Brussels/Lugano "Union" (EU and EEC states) and all other states.[174] Within the Brussels/Lugano Union, judgements from other Member States are relied on, in such a way that the examination that can be brought forward to prevent enforcement is limited, and can notably not regard the substance. This gives that a defendant sued in a court of law within the Brussels/Lugano Union is ought to be very attentive, in order to watch his/hers interests.

In the group of other states recognition and enforcement is a matter of which judgements each state chose to rely on, i.e. no conventions are entered with Denmark, giving that despite the existence of a judgement entered in a foreign state, it can not prevent the defendant (or the plaintiff) from a full hearing of the case before a Danish court of law.

As an alternative to "normal" litigation is the possibility to agree on arbitration, which can also be done after the dispute arise, the main benefit is in relation to enforcement, the wide access to get an arbitration award enforced through the widely adopted New York Convention. The Idea of the New York Convention is like the Brussels and the Lugano Convention to limit the objections available in relation to enforcement.

The most important forum rules in relation to this thesis are the performance forum, the tort forum and the consumer forum. These forums are alternatives to the main rule of the defendant to be sued in his/her homecourt, - or in other words; the plaintiff has to bear the inconvenience of commencing proceedings.

I have established that a jurisdiction clauses on a homepage, if it is clearly presented, will have effect under the Brussels and Lugano Conventions, this gives that a court of law in the Brussels/Lugano Union is to refuse a hearing of the case, if necessary on request. If the jurisdiction of a court is not contested the court can achieve power to hear the case, on the basis

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174 I have chosen to ignore the Nordic Judgement Convention, since its geographical scope is very limited and it does not seem to gain significant value in the future.

of silent consent. In relation to jurisdiction clauses is important to notice that such a clause can not delimit a consumer' s rights to bring proceedings under the Conventions.

The freedom to provide services

Purpose of this chapter

When it comes to regulation the main rule is that each state has sovereign powers to provide legislation within the state, though this power can be limited by international Convention obligation. I have chosen to focus on the limitations that lies within the European Union, since these are the most restrictive. It follows from that choice, that the examination in this chapter only applies to actions taken against other businesses in other Member States. Because of the fact that homepages are not naturally bound to one specific state, and therefore invites publishers to set up the homepage in the state with the least restrictive regulation, I have chosen to examine the doctrine of circumvention as well.

This chapter will mainly be based on two communications from the Commission, viz. the free exchange of services Communication (COM1)[175] and the draft of a Communication on public considerations in relation to the 2nd Bank Directive (COM2).[176]

Freedom to provide services[177]

Scope of application

Contrary to the freedom of establishment, the freedom to provide services does only apply to services provided on the basis of a temporary establishment, or a non-establishment, i.e. it is not necessary to reside, even temporarily, in the State in which the service is provided.[178] Furthermore, the service provided has to be of a transnational nature.[179]

Services are defined as those normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and person.[180] Broadcasting is under normal circumstances considered a service within the Treaty,[181] even though it does not necessarily receive remuneration from the viewers (but from sponsors instead). It seems like the rule is that commercial services are comprised, and the remuneration can only be

175 93/C 334/03
176 95/C 291/6
177 The EU Treaty articles 59 to 66
178 Steiner p. 232f.
179 Article 59
180 Article 60
181 Collet p. 25, See furthermore the Broadcasting Directive p. 1

regarded as a presumption rule. This gives that commercial services on the Internet are comprised as well, any other result would be peculiar. This opinion is also supported by the Commission,[182] giving that an electronically installations under normal circumstances[183] will be regarded as a service, since the electronically installation itself will not be sufficient to establish an establishment.[184]

The question of what is considered commercial arose in case C-159/90:[185]

> *The plaintiff society had obtained an injunction from the Irish High Court to prevent the distribution in Ireland by student bodies of information concerning clinics in other Member States, where abortion services were available. The provisions of such information was found contrary to a provision in the Irish Constitution. The ECJ agreed that the provision of abortion services for remuneration was a service within article 60. But since there were no (commercial) connection between the information and the clinics, the information was not considered within article 60.*[186]

This gives that information in general does not fall within the freedom to provide services, as long as it is not of a commercial nature. Information not comprised can only rely on the freedom of speech, as examined earlier in this thesis.

The content of the freedom to provide services

It has in the caselaw of the ECJ been established that article 59 is prohibiting all restrictions that can hinder the free exchange of services between Member States,[187] whatever the Member State is hindering foreign serviceproviders to provide services within the Member State or a Member State is hindering serviceproviders within the state to provide services to other Member States.[188]

COM1 provides a list of arrangement that can constitute hinder of the free exchange of services; of interest for this thesis is actions that can prevent potential customers from choosing the service they want considered a hindering arrangement. That gives that also advertisement for the service

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182 The communication on the 2nd. Bank Directive

183 The installation does not have a management and is not able to negotiate with a third party.

184 (The subject in this argument was a bank, whether the placing of an electronically installation would)

185 The Society for the Protection of Unborn Children Ltd vs. Grogan, see Steiner p. 243f.

186 The result would have been different if the information was provided by the clinics themselves.

187 COM1 p. 2

188 Case 384/93 (Alpine Investment) paragraph 39

is comprised in this freedom, why a limitation of the access to market or receive information via the Internet must be considered hindering arrangement if it does not fall within the limitation examined below.[189]

Access to limit the freedom to provide services

Regulation on the basis of nationality

Article 66 is referring to articles 55 to 58, dealing with limitations to the freedom of establishment, as to give limitation to the freedom to provide services as well. Of special interest is article 56 providing that special regulation of foreign citizens is not prohibited by this chapter, as long as the regulation is given to secure the public policy, the public security or the public health.

Regulation that applies without prejudice to the nationality

Whereas article 56 sets up an exhaustive list of public consideration, that can legitimate discrimination based on nationality, the Commission has in COM1 examined, based on rulings from the ECJ, what regulation can be legitimised when it does not discriminate on the basis of nationality.[190] The ECJ has established that the national legislation may not demand that all requirements for establishment shall be satisfied for the cause of providing services, i.e. it shall be easier to provide services than to set up a business in a Member State.[191]

Cogent public considerations.

Restrictions are only consistent with article 59 to the extent that it is proved that it is based on public considerations. These considerations can be them listed in article 56, but also other protection worthy considerations can apply, e.g. protection of intellectual property, protection of consumers etc.[192]

Another requirement is that the regulation shall be "objectively necessarily", giving that the public considerations shall be regarded as cogent public considerations.

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189 COM1 p. 2, provide that also the right to receive services is protected by article 59.

190 P. 2f.

191 Case C-76/90 (Säger), see COM2 p. 12, 2nd column

192 See COM1 p. 3, 1st column and COM2 p.11, 2nd. column f. for a non exhaustive list

Protected in the service provider' s state

If these cogent public considerations are protected in the state where the service provider is established, then the restrictions can not be introduced. If harmonisation by the EU has taken effect on the matter, this harmonisation will as a rule of thumb be considered a sufficient level of protection.[193] The idea is that any service provider shall be spared for double control, i.e. it shall be the main rule that a service that complies with the regulation of one Member State shall not be met with new requirements when offering the service to people in other Member States.[194] This can be considered the concept of free movement of services, based on a mutual recognition of the legal regulation of the Member States.

Proportionality

This criterion is defined in COM1 as the same result could not be reached by less radical regulation, i.e. the restriction shall be indispensable, objective necessary and suitable for reaching the objectives. A restriction is especially disproportionate when the same objectives could be reached by a regulation causing less restriction to the exchange of services.[195]

The doctrine of circumvention

The doctrine of circumvention is dealing with the access to regulate situations where a company by establishing a business in another Member State intents to circumvent domestic regulation. One could argue that the circumvention situation, when the only connection to another Member State was the establishment, would fall outside the scope of article 59,[196] but this idea is turned down by the ECJ.[197] The question of the access to regulate against circumvention, can be regarded as a limitation of the scope of article 59, i.e. the fundamental freedoms under the EU Treaty can not be relied on in relation to circumvention.

The doctrine of circumvention is brought forward in the Binsbergen Case,[198] paragraph 13 provide that a Member State can not be refused to take actions to prevent serviceproviders who is carrying on a business in another Member State to rely on the freedom provided by article 59, if

193 Steiner p. 242, see case C-291/15
194 COM1 p. 3, 2nd column
195 COM1 p. 4, 1st column
196 Like case 52/79 paragraph 9 (Debauve), giving that where all relevant factors are pointing at one state, it does not fall within the scope of article 59.
197 Case C-23/93 (TV-10 SA)
198 Case 33/74

the business is entirely or mainly directed at the Member State, with a view to escape the industrial regulation that would apply if the business was established in that Member State.
In the case the Commission vs. Belgium,[199] a Belgian provision giving that only television stations using at least one of the languages in the establishing state, may be retransmitted in Belgium, was overruled as discriminating, and it did not fall within the doctrine of circumvention given in The Binsbergen Case. The Binsbergen was based on a circumvention intention, whereas the regulation in the Commission vs. Belgium Case was based on one single criterion, with the effect of prohibiting certain services from being produced outside Belgium.[200]

The latest judgement on this subject is the TV-10 SA Case (C-23/93):

> *The defendant (commissariaat voor de media, Nederland) has refused access to retransmission in the Netherlands, of signals from the plaintiff (TV-10 SA, Luxembourg), since the plaintiff could not be considered a foreign television company under section 66 of the Dutch Broadcasting Act (Mediawet), since the reason for setting up the television-station in Luxembourg have been the intention to circumvent Nerderland' s legislation.*
> *The ECJ establishes that the provision in the Mediawet is hindering the free exchange of services, but it states that article 59 shall not be understood as it prevents Member States from regarding foreign broadcasting companies as domestic, if the broadcasting is entirely or mainly directed to that Member State, when the establishment has been made in order to circumvent the legislation of the Member State.*[201]

The ECJ is furthermore asked in the TV-10 Case, whether the Dutch regulation conflicts with ECHR article 10. The ECJ is answering pretty brief, whereas the Advocate-General provide a more thorough examination.[202] The Conclusion is based on an judgement rendered by the European Court of Human Rights, giving that the circumvention regulation is legitimate as long as the content was not subject to censorship.[203]

The main concept is that business from other Member States shall be recognised, but if the business is regarded foreign due to an establishment in another state, with the intention to

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199 Case C-211/91

200 Paragraph 12

201 This dispute is brought before the ECJ before the EU-broadcasting directive took effect, the Advocate General states that the result of the dispute would have been different after the directive (point 9).

202 Point 83ff.

203 Gropera Radio AG m.fl. vs. Switzerland, Case 14/1988/158/214. See also Lorenzen p. 277

circumvent the industrial regulation in the state of which it is entirely or mainly directed to,[204] then the state is allowed to put up the same requirements, that applies to domestic businesses, as long as these requirements are considered public considerations.[205] The ECHR does not hinder a circumvention regulation, as long as the content is not censored.

The doctrine of circumvention in Danish law

The doctrine of circumvention has so far been before a Danish court of law once, viz. in the case of Centros limited. This case was from the area of establishment, but the principle is the same. The dispute was concerning whether the Danish Commerce and Companies Agency could deny the registration of a branch of an English registered company (Centros ltd.), because the intention was to carry on business only through the branch and the establishment in Great Britain was only made in order to circumvent the Danish Capital requirements. The Danish High Court accepted the argument, but the case is appealed to the Danish Supreme Court. This case gives that the Danish courts of course do accept the doctrine of circumvention, - at least the Danish High Court.

The doctrine of circumvention gives a right to present requirement to foreign businesses carrying on business in Denmark, but it is notably not a duty to do so. So if e.g. Denmark want to prevent the retransmission of e.g. TV3 (Broadcasting in Danish from Great Britain), an action from the legislators might be necessary. The people operating the retransmission is allowed to refuse the retransmission but they do not have interest in doing so. The same situation applies to the Internet in a circumvention situation, so the initiative to fight circumvention lies on the legislators.[206]

The relationship to the Rome Convention[207]

It is possible that the choice of law given under the Rome Convention might conflict with the above, since it is the idea of the Rome Convention to choose only one state' s law to a contract. The principle of the mutual recognition of services gives that the main rule is that the law of the state in which the serviceprovider is established shall apply, with reservations to regulations based on cogent public considerations as described above. The same result will usually be given under the Rome Convention, since it most often will be the party who is to perform the most characteristic obligation, which will most often be the service as well. But as long as the recipient

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204 When determining when a service is directed entirely or mainly to a certain state, objective criteria must be used according to the Advocate General in the TV-10 Case, point 55. Cf. the section on the contacts approach under private international law.

205 Case C-23/93 (TV-10 SA) paragraph 19

206 See the next chapter

207 About the Rome Convention in general see the chapter on private international law

of the service is a consumer, the consumer state' s law shall apply, which might conflict with the law that applies under the mutual recognition of services.

The EU treaty is indisputable superior to the Rome Convention, this is also given in article 20 of the Convention. The Commission gives in COM2[208] a solution to how to treat such a conflict; the method comprises three steps: 1) Establish the applicable law under the Rome Convention. 2) Will that law hinder the mutual recognition? 3) If the answer is no, then the applicable law under the Rome Convention applies (the recipient state). If the answer is yes, then the law of the recipient state will only apply if the regulation satisfies the requirements above for public considerations.

Conclusion

The main rule within the EU is that a Member State can not prevent a serviceprovider from another state to provide his/hers services in that state. Some modifications are put forward by the ECJ, giving that discrimination by nationality can only be presented within the narrow limits of the public policy, whereas the regulation that does not discriminate by nationality can be presented as long as they satisfy the requirements for the cogent public considerations.

A situation where e.g. a Danish business is providing service from another Member State in order to circumvent Danish law, does fall within the freedom to provide services, but that does not prevent Denmark from regarding the business a Danish business, i.e. presenting the business for the same requirements that would apply if the business was providing the services from Denmark.

In cases where the freedom to provide services conflict with the choice of law in the Rome Convention, the Rome Convention shall yield in situations where the choice of law does not comply with the freedom to provide services unless this incompliance is legitimated under the cogent public considerations or the circumvention considerations.

[208] p. 13

The need for legislation

Purpose of this chapter

The idea of this chapter is to examine the possibilities of regulating the Internet, both what is practical possible and what can be legitimised, especially under the EU in relation to the freedom to provide services. It is not within the purpose of this chapter to present a draft of an act that can solve the problems, the purpose is merely to describe the approaches available.

Which problems are discovered

In general

The Internet is by definition very anarchistic, with its self-appointed boards, its own standard for good behaviour (netiquette) and own way of punishing people that contravene with the netiquette (flaming).[209] For these reason will regulation of the Internet meet a lot of opposition from the Internet users, like when the United States Administration passed the Communication Decency Act, a group of net freedom fighters (American Civil Liberties Union) contested the Act before a court of law.[210]

It is my opinion that the Internet has grown from a specimen that could bear an anarchistic structure to one that can not, mainly because of the growth of commercial activity on the Internet (E-commerce) and because of the unlawful exploitation of especially intellectual property. It seems like these two factors are the most significant results of the Internet, seen from a legal perspective and notably combined with a concept of a global market, in a scale as never before.

It is obvious that the emerging problems involves both a civil and a criminal aspects, which are both of very significant interest, though I have decided only to deal with the civil aspect in this thesis, some of the considerations will apply in the criminal aspect as well.

Substantive law

[209] The word flaming derives from a Monty Python film, and it covers the sending of mails in thousands, from angry surfers, - flaming will most likely make the mail server crash.

[210] The matter in dispute is whether the Act is passed in contravention of the American Constitution, -the case is still pending in the US Supreme Court

At the national level, I have discovered that some acts do apply to the Internet even though they where made before the Internet had any significant value and by that do not comprise these new media. As regarding the future legislation we can only appeal to the legislators to bear this new medium in mind when passing new acts, a request that I think will naturally be followed as the Internet has become a recognised medium. The future legislation could with advantage be based on a behavioural legislation, instead of being medium bound.

Private International law

As regarding the International level, the choice of law seems very important, I have discovered that the contacts approach gives a very flexible regulation, which means that also the choice of law on the Internet, within this method can be served with justice. Whether this method will give a sufficient protection can only be reviewed when some judgements have been entered.

Dispute and enforcement

In relation to the international aspect the most significant problem seem to be the fact that the material can be located virtually anywhere in the world, without any significant inconvenience for the viewer or the publisher. When the level of protection is at least as good in the state governing the site as in the receiving state there will only be the inconvenience that follows with international litigation, but if the protection is of a lover degree; problems arise. Litigation within the EU/EEC seems to be pretty well organised (and predictable) but when it comes to states outside this Union, the predictability seems to end (as seen in a Danish perspective). I have established how the tort and consumer forum is ought to apply to the Internet, but this is still my opinion and the finally construction lies within the power of the ECJ.

Circumvention

If a business is established in a state that does not recognise Danish judgements in order to circumvent Danish law, non of the extraterritorial jurisdiction is of appreciable value, why the business has to be sued in its homecourt, with that states private international law to follow. If the establishing state does recognise Danish judgements the aggrieved party, the consumer and the contracting party will keep their right in relation to the tort forum, the consumer forum and the performance forum respectively, giving that Danish private international law shall apply. If the establishing state has adopted the CISG, then the choice of law is of no interest in relation to commercial contracts on sale of goods, since the same substantive law will apply.

Danish private international law gives that Danish law will apply in consumer and tort cases, so in the situation where the establishing state recognises Danish judgements it is only the commercial buyer that is deprived the rights under national law. In relation to situations where the establishing state does not recognise Danish judgements, the extent of which the plaintiffs are deprived rights under national law will depend on the private international law of the establishing state.

How can the problems be solved

It seem like mainly three problems emerge from the Internet, viz. 1) that the content on the Internet is deriving from different states with a different level of legislation, 2) that transnational litigation is very complicated, especially outside the EU/EEC and finally 3) that it is possible to circumvent Danish law by a conscious choice of establishing state.

Substantive law

The problem on the international content could be solved by international conventions giving the same level of regulation all over the world, but since this will not happen within a reasonable period (probably never), the problem of unwanted materiel will always exist. Since a state only have jurisdiction to legislate within its own state, the regulation is ought to be based on prohibiting the access to material that does not comply with the law of the receiving state.

These problems of the Internet resembles in some way the one' s that comes with satellite television; here the retransmission has been used as a valve for what can be sent in a state,[211] like in the TV-10 case. The corresponding valve lies for the Internet at the ISPs, but they do notably not provide all viewers with Internet access, since some (usually bigger companies) have their own server. Taken from a technical point of view, the only way to keep control on the Internet is by controlling the providers, this could be done by licensing the right to provide Internet services, and then enjoin the ISPs to deny access to certain homepages. This method could be used to prohibit the retransmission of sites that does not comply with the public policy in Denmark.

This was precisely what happened in the German CompuServe dispute, where the international ISP (CompuServe) was instructed by the German police to deny access to some hundred sites,

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[211] Even though the ability to receive the signals with a personal antenna exist, is this only used by a small number of people.

because of some sexual offensive material. This dispute did never appear in court and ended with the German Government denying their involvement in the dispute. The same approach was taken in the above mentioned Communication Decency Act, where the ISPs where made liable for sexual offending materiel, this Act has not entered into force yet.

The down side part of this kind of regulation is firstly that it is pretty easy circumvented, by moving the offensive site, this kind of regulation is also easy to circumvent, by logging into a foreign computer, and letting that computer download the homepage and transmit it to the surfers computer, by doing so the homepage will look like it is sent from a non obstructed site. Another tough question is how to decide, which sites to deny access to and who shall decide it.

Another approach is to regulate at the viewer's level, like it is done in the DCA, where the digital to digital copying is prohibited for the private use as well. The problem in legislating on the viewer's level is that it is pretty hard to enforce, because it is a part of the private sphere.

Private international law

As described above it is not clear how the judges will deal with the contacts approach, but the Rome Convention could be expanded by implementing a presumption rule, giving that e.g. the law of the state where the server in electronically networks is placed shall apply. I think it is important to keep it as a presumption rule, none the less because of the different other relevant factors, but also because the contacts approach will in many situations give the better result, since the factors of relevance seems to vary and rule of reason seems very practicable.

Dispute and enforcement

The main question in transnational litigation is whether a certain judgement can be enforced or recognised in the defendants state, because if enforcement or recognition is not possible there is no use for the judgement (unless it is as a matter of principle). Within the EU/EEC (Brussels/Lugano Union) there seems to be sufficient possibilities of enforcement and recognition of judgements entered within the Union, and both the consumer forum and the tort forum seems to give the consumer and the aggrieved party sufficient protection, by giving the possibility to sue before the homecourt of the plaintiff.

The problems seem to be much more significant in relation to suing persons outside the Union, when the stay forum or property forum does not apply, a problem that is ought to be solved by

international conventions, like the Brussels and Lugano Conventions. This problem does not seem to be solved within a reasonable period, why the Internet users must take precaution when dealing with the Internet, and by being aware that a law suit might have to be brought before a foreign court, even though the plaintiff is a consumer or an aggrieved party in a tort claim (see the next chapter).

Limitations in the right to regulate

The freedom of speech

The idea of the freedom of speech is to prevent the government from exercising censorship, but it does not prevent the states from regulating retransmission of signals either if it contravenes with the public policy or if it is based on a circumvention consideration. The licensing of the right to provide Internet access does not contravene with the freedom of speech if the regulation is based on the public policy or circumvention considerations.

But there is no basis for regulation based on a more political basis (like pre-publish censorship), like e.g. prohibiting homepage from a certain state or with certain content, the basis of regulation shall be based on the principles examined in the section on freedom of speech.

The freedom to provide services

It goes without saying that this freedom does only regard legislation between the EU states, whereas the regulation against other (non-EU) states shall not necessarily comply with the freedom to provide services. The idea of the freedom to provide services is that a Member State shall accept the providing of service within the state as long as the service is provided from another Member State. Regulation against other Member States can only be passed if they are based on the protection of the public policy, public security or public health. If a regulation is not discriminating by nationality, but yet do obstruct the freedom to provide services, then the regulation can only be upheld if it is based on cogent public consideration as described in the previous chapter. Also regulation against circumvention can be passed within the freedom to provide services, as long as the regulation is based on the intention to circumvent, and not on specified criteria.

How should the problems be solved

If the Internet is to be regulated, I see the regulation of the ISPs, as presented above, seem to be the only practicable way. I can imagine that it would be preferable with some kind of tribunal[212] to determine whether a request to deny access to a certain site or homepage, I think further more that it is important that the obstruction of access shall be based on requests from an aggrieved party or a third party, so that the government is not obliged to supervise the Internet.[213] A request for the obstruction of access should of course be appealable to a court of law. If a regulation like this shall comply with the freedom of speech it has to be based on illegal content (i.e. also illegal to publish for the national publishers) and not on e.g. specific opinions.

If this idea is to be carried out, the ISPs should be enjoined to observe the prohibition of the homepages, which could be done by passing a law that enjoins the ISPs to prohibit the access to certain sites. This method could practicably be carried out if the tribunal were updating a database of illegal homepages, to which the ISPs have access to. The burden on the ISPs would be very limited, since a system that denies the ISP's customers access to the homepages listed in the tribunal's database can be set up to do the job automatically.

A regulation like the described has to be split up into regulation against EU Member States and all other states, since the freedom to provide services gives that only regulation based on cogent public considerations as given by the ECJ is allowed, whereas material from outside the EU can easily be meet with the same regulation as applying to national publishers; a distinction that would lie on the tribunal to comply with.

I do not think the time has come yet for a legislation as the described, but it might very well be necessary within a few years, depending on the development of the Internet and especially the content of it. The need for legislation will in fact depend on the amount of infringements and how the courts will resolve the disputes.

In relation to private international law, I do not see a need for altering the presumption rule that gives the law of the state of the provider in a commercial contract and the state of the buyer in a consumer contract,[214] as long as all the other examined factors will be considered as well. In

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212 In order to keep the denying process rather quick

213 But e.g. the Danish Consumer Ombudsman might as well be empowered to complain when homepages or sites does not comply with the DMPA.

214 With the limitations that lies within the freedom to provide services.

relation to tort it is the main rule that aggrieved party can chose between the law of the state in which the infringement is done (the server state) or where it did take effect (the downloading state) as long as the downloading state can be said to be within the recipient group. I see no reason for altering this principle as well.

As I have indicated above there is no reason to believe that the problems that comes with transnational litigation will be solved shortly, but the way to do it is to make international Conventions like the Brussels Convention and The Lugano Convention, which will be a pretty tough task. So it seems like the plaintiffs themselves must pay the price of the new global society.

In relation to mitigate the problems in relation to the circumvention situation, I see the ISP regulation as the most effective and only practicable way to cope with it, by including the circumvention situations in the basis for obstruction of access to homepages.

Conclusion

Purpose of this chapter

The purpose of this chapter is obviously to sum up the results achieved through the process of making this thesis, in order to give the thesis a practical angle I have decided to split up the conclusion into four sections, taking the point of view of 1) the aggrieved party, 2) the viewer, 3) the publisher/provider and finally 4) the legislator, in order to establish which problems these groups are confronted with, and how to cope with it; these four groups will be examined under the assumption that they are Danish.

The idea of this thesis has been to present the legal framework the Internet is placed in, how to commence proceedings and enforce claims deriving from infringements on the Internet and as described in the previous chapter, how to regulate the Internet.

The aggrieved party

The aggrieved party is the party suffering a loss or loosing esteem, because of material published on the Internet, e.g. defamation, unfair comparison, unlicensed use of intellectual property etc. The question is how to deal with a tort claim when it is caused by material published on the Internet, and where there is international aspects involved; The question is how to achieve compensation for the loss suffered.

The first question to ask is which law is governing the published material in order to establish whether the harmful material is illegal. This question is strongly connected to choice of forum, since the court of law will apply its own private international law in order to establish the applicable law. The task is to establish which forums can be relevant in relation to the tort claim and this question is again connected to the recognition and enforcement of judgements, because a judgement that can not be enforced or recognised in the state where the tortfeasor has his/her values, will most likely be worthless.[215] So the first question to ask turns out to be, which states' judgements will the tortfeasor' **s**tate enforce or recognise.

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[215] For a business that are suffering from a defamation or unfair comparison might be well of by just being able to present a judgement that disproves the harmful statements, whereas the compensation is of no significant value.

The question of which state's judgement a state is very difficult when dealing with states without the EU/EEC states, it requires knowledge of each state's procedural law. All states will enforce or recognise judgements entered in the enforcing / recognising state, but when it comes recognising foreign judgements the picture becomes way more blurred. Some states requires that a corresponding judgement would be enforced or recognised in the rendering state, i.e. a requirement for mutuality, which leaves pretty bad odds for judgements entered in Denmark, since Denmark only enforces and recognises judgement from states of which Denmark has entered a mutual agreement on enforcement and recognition. These agreement have so far only been made only with the Nordic and the EU/EEC states, giving that judgements entered in Denmark as the overriding rule can be enforced in both the Nordic states and the EU/EEC states.

As an alternative to the normal proceedings, the parties can agree on arbitration, which due to the New York Convention gives a wide access to enforcement. Though this will normally not help the aggrieved party, since the tortfeasor will most likely not accept an arbitration agreement if it would put him in a worse position.

The next question is which states will hear the case, and here the tortfeasors homecourt will always be able to hear the case, but it might as well be interesting to find a extraterritorial jurisdiction in the aggrieved party's homecourt, which will give the aggrieved party the advantage of being on own ground. In order to establish whether the aggrieved party can bring proceedings before his/her homecourt, it has to be determined whether the tortfeasor is domiciled within the EU/EEC or not in order to establish whether the Brussels/Lugano Conventions or the DAJA respectively applies. The forum of interest is the tort forum, and it is to be determined whether it applies to the Internet and to which extent.

The Brussels Convention is by the ECJ construed in such a way that the tort forum in relation to distance damages does apply where the damage has occurred, but only for the damage in that state, i.e. if the aggrieved party want's to sue for the world wide damages he/she has to bring proceedings before the tortfeasor's homecourt. In relation to the Internet, the damage in the aggrieved party's state must be the damage deriving from the homepages downloaded in that state. The Lugano is not bound by the ECJ construction but might as well give the same result. Without having any sources, I could imagine that the tort forum in the DAJA would be construed in such a way that it would apply to world wide damages as well.

When a forum of which the judgements can be enforced or recognised in the state of the tortfeasor is established, is it time to examine which state' s law applies to the question on whether there is basis for a tort claim. When a court shall determine which state' s law that applies on a matter it uses its own state' s private international law, which requires exact knowledge of that state' s law to establish the applicable law. Some general rules can be put forward in relation to choice of law in tort, viz. that the aggrieved party can choose between the law of the state either where the harmful event occurred or the where the harmful event took effect. This rule is mainly based on the contacts approach, a method that leaves a lot of discretion to the judges, so the described rule can very well be altered because of the judges discretion.

Commercial publishing on the Internet is comprised in the concept of the freedom to provide services within the EU, not least because broadcasting of satellite television is considered a service. This gives in relation to other EU states, that regulation which is more severe in the receiving state than in the publishing state (i.e. hindering the freedom to provide service) can only be based on cogent public considerations, not sufficiently protected in the publishing state. This has influence on the choice of law as well, since the choice of law must not hinder the free movement of services. There is an exception in relation to the circumvention situation, where e.g. a Danish business is making an establishment in another EU state with the intention to circumvent Danish law, this situation does not prevent the states from putting business on the very same footing as a corresponding Danish business.

The last step is to establish whether there exist a claim under the applicable substantive law, but this question does not fall within the purpose of this thesis to examine.

The buyer

The buyer is defined as a person buying either goods or services via the Internet, and where a dispute arise e.g. because of disagreement on the contract terms or because of a faulty deliverance from the provider. This situation resembles the previous with the difference that this is a contractual situation and does not regard tort, so the differences are that the performance forum, the consumer forum and the choice of law in contract is to be examined. The considerations in relation to enforcement are the same as above.

The idea of the performance forum is that a party of a contract can be sued in the state where the performance in dispute has to be delivered. This forum exist both in relation to the EU/EEC states (the Brussels/Lugano Conventions) and to other states (the DAJA), with the only difference that the DAJA does not include pure money claims. The court that hears the case has to determine the place of deliverance by using the applicable law, to determine which law is applicable the court has to apply its own private international law. This gives if the dispute arise because of a faulty deliverance of goods or services and it has to be delivered in Denmark the buyer can sue the provider in Denmark. If the provider is established in a state that does not recognise Danish judgements, the buyer will have to sue in that state. It appears to be significant in a contractual dispute, who will have to commence proceedings, i.e. the party who have anything outstanding will be most likely to commence proceedings.

When the buyer is a consumer (i.e. not dealing within his trade or profession) the consumer forum is worth considering. The idea of the consumer forum is to protect consumers, by giving the consumer a permanent advantage of being on own ground, since the consumer can always choose to sue in his/her homecourt and can only be sued in that court, notable as long as some requirements are satisfied. These requirements are that the contract is concluded on the basis of an special invitation to the consumer or an advertisement made in the consumers state, and that the steps necessary for concluding the contract was made in the consumers state. The second requirement seems to be satisfied when the contract is entered on the basis of a homepage, by accepting an offer on the homepage electronically, but when it comes to determine whether the requirement for advertising is satisfied things becomes more complicated.

I have established that whether a homepage can be regarded as advertising in the consumer state, it has to be determined whether the state is within the recipient group of the homepage. The recipient group is to be determined by some objective factors in order to establish which group of viewers, the publisher/provider has intended to direct the advertising towards. These factors are among others the choice of language, the group of which the provider will provide the goods or services to and the choice of language. If the provider accept to provide services to a consumer in X-state, then X-state will presumably be regarded as being within the recipient group. The nationality of the buyer is not always known to the provider, so Denmark will not necessarily be considered within the recipient group of a French homepage written in French, even though the service is provided to a Dane registered under the .FR TLD, the outcome might differ if the Dane were registered under another TLD, depending on the situation.

In relation to choice of forum clauses I have decided only to examine how such a clause will influence on the choice of forum if the clause is presented on a homepage. A choice of forum clause will have effect if it is clearly presented on the homepage, which gives that only the chosen forum can hear the case, with the exception of the silent acceptance of forum as described below. It is worth noticing that a choice of forum clause can not delimit the consumers right to bring proceedings before his/her homecourt. Limitations in the consumers right to bring proceedings can only be agreed on, after the dispute arise.

The silent acceptance of forum gives that if a proceedings is brought before a court within the EU or EEC, and the jurisdiction is not contested in what is by national law regarded as the first legal proceeding, this concept applies as well in contracts without a derogation clause, but notably not in relation to consumer contracts.

The next issue to be examined is the choice of law in contract, where two conventions applies, i.e. The 1955 Haag Convention for commercial sales of goods and the Rome Convention for services and consumer contracts. The Haag Convention provides a single factor test, viz. the place of the provider (the provider), whereas the Rome Convention has the same rule (the party that is to present the more significant performance), but notably only as a presumption rule modifying the multi factor test (the contacts approach). The Rome Convention has also a special rule for contracts concluded in the consumers state on the basis of a special invitation or advertisement (same definition as the consumer forum in the Brussels/Lugano Conventions), giving that the law of the consumer in that situation shall apply (this is notably not a presumption rule). When determining whether the contract is concluded on the basis of advertisement, the same systematism as described above for the consumer forum applies.

The choice of law in relation to commercial contract on sales of goods is not important when both the provider and buyer state has adopted the widely adopted CISG, since the same substantive regulation will apply, no matter which state' s law is to apply. It is worth noticing that England has not adopted the CISG.

Both in the consumer situation and the commercial situation can a contract be concluded without knowledge of the nationality of the other party, like e.g. a situation like the one described above about advertising in relation to the consumer forum, with the difference that both the consumer

and the provider were registered under the .COM TLD. In this new situation neither of the parties knows the nationality of the other party, which gives that the presumption rule will not apply, but the natural seat of the dispute has to be determined on the basis of the contacts approach based on objective factors and a rule of reason.

Choice of law clauses is dealt with in both the Haag- and Rome-Conventions, with the difference that where the Rome Convention choice of law clause shall be demonstrated with reasonable certainty, the Haag Convention requires the choice of law clause to be contained in an express clause, or unambiguously result from the provisions of the contract. The Rome Convention gives that a consumer, satisfying the requirements for the consumer rule on choice of law, can not be deprived rights given in mandatory regulation in the consumer state. This gives that as long as the clause is clearly presented, then it will take effect.

The same consideration in relation to the freedom of speech and the freedom to provide services, as described under the examination of the aggrieved party applies to the choice of law in contract.

The publisher/provider

When the publisher/provider intents to sue either a contracting party or a 3rd party (a tortfeasor), the same systematism as above applies, so I have chosen to focus on the consideration a publisher/provider is ought to bear in mind, in relation to be sued.

Since Denmark does not enforce or recognise other judgements than those entered within the Brussels-, the Lugano- and the Nordic Judgement Conventions, the publisher/provider needs only to be aware of law suits from states within these regions. It is important to notice that in relation to the tort forum is it only possible to sue for the damage occurred in that state, i.e. for the damage done by the downloading of the homepage in that state. All the states have the same approach to the choice of law, viz. the contacts approach, but this does notably not mean that the method is used in the same way in all courts.

The contact approach gives in relation to tort that the aggrieved party can choose between the law of the state where the harmful event is committed and the state where the harmful event took effect. In order to establish which state' s law can apply as the state in which the harmful event took effect, the recipient group has to be defined by using the same systematism as above. This

approach gives that only the law of a state to which the publisher intended to publish the content of his/hers homepage can apply.

In relation to the choice of law in contract, there has to be distinguished between a consumer contract satisfying the requirements examined above and a commercial contract. In relation to the commercial contract there is a presumption rule giving that the law of the state in which the provider is domiciled is to apply (this rule is notable not a presumption rule in relation to commercial contracts concerning the sale of goods), but as regarding the consumer contract, the consumer state' s law shall apply. There must be a presumption that when a provider provides either services or goods to a consumer he accepts that the law of the state in which the consumer is domiciled will apply. If the nationality of the consumer can not be determined by the provider (e.g. when providing software on demand), the objective factors can be used to delimit the recipient group and by doing so also delimit the possible consumer forums.

It seems pretty important that a publisher or provider bear the group of recipients in mind (if convenient express it) and also take precautions in relation to keeping the activity within the intended recipient group. Another precaution could be presenting jurisdiction clauses and choice of law clauses on the site, as long as these a clearly presented they will take effect, but notably not against consumers; as regarding the choice of law a consumer can not be deprived regulation given in mandatory regulation in the consumer state, - practically all consumer protection will be mandatory regulation. Another and very obvious way of mitigating the possibilities of being sued is to observe that all the copyrighted material on a homepage is licensed, and that the content in general is kept in compliance with fair trade practices.

The publisher/provider within the EU can with advantage bear in mind that the main rule is, that regulation in another Member State that is hindering the free movement of services can only be upheld if they are based on the cogent public considerations.

In relation to the circumvention situation can be said that Danish law can be circumvented by establishing the business in a foreign state, whereas the choice of TLD and server state will only be relevant in relation to defining the recipient group. But the circumventing business can not refer to neither the freedom of speech nor the freedom to provide services if the business is pointed entirely or mainly is directed towards the state of which the business intends to circumvent the law.

The legislator

It seems like the only way the legislator can cope with the international problems of the Internet, on a national level is by regulating the ISPs, in order to prohibit unwanted material, including material from businesses circumventing Danish law. The legislator will have to observe both the freedom of speech and the freedom to provide services. The freedom of speech will not give any problems in relation to applying the same level of regulation to a foreign business as applies to Danish businesses. The freedom to provide services gives in relation to businesses in other EU Member States, that a regulation which is more severe than the regulation in the establishing state can only apply to a foreign business if it is based on cogent public considerations not sufficiently protected in the establishing state, and only as long as the regulation is within reasonable proportions in relation to the purpose.

Conclusion

I have now examined the areas that I had put forward in the presentation of the problems, viz. the framework of the legislation that the Internet is comprised in, in relation to transnational litigation and international publishing and providing of goods and services on the Internet, - including circumvention. The most significant difference in relation to other known media is the world wide nature of the Internet, both as regarding transmitting and receiving. In order to oppose the countless consequences of a theory giving that a homepage will be considered published in all connected states, I have argued that the extent of the publishing shall be the recipient group the publisher had in mind, determined by objective factors, - even though the homepage can be viewed world wide.

It is important that the content of this thesis at any time shall be reviewed in the context of the development of the media landscape, the number and nature of conflicts deriving from the Internet and common sense. The Internet as a medium is still young and it is very hard at this time to establish where the big conflicts on the Internet will occur, and that is why I am exercising restraint with the proposal of new legislation. Even though the Internet is a dynamic specimen, the systematism presented in this thesis will apply to future developments as well.

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